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Contents

Federal Register

Vol. 80, No. 151

Thursday, August 6, 2015

Agency for International Development
PROPOSED RULES
Participation by Religious Organizations in USAID Programs; Amendments, 47238–47241

Agricultural Marketing Service
RULES
Processed Raspberry Promotion, Research, and Information Orders:
Late Payment and Interest Charges on Past Due Assessments, 46789–46791
PROPOSED RULES
Milk in California:
Proposal To Establish a Federal Milk Marketing Order; Public Hearing, 47210–47235
NOTICES
International Trade Data System Tests:
Electronic Submission Through the Automated Commercial Environment of Notification of Importation of Fruits, Vegetables, and Specialty Crops, etc., 46947–46949

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Food and Nutrition Service
See Forest Service
See Rural Housing Service
PROPOSED RULES
Equal Opportunity for Religious Organizations, 47244–47252
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46949–46950
Meetings:
Council for Native American Farming and Ranching, 46950–46951

Alcohol and Tobacco Tax and Trade Bureau
PROPOSED RULES
Viticultural Areas:
Tip of the Mitt; Establishment, 46883–46888

Animal and Plant Health Inspection Service
NOTICES
International Trade Data System Test:
Electronic Submission to the Automated Commercial Environment of the Lacey Act Import Declaration Form Using the Partner Government Agency Message Set, 46951–46953

Centers for Medicare & Medicaid Services
RULES
Medicare Program:
FY 2016 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements, 47142–47207
Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2016, 47036–47139

Chemical Safety and Hazard Investigation Board
RULES
Organization and Functions, 46822–46824

Children and Families Administration
PROPOSED RULES
Updating Participation in Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Program Participants, 47272–47282
NOTICES
Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act, 47003–47004

Commerce Department
See Economic Development Administration
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Defense Department
RULES
Civilian Health and Medical Program of the Uniformed Services:
TRICARE: Refills of Maintenance Medications Through Military Treatment Facility Pharmacies or National Mail Order Pharmacy Program, 46796–46799

Economic Development Administration
NOTICES
Trade Adjustment Assistance Eligibility Petitions, 46953–46954

Education Department
RULES
Final Priorities and Definitions:
Demonstration and Training Program: Career Pathways for Individuals With Disabilities, 46799–46804
PROPOSED RULES
Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs, 47254–47269
NOTICES
Applications for New Awards:
Demonstration and Training: Career Pathways for Individuals With Disabilities, 46961–46965
Meetings:
President's Advisory Commission on Educational Excellence for African Americans, 46965–46966
Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act, 47003–47004

Energy Department
See Federal Energy Regulatory Commission
PROPOSED RULES
Energy Conservation Program:
Test Procedures for Battery Chargers, 46855–46870
Test Procedures for Small, Large, and Very Large Air–Cooled Commercial Package Air Conditioning and Heating Equipment, 46870–46882
NOTICES
Applications To Export Liquefied Natural Gas:
Cameron LNG, LLC; 20-Year Period, 46967–46972

Floridian Natural Gas Storage Co., LLC; 20-Year Period, 46969–46970
Texas LNG Brownsville, LLC; 25-Year Period, 46966–46967

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Missouri; Update to Materials Incorporated by Reference, 46804–46816
Pesticide Tolerances:
Fluazifop-P-butyl, 46816–46822
NOTICES
Proposed Consent Decrees, Clean Air Act Citizen Suits, 46985–46987
Settlements:
Pender Plating Site, Burgaw, Pender County, NC, 46985

Federal Aviation Administration
RULES
Elimination of the Air Traffic Control Tower Operator Certificate for Controllers Who Hold a Federal Aviation Administration Credential With a Tower Rating, 46791–46793
NOTICES
Meetings:
Unmanned Aircraft Systems Test Sites and Center of Excellence, 47021–47023

Federal Communications Commission
RULES
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 46824–46847
PROPOSED RULES
Creation of Interstitial 12.5 kHz Channels in the 800 MHz Band Between 809-817/854-862 MHz, 46928–46930
Equipment Authorization and Electronic Labeling for Wireless Devices, 46900–46928

Federal Deposit Insurance Corporation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46987

Federal Emergency Management Agency
NOTICES
Major Disaster Declarations:
Kentucky; Amendment No. 3, 46996–46997

Federal Energy Regulatory Commission
NOTICES
Applications:
Grand River Dam Authority, 46977–46978
Hiland Partner Holdings, LLC, 46982–46983
Combined Filings, 46972–46977, 46981–46985
Filings:
Bonneville Power Administration, 46983
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
Aspirity Energy Mid-States LLC, 46975–46976
Aspirity Energy Northeast LLC, 46978
ORNI 37, LLC, 46978–46979
Orders:
Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities, 46979–46981

Federal Highway Administration
NOTICES
Environmental Impact Statements; Availability, etc.:
Alexander, Johnson, Massac, Pulaski, and Union Counties, IL; Ballard and McCracken Counties, KY; and Cape Girardeau, Scott, and Mississippi Counties, MO, 47023

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Annual Report of Class I and Class II Motor Carriers of Property, 47023–47024
Parts and Accessories Necessary for Safe Operation; Exemption Applications:
TowMate, LLC, 47031–47032
Qualification of Drivers; Exemption Applications:
Diabetes Mellitus, 47024–47030

Federal Railroad Administration
RULES
Securement of Unattended Equipment, 47350–47386

Federal Reserve System
NOTICES
Changes in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 46987–46988
Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities, 46988

Federal Trade Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46988–46990

Fish and Wildlife Service
PROPOSED RULES
Migratory Bird Hunting:
Proposed 2016–17 Migratory Game Bird Hunting Regulations (Preliminary) With Requests for Indian Tribal Proposals; Meetngs, 47388–47398

Food and Drug Administration
NOTICES
Guidance:
Brief Summary and Adequate Directions for Use: Disclosing Risk Information in Consumer-Directed Print Advertisements and Promotional Labeling for Prescription Drugs, 46990–46993

Food and Nutrition Service
NOTICES
Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act, 47003–47004

Foreign-Trade Zones Board
NOTICES
Subzone Expansions; Applications:
Houston Refining LP, Foreign-Trade Zone 84, Houston, TX, 46954

Forest Service
NOTICES
Meetings:
Hood-Willamette Resource Advisory Committee, 46953

Health and Human Services Department
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
PROPOSED RULES
Updating Participation in Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Program Participants, 47272–47282

Health Resources and Services Administration
NOTICES
Single-Case Deviation From Competition Requirement for Program Expansion:
American Academy of Pediatrics, 46993–46994

Homeland Security Department
See Federal Emergency Management Agency
See U.S. Customs and Border Protection
PROPOSED RULES
Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 47284–47299
NOTICES
Requests for Nominations:
U.S. Immigration and Customs Enforcement Advisory Committee on Family Residential Centers; Correction, 46997

Housing and Urban Development Department
PROPOSED RULES
Equal Participation of Faith-Based Organizations in HUD Programs, 47302–47313
NOTICES
Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act, 47003–47004

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See National Park Service

Internal Revenue Service
RULES
Suspension of Benefits Under the Multiemployer Pension Reform Act; Correction, 46795–46796
PROPOSED RULES
Suspension of Benefits Under the Multiemployer Pension Reform Act; Correction, 46882

International Trade Administration
RULES
Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act, 46793–46795
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Carbazole Violet Pigment 23 From India and the People's Republic of China, 46955–46956
Certain Crepe Paper Products From the People's Republic of China, 46954–46955
Polyethylene Terephthalate Film, Sheet, and Strip From India, 46956–46959

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Passenger Vehicle and Light Truck Tires From China, 47000
Certain Vision-Based Driver Assistance System Cameras, Components Thereof, and Products Containing the Same, 46998–47000

Justice Department
PROPOSED RULES
Partnerships with Faith-Based and Other Neighborhood Organizations, 47316–47326

Labor Department
See Veterans Employment and Training Service
See Wage and Hour Division
PROPOSED RULES
Equal Treatment in Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Social Service Providers and Beneficiaries, 47328–47338
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Employer Perceptions Study for the Evaluation of Round 4 of the Trade Adjustment Assistance Community College Career Training Grants Program, 47001–47002
Independent Contractor Registration and Identification, 47000–47001

Land Management Bureau
NOTICES
Proposed Withdrawals of Public Lands:
Oregon; Meeting, 46997

National Highway Traffic Safety Administration
PROPOSED RULES
Motor Vehicle Theft Prevention Standard:
Preliminary Theft Data, 46930–46939

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 46994
National Institute on Alcohol Abuse and Alcoholism, 46994–46995

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Northeastern United States:
Atlantic Bluefish Fishery; 2015 Atlantic Bluefish Specifications, 46848–46852
Atlantic Bluefish Fishery; Quota Transfer, 46848
Fisheries Off West Coast States:
West Coast Salmon Fisheries; 2015 Management Measures; Correction, 46852
PROPOSED RULES
Refinance of the Pacific Coast Groundfish Fishing Capacity Reduction Loan:
Pacific Coast Groundfish Federal Limited-Entry Trawl, Washington Coastal Dungeness Crab and California Pink Shrimp Fisheries; Refinanced Reduction Loan Terms and Industry Fee System, 46941–46946
Taking and Importing Marine Mammals:
Northeast Fisheries Science Center Fisheries Research; Correction, 46939–46941

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Atlantic Highly Migratory Species Tournament Registration and Reporting, 46960
Evaluation of National Estuarine Research Reserve, 46959
Meetings:
Fisheries of the South Atlantic Southeast Data, Assessment, and Review, 46960–46961

National Park Service
NOTICES
Repatriation of Cultural Items:
Heard Museum, Phoenix, AZ, 46997–46998

National Science Foundation
NOTICES
Meetings:
Advisory Committee for Environmental Research and Education, 47006

Pipeline and Hazardous Materials Safety Administration
RULES
Pipeline Safety:
Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments; Corrections, 46847–46848
PROPOSED RULES
Petitions for Reconsideration:
Miscellaneous Changes to Pipeline Safety Regulations Administrative Significance, 46930
NOTICES
Meetings:
Gas Pipeline Safety and Liquid Pipeline Safety Advisory Committees, 47032–47033

Reagan-Udall Foundation for the Food and Drug Administration

NOTICES
Requests for Nominations:
Steering Committee for the Foundation's Big Data for Patients Program, 47006–47007

Rural Housing Service
PROPOSED RULES
Multi-Family Housing Program Requirements to Reduce Financial Reporting Requirements, 46853–46855

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Chicago Mercantile Exchange, Inc., 47014–47018
Financial Industry Regulatory Authority, Inc., 47018–47020
New York Stock Exchange, LLC, 47008–47014

State Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
U.S. Passport Application Drop-Off List, 47021
Culturally Significant Objects Imported for Exhibition:
Berlin Metropolis: 1918–1933, 47020
Breguet: Art and Innovation in Watchmaking, 47020–47021
Kongo: Power and Majesty, 47020

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
See National Highway Traffic Safety Administration
See Pipeline and Hazardous Materials Safety Administration

Treasury Department
See Alcohol and Tobacco Tax and Trade Bureau
See Internal Revenue Service
NOTICES
Survey of Foreign Ownership of U.S. Securities as of June 30, 2015, 47033

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Customs Modernization Act Recordkeeping Requirement, 46995–46996
Ship's Store Declaration, 46996

Veterans Affairs Department
PROPOSED RULES
Equal Protection of the Laws for Faith-Based and Community Organizations, 47340–47347
Schedule for Rating Disabilities:
Hematologic and Lymphatic Systems, 46888–46900

Veterans Employment and Training Service
NOTICES
Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act, 47003–47004

Wage and Hour Division
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Special Employment Under the Fair Labor Standards Act, 47004–47006

Separate Parts In This Issue

Part II
Health and Human Services Department, Centers for Medicare & Medicaid Services, 47036–47139

Part III
Health and Human Services Department, Centers for Medicare & Medicaid Services, 47142–47207

Part IV
Agriculture Department, Agricultural Marketing Service, 47210–47235

Part V
Agency for International Development, 47238–47241

Part VI
Agriculture Department, 47244–47252

Part VII
Education Department, 47254–47269

Part VIII
Health and Human Services Department, Children and Families Administration, 47272–47282
Health and Human Services Department, 47272–47282

Part IX
Homeland Security Department, 47284–47299

Part X
Housing and Urban Development Department, 47302–47313

Part XI
Justice Department, 47316–47326

Part XII
Labor Department, 47328–47338

Part XIII
Veterans Affairs Department, 47340–47347

Part XIV
Transportation Department, Federal Railroad Administration, 47350–47386

Part XV
Interior Department, Fish and Wildlife Service, 47388–47398

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

2 CFR
Proposed Rules:
3474 47254

6 CFR
Proposed Rules:
19 47284

7 CFR
1208 46789
Proposed Rules:
16 47244
1051 47210
3560 46853

10 CFR
Proposed Rules:
429 (2 documents) 46855, 46870
430 46855
431 46870

14 CFR
65 46791

19 CFR
351 46793

22 CFR
Proposed Rules:
205 47238

24 CFR
Proposed Rules:
5 47302
92 47302
570 47302
574 47302
576 47302
578 47302
582 47302
583 47302
1003 47302

26 CFR
1 (2 documents) 46795
602 46795
Proposed Rules:
1 46882

27 CFR
Proposed Rules:
9 46883

28 CFR
Proposed Rules:
38 47316

29 CFR
Proposed Rules:
2 47328

32 CFR
199 46796

34 CFR
Ch. III 46799
Proposed Rules:
75 47254
76 47254

38 CFR
Proposed Rules:
4 46888
50 47340
61 47340
62 47340

40 CFR
52 46804
180 46816
1600 46822

42 CFR
412 47036
418 47142

45 CFR
Proposed Rules:
87 47272
1050 47272

47 CFR
73 46824
Proposed Rules:
0 46900
2 46900
15 46900
18 46900
90 46928

49 CFR
192 46847
193 46847
195 46847
232 47350
Proposed Rules:
191 46930
192 46930
195 46930
541 46930

50 CFR
648 (2 documents) 46848
660 46852
Proposed Rules:
20 47388
219 46939
600 46941

Rules and Regulations

Federal Register

Vol. 80, No. 151

Thursday, August 6, 2015

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

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1208

[Document Number AMS–FV–14–0042]

Processed Raspberry Promotion, Research, and Information Order; Late Payment and Interest Charges on Past Due Assessments

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule prescribes late payment and interest charges on past due assessments under the Processed Raspberry Promotion, Research, and Information Order (Order). The Order is administered by the National Processed Raspberry Council (Council) with oversight by the U.S. Department of Agriculture (USDA). Under the Order, assessments are collected from domestic producers and importers and used for research and promotion projects designed to maintain and expand the market for processed raspberries. This rule implements authority contained in the Order that allows the Council to collect late payment and interest charges on past due assessments. Three additional changes are being made to reflect current practices and update the Order and regulations. The changes will contribute to effective administration of the program and were unanimously recommended by the Council.

DATES: *Effective:* September 8, 2015.

FOR FURTHER INFORMATION CONTACT: Tarun Harit, Program Management Specialist, Promotion and Economics Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., Room 1406–S, Stop 0244, Washington, DC 20250–0244; telephone: (202) 720–9915; facsimile (202) 205–2800; or electronic mail: *Tarun.Harit@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under the Order (7 CFR part 1208). The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules and promoting flexibility. This action has been designated as a ''non-significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has waived the review process.

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act (7 U.S.C. 7418), a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

This rule prescribes late payment and interest charges on past due assessments under the Order. The Order is administered by the Council with oversight by USDA. Under the Order, assessments are collected from domestic producers and importers and used for research and promotion projects designed to maintain and expand markets for processed raspberries. Processed raspberries include raspberries that have been frozen, dried, pureed, made into juice, or altered by mechanical processes. This rule implements authority contained in the Order and the 1996 Act that allows the Council to collect late payment and interest charges on past due assessments. This action was unanimously recommended by the Council and will contribute to effective administration of the program.

Section 1208.52(a) of the Order specifies that the funds to cover the Council's expenses shall be paid from assessments on producers and importers, donations from persons not subject to assessments, and from other funds available to the Council. Paragraph (b) specifies that the collection of assessments on domestic processed raspberries is the responsibility of the first receiving handler of the raspberries for processing. Section 1208.52(e) specifies that ''a late payment charge shall be imposed on any handler or importer who fails to remit to the Council, the total amount for which any such first handler or importer is liable on or before the due date established by the Council. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the first handler or importer is liable. The rate of interest shall be

prescribed in regulations issued by the Secretary.''

The Order was implemented in May 2012. Assessment collection began in September 2012. Domestic assessments are due to the Council once annually by October 31. Import assessments are collected monthly by the U.S. Customs and Border Protection (Customs). If Customs does not collect the assessment, the importer must pay the assessment directly to the Council. Entities that produce less than 20,000 pounds of raspberries for processing annually or import less than 20,000 pounds of processed raspberries annually are exempt from assessment.

Assessment funds are used by the Council for activities designed to benefit all industry members. Thus, it is important that all assessed entities pay their assessments in a timely manner. Entities who fail to pay their assessments on time could reap the benefits of Council programs at the expense of others. In addition, they could utilize funds for their own use that should otherwise be paid to the Council to finance Council programs.

Council Recommendation

Thus, the Council met on January 15, 2014, and unanimously recommended specifying rates of late payment charges and interest on past due assessments in the Order's regulations. Specifically, the Council recommended that a late payment charge be imposed on any handler or importer who fails to make timely remittance to the Council of the total assessments for which the handler or importer is liable. The late payment will be imposed on any assessments not received within 30 calendar days of the date they are due. This will be a one-time late payment charge equal to 10 percent of the assessments due before interest charges have accrued. The Council also recommended that 1 percent per month interest on the outstanding balance, including any late payment and accrued interest, be added to any accounts for which payment has not been received within 30 calendar days after the date assessments are due. Interest will continue to accrue monthly until the unpaid balance is paid to the Council.

This action will help facilitate program administration by providing an incentive for entities to remit assessments in a timely manner, with the intent of creating a fair and equitable process among all assessed entities. Accordingly, a new Subpart C is added to the Order for Provisions Implementing the Processed Raspberry Order, and a new section 1208.520 is added to Subpart C. (The proposed rule published on November 12, 2014 (79 FR 67 67103) concerning this action has been modified to revise the name of the new Subpart C to meet **Federal Register** guidelines.)

This rule also makes three additional changes to the Order. It revises the terms crop and fiscal years as defined in sections 1208.3 and 1208.7, respectively. The crop and fiscal years are changed in the Order from the 12-month period April 1 through March 31 to October 1 through September 30. The new time frames help facilitate program operations because domestic assessments are due by October 31, so those funds can be used to support current year activities. Revising the terms will bring the Order in line with current practices.

This rule also changes the OMB control numbers in sections 1208.78 and 1208.108. In section 1208.78, the OMB control number 0581–0257 is omitted because it is no longer relevant. In sections 1208.108, the OMB control number is changed from 0581–NEW to 0581–0093, the control number assigned by the OMB.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the rule on small entities. Accordingly, AMS has considered the economic impact of this action on such entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (first handlers and importers) as those having annual receipts of no more than $7.0 million.

According to the Council, it is estimated that there are 160 producers of raspberries for processing and 30 first handlers of processed raspberries in the United States. Dividing the processed raspberry crop value for 2013 reported by the National Agricultural Statistics Service (NASS) of $60,883,000 [1] by the number of producers yields an average annual producer revenue of $380,520. It is estimated that in 2013, 75 percent of first handlers shipped under $7.0 million worth of processed raspberries.

Likewise, based on Customs data, it is estimated there are 140 importers of processed raspberries. Using 2013 Customs data, nearly all importers, or 99 percent, import less than $7.0 million worth of processed raspberries annually. Thus, the majority of domestic producers, first handlers and importers of processed raspberries would be considered small entities.

Regarding the value of the commodity, as mentioned above, based on 2013 NASS data, the value of the domestic processed raspberry crop was about $61 million. According to Customs data, the value of 2013 imports was about $65 million.

This rule prescribes late payment and interest charges on past due assessments under the Order. The Order is administered by the Council with oversight by USDA. Under the Order, assessments are collected from domestic producers of raspberries for processing and importers of processed raspberries. Processed raspberries include raspberries that have been frozen, dried, pureed, made into juice, or altered by mechanical processes. This rule adds a new section 1208.520 that will specify a late payment charge of 10 percent of the assessments due and interest at a rate of 1 percent per month on the outstanding balance, including any late payment and accrued interest. This section will be included in a new Subpart C—Provisions for Implementing the Processed Raspberry Promotion, Research, and Information Order. This action was unanimously recommended by the Council and is authorized under section 1208.52(e) of the Order and section 517(e) of the 1996 Act.

Regarding the economic impact of this rule on affected entities, this action imposes no costs on handlers and importers who pay their assessments on time. It merely provides an incentive for entities to remit their assessments in a timely manner. For all entities who are delinquent in paying assessments, both large and small, the charges will be applied the same. As for the impact on the industry as a whole, this action will help facilitate program administration by providing an incentive for entities to remit their assessments in a timely manner, with the intent of creating a fair and equitable process among all assessed entities.

Additionally, as previously mentioned, the Order provides for an exemption for entities that produce or import less than 20,000 pounds of processed raspberries annually. About 140 producers of raspberries for processing and 80 importers of

[1] Noncitrus Fruits and Nuts 2013 Summary, July 2014, USDA, National Agricultural Statistics Service, p. 37.

processed raspberries pay assessments under the Order.

Regarding alternatives, one option to the proposed action would be to maintain the status quo and not prescribe late payment and interest charges for past due assessments. However, the Council determined that implementing such charges will help facilitate program administration by encouraging entities to pay their assessments in a timely manner. The Council reviewed rates of late payment and interest charges prescribed in other research and promotion programs and concluded that a 10 percent late payment charge and interest at a rate of 1 percent per month on the outstanding balance would be appropriate.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are imposed by the Order have been approved under OMB control number 0581–0093. This rule results in no change to the information collection and recordkeeping requirements previously approved and imposes no additional reporting and recordkeeping burden on domestic producers, first handlers, and importers of processed raspberries.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

Regarding outreach efforts, the Council met on January 15, 2014, and unanimously made its recommendation. All of the Council's meetings, including meetings held via teleconference, are open to the public and interested persons are invited to participate and express their views.

As previously mentioned, a proposed rule concerning this action was published in the **Federal Register** on November 12, 2014 (79 FR 67103). The proposal was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending December 12, 2014 was provided to allow interested persons to submit comments. No comments were received. One change was made to section 1208.520(2) for clarification purposes, the addition of the word ''charge'' after the words ''late payment''.

After consideration of all relevant matters presented, including the information and recommendation submitted by the Council and other available information, it is hereby found that this rule, as hereinafter set forth, is consistent with and will effectuate the purposes of the 1996 Act.

List of Subjects in 7 CFR Part 1208

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Raspberry promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1208 is amended as follows:

PART 1208—PROCESSED RASPBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

■ 1. The authority citation for 7 CFR part 1208 continues to read as follows:

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

■ 2. Section 1208.3 is revised to read as follows:

§ 1208.3 Crop year.

Crop year means the 12-month period from October 1 through September 30 or such other period approved by the Secretary.

■ 3. Section 1208.7 is revised to read as follows:

§ 1208.7 Fiscal period.

Fiscal period means the 12-month period from October 1 through September 30 or such other period as approved by the Secretary.

■ 4. Section 1208.78 is revised to read as follows:

§ 1208.78 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505–0001, and OMB control number 0581–0093.

■ 5. Section 1208.108 is revised to read as follows:

§ 1208.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581–0093.

■ 6. Add Subpart C, consisting of § 1208.520, to read as follows:

Subpart C—Provisions Implementing the Processed Raspberry Promotion, Research, and Information Order

§ 1208.520 Late payment and interest charges for past due assessments.

(a) A late payment charge shall be imposed on any handler or importer who fails to make timely remittance to the Council of the total assessments for which such handler or importer is liable. The late payment will be imposed on any assessments not received within 30 calendar days of the date they are due. This one-time late payment charge shall be 10 percent of the assessments due before interest charges have accrued.

(b) In addition to the late payment charge, 1 percent per month interest on the outstanding balance, including any late payment charge and accrued interest, will be added to any accounts for which payment has not been received by the Council within 30 calendar days after the date the assessments are due. Such interest will continue to accrue monthly until the outstanding balance is paid to the Council.

Dated: August 3, 2015.

Rex A. Barnes,

Associate Administrator.

[FR Doc. 2015–19325 Filed 8–5–15; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 65

[Docket No. FAA–2014–1000; Amdt. No. 65–56A]

RIN 2120–AK40

Elimination of the Air Traffic Control Tower Operator Certificate for Controllers Who Hold a Federal Aviation Administration Credential With a Tower Rating

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; disposition of comments.

SUMMARY: On December 16, 2014, the FAA published a final rule with a request for comments that eliminated the requirement for an air traffic control tower operator to hold a control tower operator certificate if the individual also holds a Federal Aviation Administration Credential with a tower rating (FAA

Credential). This action addresses the public comment the FAA received.

DATES: The final rule effective date remains February 17, 2015.

ADDRESSES: The docket may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket. The docket may also be accessed at the Docket Operations in Room W12–140 of the West Building Ground Floor, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Michele Cappelle, Air Traffic Safety Oversight Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–5205; email *Michele.cappelle@faa.gov*

For legal questions concerning this action, contact Neal O'Hara, Attorney, Office of the Chief Counsel, Regulations Division, AGC–240, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3073; email *neal.o'hara@faa.gov*

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2014, the FAA published a final rule that eliminated the requirement for an air traffic control tower operator to hold a control tower operator (CTO) certificate if the individual also holds an FAA Credential (79 FR 74607). The requirement to hold both the CTO certificate and the FAA Credential was redundant since the underlying requirements for the FAA Credential encompass those of the CTO certificate. The action will reduce the FAA's burden of administering redundant programs for those individuals who hold an FAA Credential.

Discussion of Comments

The FAA received one comment from the National Air Traffic Controllers Association—AFL–CIO (NATCA). NATCA had several concerns with the rule.

NATCA opposes the elimination of the CTO certificate. NATCA believes that if the FAA eliminates the requirement for the CTO certificate, important training requirements risk elimination, which will result in a significant lack of appropriate oversight and create disparities between FAA and non-FAA tower Air Traffic Control Specialists.

The FAA notes the training requirements for air traffic controllers have not changed because of this rulemaking. All FAA air traffic controllers must adhere to the requirements in FAA Order JO 3120.4, *Air Traffic Technical Training.* The final rule simply eliminated duplicative programs that only applied to a portion of the FAA controller workforce. Before February 17, 2015 (the effective date of the final rule), air traffic controllers assigned to control towers were required to possess a CTO certificate issued in accordance with 14 Code of Federal Regulations (14 CFR) part 65, subpart B. CTO certificates were only required for air traffic controllers working in a control tower; no such requirement existed for air traffic controllers assigned to approach control or en-route air traffic control facilities. In addition, once a CTO certificate was issued, it remained valid with no recurrent or refresher training requirements to ensure the holder still possessed the skills demonstrated at the time the CTO certificate was awarded.

When the FAA Credentialing program was introduced in 2006, it included all FAA controllers, not just tower controllers as in the CTO program. In addition, the emphasis was shifted to ensuring safety-related personnel retained the skills necessary to perform their responsibilities. Under the FAA Credentialing program, the individual must: (1) Complete all required training in accordance with FAA standards; (2) undergo required certification; and (3) successfully complete the initial skills evaluation to be issued an FAA Credential with an appropriate rating. Once issued, the rating associated with the FAA Credential is valid for 2 years, after which the individual undergoes another skills evaluation similar to the one used for the initial certification. The biennial skills evaluation is required for all air traffic controllers, regardless of their assignment to a tower, approach control, or en-route air traffic control facility.

NATCA is also concerned that the knowledge, skill, and experience requirements in part 65 for CTO certificate holders have not been properly incorporated into FAA Orders and that no analysis was performed.

During the rulemaking process, the FAA reviewed part 65, subpart B, and made appropriate changes to FAA Order 8000.90 upon issuance of the final rule. As noted in FAA Order 8000.90, the FAA Credentialing program incorporates the current training, certification, and qualification requirements that form the basis from which the Air Traffic Safety Oversight Service issues, amends, withdraws, and removes FAA Credentials. The Air Traffic Organization must adhere to the requirements in FAA Orders regarding the training, proficiency, and certification of personnel. These orders include FAA Order JO 3120.4, *Air Traffic Technical Training* and FAA Order JO 3000.57, *Air Traffic Organization Technical Operations Training and Personnel Certification Programs.* The Air Traffic Organization also must ensure that changes to FAA Orders JO 3120.4 and JO 3000.57 or other directives related to training, proficiency, and certification, are submitted for Air Traffic Safety Oversight Office (AOV) review and acceptance.

NATCA states that if ''the requirements are eliminated for FAA credentialed Air Traffic Control Specialists, they need to be retained in another provision of Regulation or Statute to ensure proper oversight.'' NATCA believes FAA Orders may be changed at-will and are not subject to the Administrative Procedure Act (APA). NATCA states there is no check and balance to oversee the FAA's changes to these critical matters that are currently covered by regulation and subject to oversight.

FAA Orders serve as the primary means within the FAA to issue, establish, and describe agency policies, organization, responsibilities, methods, and procedures governing FAA employees. FAA Order 1320.1 contains the requirements to issue Orders. Also, in 1997, the National Civil Aviation Review Commission (NCARC) recommended that the air traffic service provider in FAA be subject to the safety policies of a separate part of the FAA to provide independent safety oversight. In addition, in 2001, the International Civil Aviation Organization (ICAO) adopted an amendment requiring states to implement formal safety management procedures for their air traffic services systems.

FAA Order 1100.161 specifies the manner by which AOV, within the Office of the Associate Administrator for Aviation Safety (AVS), will oversee the Air Traffic Organization (ATO), and other organizations within the Federal Aviation Administration (FAA) regarding safety management of the air traffic system. AOV's safety oversight responsibilities remain the same whether certain Air Traffic requirements are contained in 14 CFR or in FAA Orders. Thus, there is no erosion of oversight of these important training and certification requirements.

NATCA notes that military and Department of Defense civilian

controllers, as well as controllers working in Federal Contract Towers, are issued CTO certificates. NATCA states that these air traffic controllers, as well FAA air traffic controllers, regularly transfer between these employers. NATCA is concerned these transfers will be stifled or new bureaucracies will need to be created to ensure equivalent qualifications before transfer.

The underlying requirements for the FAA Credential encompass those of the CTO certificate. In addition, the FAA Credential includes the biennial skills evaluation discussed previously. Therefore, the FAA does not expect movement between employers to be stifled.

NATCA states that the FAA's final rule does not address how the FAA will maintain CTO certificates for incumbent employees for whom they will not be eliminated.

The procedures for current CTO certificate holders have not changed. Therefore, no additional changes were needed to 14 CFR part 65.

NATCA states that FAA should have collaborated with them on the development of any changes to the CTO certification process.

The FAA followed the procedures and requirements of the Administrative Procedure Act as well as those prescribed by FAA Order 1320.1.

Finally, NATCA requested that the FAA withdraw the rule and include FAA Credential holders in 14 CFR part 65. NATCA notes that under such an amendment, all certified controllers, whether holding a CTO certificate or an FAA Credential would be subject to the same rules, any subsequent rule changes would be subject to due process because they would require amendments to 14 CFR, and it would eliminate redundant processes.

The FAA followed the requirements in the Administrative Procedure Act and FAA Order 1320.1. Because FAA Orders serve as the primary means within the FAA to issue, establish, and describe agency policies, organization, responsibilities, methods, and procedures for FAA employees, the FAA has determined its actions are appropriate and have eliminated redundant processes.

Conclusion

After consideration of the comment submitted in response to the final rule, the FAA has determined that no revisions to the rule are warranted.

Issued in Washington, DC on July 27, 2015.

Anthony S. Ferrante,

Director, Air Traffic Safety Oversight Service.

[FR Doc. 2015–19278 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

RIN 0625–AB04

[Docket No.: 150731663–5663–01]

Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Interpretive Rule; Notice of Determination.

SUMMARY: On June 29, 2015, President Obama signed into law the Trade Preferences Extension Act of 2015. The Act provides a number of amendments to the antidumping duty (''AD'') and countervailing duty (''CVD'') laws but does not specify dates of application for those amendments. This notice of determination establishes a date of application for each statutory revision pertaining to the Department of Commerce and provides notice thereof to all interested parties to AD and CVD proceedings and to the public.

DATES: The date of application of this interepretive rule is August 6, 2015.

FOR FURTHER INFORMATION CONTACT: Robert Heilferty, Deputy Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Ave. NW., Washington, DC 20230, 202–482–0082.

SUPPLEMENTARY INFORMATION:

Background

The Trade Preferences Extension Act of 2015, Public Law 114–27 (the ''Act'') provides five amendments to the AD and CVD laws: (1) Section 502 amends Section 776 of the Tariff Act of 1930, 19 U.S.C. 1677e, to modify the provisions addressing the selection and corroboration of certain information that may be used as facts otherwise available with an adverse inference in an AD or CVD proceeding; (2) Section 503 amends Section 771(7) of the Tariff Act of 1930, 19 U.S.C. 1677(7), to modify the definition of ''material injury'' in AD and CVD proceedings; (3) Section 504 amends Section 771(15) of the Tariff Act of 1930, 19 U.S.C. 1677(15), and Section 773 of the Tariff Act of 1930, 19 U.S.C. 1677b, to modify the definition of ''ordinary course of trade'' and the provisions governing the treatment of a ''particular market situation'' in AD proceedings; (4) Section 505 amends Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), to modify the treatment of distorted prices or costs in AD proceedings; and (5) Section 506 amends Section 782(a) of the Tariff Act of 1930, 19 U.S.C. 1677m(a), to modify the provision regarding accepting voluntary respondents in AD and CVD proceedings.

The Act does not contain dates of application for any of these amendments. As explained below, it would be impracticable for the Department to apply at least one of the amendments, Section 505, immediately, and extremely difficult to apply the others immediately. Accordingly, the Department is establishing dates of application for each section, except for Section 503 (which relates to determinations of material injury by the U.S. International Trade Commission).

As an initial matter, we are cognizant of the Supreme Court's ruling in *Landgraf* v. *USI Film Prods.,* 511 U.S. 244 (1994), that, absent clear Congressional intent that a statute be applied retroactively, a statute may not attach new legal consequences to events completed before its enactment. *Landgraf,* 511 U.S. at 280; s*ee also, AT&T Corp.* v. *Hulteen,* 556 U.S. 701 (2009). In determining whether the *Landgraf* prohibition has been breached, important considerations are whether the new law takes away or impairs vested rights or creates new obligations, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Landgraf,* 511 U.S. at 269. Another important consideration is whether the prior provision was reasonably relied upon, so that application of the new provision would be manifestly unfair. *INS* v. *St. Cyr,* 533 U.S. 289 (2001).

In considering whether application of the amended statutes to merchandise entered into the United States before the passage of the Act would disturb vested rights, create new obligations or upset a reasonable reliance, our starting point is the holding of the Supreme Court in *Buttfield* v. *Stranahan,* 192 U.S. 470, 493 (1904), that ''no individual has a vested right to trade with foreign nations. . . .'' and that importing merchandise is not a fundamental right that is protected by other constitutional privileges such as due process. *See also NEC Corp.* v. *United States,* 151 F.3d 1361, 1369 (Fed. Cir. 1998). More

specifically, the Supreme Court held in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 318 (1933), that no party has a legal right to a particular rate of duty.

It follows that, even assuming that one or more of the Act's amendments were to result in a higher rate of duty being applied to imported merchandise than otherwise would have been applied, application of that higher rate would not disturb a vested right, attach a new disability to transactions or considerations already past, or upset any legitimate expectation. In other words, the Act does not attach any ''new'' legal consequences to past events, because those events had no settled legal consequences to begin with and, therefore, created no legitimate expectations concerning duty rates. As the Court of Appeals for the Federal Circuit (''Federal Circuit'') recently observed in *GPX Int'l Tire Corp.* v. *United States,* 780 F.3d 1136, 1144 (Fed. Cir. 2015) ''[a]lthough trade duties are forward-looking in part, the government also has a clear interest in fashioning a remedy for damaging past acts, 'level[ing] the playing field for particular American manufacturers,' and 'remedy[ing] the harm American manufacturers and their workers experience as a result of unfair trade practices' '' (quoting *Guangdong Wireking Housewares & Hardware Co.* v. *United States,* 745 F.3d 1194, 1206 (Fed. Cir. 2014)).

Other decisions of the Federal Circuit are in accord. In *Parkdale Int'l* v. *United States,* 475 F.3d 1375 (Fed. Cir. 2007), the Federal Circuit ruled that the application of the Department's new policy for resellers sales that preceded the announcement of that change in policy was not impermissibly retroactive. The Federal Circuit based its decision primarily on the fact that, under the U.S. system of duty assessment, final duty liability is not set until the entries of the imported merchandise are liquidated, which is often many years after the date of entry. *See, e.g.,* 19 U.S.C. 1675(a)(2)(C). Thus, importers bring goods into the United States with full knowledge that the rates of estimated duties deposited with U.S. Customs and Border Protection upon importation may change. In *Travenol Labs., Inc.* v. *United States,* 118 F.3d 749, 753–54 (Fed. Cir. 1997), the Federal Circuit ruled that the application of an amendment to customs law that changed the time period in which interest was calculated for overpayment of duties to goods that entered the United States prior to enactment of the law was not impermissibly retroactive.

Many decisions of the Court of International Trade agree. In *GPX Int'l Tire Corp.* v. *United States,* 893 F. Supp. 2d 1296, 1314 (Ct. Int'l. Trade 2013), the court observed that ''customs duties are to an extent unique from other government assessments in that there is no right to import, and where unfair trade remedies apply those with goods that may be imported rarely can predict with accuracy what the duty will be [referencing *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 318 (1933)]. For example, when goods become the subject of an AD/CVD investigation, liquidation is suspended while the initial investigation is undertaken, and generally while a review is conducted, prior to a final rate determination and duty assessment. *See Parkdale Int'l* v. *United States,* 475 F.3d 1375, 1376–77 (Fed. Cir. 2007).'' Similarly, in Y*amani Fishing Net Co.* v. *United States,* 830 F. Supp. 1502, 1507 (Ct. Int'l Trade 1993), the Court ruled that the application of a new regulation creating additional requirements for the submission of information to Commerce to a segment of an AD proceeding initiated before the promulgation of that regulation was not impermissibly retroactive.

Based on these precedents, we have determined that implementing these statutory amendments immediately, including to merchandise which entered into the United States before the passage of the Act, would not be impermissibly retroactive. In determining dates of application, therefore, we have been guided by Congress's intention that each amendment be implemented as soon as practicably possible. Accordingly, we have determined the earliest date at which each amendment practicably could be implemented and established that date as the date of application of that particular revision to the statute. This approach results in individual dates of application for different provisions of the Act, as explained below.

Section 502 of the Act amends Section 776 of the Tariff Act of 1930, 19 U.S.C. 1677e, to revise the provisions addressing the selection and corroboration of certain information that may be used as an adverse inference in applying facts available in an AD or CVD proceeding. These amendments provide that the Department may rely on, and is not required to adjust, certain information used as an adverse inference in applying facts available in an AD or CVD proceeding. They do not impose any new requirements on the parties to such proceedings that would require them to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after August 6, 2015.

We note that Section 502 provides that, in making AD and CVD determinations on the basis of the facts available, the Department is not required to corroborate, in certain circumstances, the information employed, to make certain estimates or demonstrations concerning that information, or to address certain claims regarding the ''alleged commercial reality'' of non-cooperating parties. Because this section addresses the Department's discretion and, thus, does not require the Department to take any specific actions with respect to facts available determinations, it will be applied to determinations made on or after August 6, 2015. Although the amendment does not interfere with the operation of 19 CFR 351.308(d), the Department intends to consider whether to amend that regulation as a result of the amendment to the statute.

Section 504 of the Act amends Sections 771(15) of the Tariff Act of 1930, 19 U.S.C. 1677(15), and Section 773 of the Tariff Act of 1930, 19 U.S.C. 1677b, to modify the definition of ''ordinary course of trade'' and the provisions governing the treatment of a ''particular market situation'' in AD proceedings. Because this section codifies the Department's discretion and does not require the Department to take any action with respect to particular market situations, we will apply this provision to determinations made on or after August 6, 2015. The Department's regulation, 19 CFR 351.301(c)(2)(i), establishes a deadline for ''particular market situation'' allegations of ''10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit.'' The amendment does not require the alteration of this deadline, and so the regulation will continue to apply as before.

Section 505 of the Act amends Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), to modify the treatment of distorted prices or costs in AD proceedings. It has two parts. Under the first part of the amendment of Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), the Department will request constructed value and cost of production information from respondent companies in all AD proceedings. The Department recognizes that it can cannot ask for such information in ongoing proceedings in which the time for doing so has passed. Accordingly, the Department will apply the new law to

determinations in which the complete initial questionnaire has not been issued as of August 6, 2015.

The second part of Section 505 amends Section 773(c)(5) of the Tariff Act of 1930, 19 U.S.C. 1673b(c)(5), to permit the Department to disregard price or cost values without further investigation if it has determined that certain subsidies have existed with respect to those values, or if those price or cost values were subject to an AD order. This amendment clarifies the Department's authority for its existing practice, and does not impose any new requirements on the parties to AD proceedings that would require them to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after August 6, 2015.

Section 506 of the Act amends Section 782(a) of the Tariff Act of 1930, 19 U.S.C. 1677m(a), to identify the factors that the Department may take into account in determining whether accepting voluntary responses would be unduly burdensome. This amendment compliments the Department's voluntary respondent analysis and does not require parties to AD and CVD proceedings to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after August 6, 2015.

Classification

Pursuant to 5 U.S.C. 553(b)(A), notice and comment are not required for this rule because its intent is to interpret the Trade Preferences Extension Act to apply as explained above and to provide notice to the public. This interpretation is meant to lend clarity to the statutory terms and will reduce or eliminate any possible confusion about the application of the Act without creating any new law, rights or duties. *See General Motors Corp.* v. *Ruckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (finding that EPA's rule was interpretive because ''the agency regarded its rule as interpretive''; ''[its] entire justification for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of the [provision]''; and ''most importantly, the rule did not create any new rights or duties . . .''). Because notice and an opportunity for comment are not required, no regulatory flexibility analysis is required and none has been prepared. The rule has been determined to be not significant for purposes of Executive Order 12866.

Dated: July 31, 2015.

Ronald K. Lorentzen

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2015–19353 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9723]

RIN 1545–BM73

Suspension of Benefits Under the Multiemployer Pension Reform Act of 2014; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to temporary regulations (TD 9723) that were published in the **Federal Register** on Friday, June 19, 2015 (80 FR 35207). The temporary regulations relate to multiemployer pension plans that are projected to have insufficient funds, at some point in the future, to pay the full benefits to which individuals will be entitled under the plans (referred to as plans in ''critical and declining status'').

DATES: This correction is effective August 6, 2015 and applicable June 19, 2015.

FOR FURTHER INFORMATION CONTACT: Department of the Treasury MPRA guidance information line at (202) 622–1559 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations (TD 9723) that are the subject of this correction are under section 432(e)(9) of the Internal Revenue Code.

Need for Correction

As published, the temporary regulations (TD 9723) contain an error that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is amended by making the following correcting amendments:

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 1.432(e)(9)–1T is amended by revising the first sentence of paragraph (g)(1)(v) to read as follows:

§ 1.432(e)(9)–1T Benefit suspensions for multiemployer plans in critical and declining status (temporary).

* * * * *

(g) * * *

(1) * * *

(v) * * * An application for suspension that is not submitted in combination with an application to PBGC for a plan partition under section 4233 of ERISA generally will not be accepted unless the proposed effective date of the suspension is at least nine months from the date on which the application is submitted. * * *

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2015–19364 Filed 8–5–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9723]

RIN 1545–BM73

Suspension of Benefits Under the Multiemployer Pension Reform Act of 2014; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations; correction.

SUMMARY: This document contains corrections to temporary regulations (TD 9723) that were published in the **Federal Register** on Friday, June 19, 2015 (80 FR 35207). The temporary regulations relate to multiemployer pension plans that are projected to have insufficient funds, at some point in the future, to pay the full benefits to which individuals will be entitled under the plans (referred to as plans in ''critical and declining status'').

DATES: This correction is effective August 6, 2015 and applicable June 19, 2015.

FOR FURTHER INFORMATION CONTACT: Department of the Treasury MPRA

guidance information line at (202) 622–1559 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations (TD 9723) that are the subject of this correction are under section 432(e)(9) of the Internal Revenue Code.

Need for Correction

As published, the temporary regulations (TD 9723) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

■ Accordingly, the temporary regulations (TD 9723), that are subject to FR Doc. 2015–14945, are corrected as follows:

■ 1. On page 35207, in the preamble, third column, third line, under paragraph heading ''*Paperwork Reduction Act,''* the language ''procedure pursuant to the'' is corrected to read ''comment pursuant to the''.

■ 2. On page 35210, in the preamble, second column, ninth line, under paragraph heading ''*Suspension Applications,''* the language ''is eligible for the suspensions and has'' is corrected to read ''is eligible for the suspension and has''.

■ 3. On page 35215, in the preamble, third column, third line, under paragraph heading ''*Contact Information,''* the language ''Department of the Treasury at (202)'' is corrected to read ''Department of the Treasury MPRA guidance information line at (202)''.

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2015–19366 Filed 8–5–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[Docket ID: DOD–2015–HA–0062]

RIN 0720–AB64

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/ TRICARE: Refills of Maintenance Medications Through Military Treatment Facility Pharmacies or National Mail Order Pharmacy Program

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Interim final rule.

SUMMARY: This interim final rule implements Section 702 (c) of the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 which states that beginning October 1, 2015, the pharmacy benefits program shall require eligible covered beneficiaries generally to refill non-generic prescription maintenance medications through military treatment facility pharmacies or the national mail-order pharmacy program. Section 702(c) of the National Defense Authorization Act for Fiscal Year 2015 also terminates the TRICARE For Life Pilot Program on September 30, 2015. The TRICARE For Life Pilot Program described in Section 716 (f) of the National Defense Authorization Act for Fiscal Year 2013, was a pilot program which began in March 2014 requiring TRICARE For Life beneficiaries to refill non-generic prescription maintenance medications through military treatment facility pharmacies or the national mail-order pharmacy program. TRICARE for Life beneficiaries are those enrolled in the Medicare wraparound coverage option of the TRICARE program. This interim rule includes procedures to assist beneficiaries in transferring covered prescriptions to the mail order pharmacy program. This regulation is being issued as an interim final rule in order to comply with the express statutory intent that the program begin October 1, 2015. Public comments, however, are invited and will be considered for possible revisions to this rule for the second year of the program.

DATES: This rule is effective August 6, 2015. Written comments received at the address indicated below by October 5, 2015 will be considered and addressed in the final rule.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

Federal eRulemaking 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, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.

Instructions: All submissions received must include the agency name and docket number or RIN 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: Dr. George Jones, Chief, Pharmacy Operations Division, Defense Health Agency, telephone 703–681–2890.

SUPPLEMENTARY INFORMATION:

A. Executive Summary

1. Purpose

The legal authority for this rule is Section 702 of the National Defense Authorization Act for Fiscal Year 2015.

This interim final rule implements Section 702 (c) of the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 which states that beginning October 1, 2015, the pharmacy benefits program shall require eligible covered beneficiaries generally to refill non-generic prescription maintenance medications through military treatment facility pharmacies or the national mail-order pharmacy program. Eligible covered beneficiaries are defined in sections 1072 (5) and 1086 of title 10, United States Code.

2. Summary of the Major Provisions of the Interim Final Rule

TRICARE beneficiaries are generally required to obtain all prescription refills for select non-generic maintenance medications from the TRICARE mail order program (where beneficiary copayments are much lower than in retail pharmacies) or military treatment facilities (where there are no copayments). Covered maintenance medications are those prescribed for chronic, long-term conditions that are taken on a regular, recurring basis, but do not include medications to treat acute conditions. TRICARE will follow best commercial practices, including that beneficiaries will be notified of the new rules and mechanisms to allow them to receive adequate medication during their transition to mail for their refills. The statute and rule authorize a waiver of the mail order requirement based on patient needs and other appropriate circumstances.

3. Costs and Benefits

The effect of the statutory requirement, implemented by this rule, is to shift a volume of prescriptions from retail pharmacies to the mail order pharmacy program. This will produce savings to the Department of approximately $88M per year and savings to beneficiaries of

approximately $16.5 million per year in reduced copayments.

B. Background

In Fiscal Year 2014, 61 million prescriptions were filled for TRICARE beneficiaries through the TRICARE retail pharmacy benefit at a net cost of $5.1 billion to the government. On average, the government pays 32% less for brand name maintenance medication prescriptions filled in the mail order program or military treatment facility pharmacies than through the retail program. Not all prescriptions filled through the retail program are maintenance/chronic medications. However, there is potential for significant savings to the government by shifting a portion of TRICARE prescription refills to the mail order program or military treatment facility pharmacies. In addition, there will be significant savings to TRICARE beneficiaries who will receive up to a 90 day refill at no charge for generics in the mail order program compared to $8 copay for up to a 30 day in retail. The savings is even greater for brand-name prescriptions: $16 for up to 90 days in mail versus $20 for up to 30 days in retail, meaning that for a 90-day supply the copayment comparison is $16 in mail to $60 in retail. The non-formulary copayment comparison is $46 for up to 90 days in mail compared to $46 for up to 30 days in retail.

C. Provisions of the Interim Final Rule

The interim final rule revises paragraph (r) to 32 CFR 199.21. Paragraph (r) establishes rules for the new program of refills of maintenance medications for TRICARE through the mail order pharmacy program. Paragraph (r)(1) requires that for covered maintenance medications, TRICARE beneficiaries are generally required to obtain their prescription refills through the national mail order pharmacy program or through military treatment facility pharmacies. TRICARE beneficiaries are defined in sections 1072 (5) and 1086 of title 10, United States Code, including those enrolled in the Medicare wraparound coverage option of the TRICARE program.

Paragraph (r)(2) provides that the Director, Defense Health Agency will establish, maintain, and periodically revise and update a list of covered maintenance medications, which will be accessible through the TRICARE Pharmacy Program Web site and by telephone through the TRICARE Pharmacy Program Service Center. Each medication included on the list will be a medication prescribed for a chronic, long-term condition that is taken on a regular, recurring basis. It will be clinically appropriate and cost effective to dispense the medication from the mail order pharmacy. It will be available for an initial filling of a 30-day or less supply through retail pharmacies, and will be generally available at military treatment facility pharmacies for initial fill and refills. It will be available for refill through the national mail-order pharmacy.

Paragraph (r)(3) provides that a refill is a subsequent filling of an original prescription under the same prescription number or other authorization as the original prescription, or a new original prescription issued at or near the end date of an earlier prescription for the same medication for the same patient.

Paragraph (r)(4) provides that a waiver of the general requirement to obtain maintenance medication prescription refills from the mail order pharmacy or military treatment facility pharmacy will be granted in several circumstances. There is a blanket waiver for prescription medications that are for acute care needs. There is also a blanket waiver for prescriptions covered by other health insurance. There is a case-by-case waiver to permit prescription maintenance medication refills at a retail pharmacy when necessary due to personal need or hardship, emergency, or other special circumstance, for example, for nursing home residents. This waiver is obtained through an administrative override request to the TRICARE pharmacy benefits manager under procedures established by the Director, Defense Health Agency.

Paragraph (r)(5) establishes procedures for the effective operation of the program. The Department will implement the program by utilizing best commercial practices to the extent practicable. An effective communication plan that includes efforts to educate beneficiaries in order to optimize participation and satisfaction will be implemented. Beneficiaries with active prescriptions for a medication on the maintenance medication list will be notified that their medication is covered under the program. Beneficiaries will be advised that they may receive up to two 30 day fills at retail while they transition their prescription to the mail order program. The beneficiary will be contacted after each of these two fills reminding the beneficiary that the prescription must be transferred to mail. Requests for a third fill at retail will be blocked and the beneficiary advised to call the pharmacy benefits manager (PBM) for assistance. The PBM will provide a toll free number to assist beneficiaries in transferring their prescriptions from retail to the mail order program. With the beneficiary's permission, the PBM will contact the physician or other health care provider who prescribed the medication to assist in transferring the prescription to the mail order program. In any case in which a beneficiary is required to obtain a maintenance medication prescription refill from the national mail-order pharmacy program and attempts instead to refill such medications at a retail pharmacy, the PBM will also maintain the toll free number to assist the beneficiary. This assistance may include information on how to request a waiver or in taking any other appropriate action to meet the beneficiary's needs and to implement the program. The PBM will ensure that a pharmacist is available at all times through the toll-free telephone number to answer beneficiary questions or provide other appropriate assistance.

Paragraph (r)(6) provides that the program will remain in effect indefinitely with any adjustments or modifications required by law.

D. Regulatory Procedures

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

Executive Orders (EOs) 12866 and 13563 require that a comprehensive regulatory impact analysis be performed on any economically significant regulatory action, defined primarily as one that would result in an effect of $100 million or more in any one year. The DoD has examined the economic and policy implications of this interim rule and has concluded that this is not an economically significant regulatory action under the Executive Order. The program rule will produce savings to the Department of approximately $88M per year and savings to beneficiaries of approximately $16.5 million per year in reduced copayments. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Congressional Review Act, 5 U.S.C. 801, et seq.

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This interim rule is not a major

rule under the Congressional Review Act.

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

This rule does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more (adjusted for inflation) in any one year.

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

The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This interim rule does not have a significant impact on a substantial number of small entities.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This interim rule contains no new information collection requirements subject to the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3511).

Executive Order 13132, ''Federalism''

This interim rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on the States; the relationship between the National Government and the States; or the distribution of power and responsibilities among the various levels of Government.

Public Comments Invited

This rule is being issued as an interim final rule based on the statutory requirement of an October 1, 2015 start date. DoD invites public comments on all provisions of the rule. They will be considered for possible revisions to the program for the second and subsequent years of operation.

List of Subjects in 32 CFR Part 199

Administrative practice and procedure, Claims, Dental health, Fraud, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 will be amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.21 is amended by revising paragraph (r), to read as follows:

§ 199.21 TRICARE Pharmacy Benefits Program.

* * * * *

(r) *Refills of maintenance medications for eligible covered beneficiaries through the mail order pharmacy program*—(1) *In general.* Consistent with section 702 of the National Defense Authorization Act for Fiscal Year 2015, this paragraph requires that for covered maintenance medications, beneficiaries are generally required to obtain their prescription through the national mail-order pharmacy program or through military treatment facility pharmacies. For purposes of this paragraph, eligible covered beneficiaries are those defined under sections 1072 and 1086 of title 10, United States Code.

(2) *Medications covered.* The Director, DHA, will establish, maintain, and periodically revise and update a list of covered maintenance medications subject to the requirement of paragraph (r)(1) of this section. The current list will be accessible through the TRICARE Pharmacy Program Internet Web site and by telephone through the TRICARE Pharmacy Program Service Center. Each medication included on the list will meet the following requirements:

(i) It will be a medication prescribed for a chronic, long-term condition that is taken on a regular, recurring basis.

(ii) It will be clinically appropriate to dispense the medication from the mail order pharmacy.

(iii) It will be cost effective to dispense the medication from the mail order pharmacy.

(iv) It will be available for an initial filling of a 30-day or less supply through retail pharmacies.

(v) It will be generally available at military treatment facility pharmacies for initial fill and refills.

(vi) It will be available for refill through the national mail-order pharmacy program.

(3) *Refills covered.* For purposes of the program under paragraph (r)(1) of this section, a refill is:

(i) A subsequent filling of an original prescription under the same prescription number or other authorization as the original prescription; or

(ii) A new original prescription issued at or near the end date of an earlier prescription for the same medication for the same patient.

(4) *Waiver of requirement.* A waiver of the general requirement to obtain maintenance medication prescription refills from the mail order pharmacy or military treatment facility pharmacy will be granted in the following circumstances:

(i) There is a blanket waiver for prescription medications that are for acute care needs.

(ii) There is a blanket waiver for prescriptions covered by other health insurance.

(iii) There is a case-by-case waiver to permit prescription maintenance medication refills at a retail pharmacy when necessary due to personal need or hardship, emergency, or other special circumstance. This waiver is obtained through an administrative override request to the TRICARE pharmacy benefits manager under procedures established by the Director, DHA.

(5) *Procedures.* Under the program established by paragraph (r)(1) of this section, the Director, DHA will establish procedures for the effective operation of the program. Among these procedures are the following:

(i) The Department will implement the program by utilizing best commercial practices to the extent practicable.

(ii) An effective communication plan that includes efforts to educate beneficiaries in order to optimize participation and satisfaction will be implemented.

(iii) Beneficiaries with active retail prescriptions for a medication on the maintenance medication list will be notified that their medication is included under the program. Beneficiaries will be advised that they may receive two 30 day fill at retail while they transition their prescription to the mail order program.

(iv) Requests for a third fill at retail will be blocked and the beneficiary advised to call the pharmacy benefits manager (PBM) for assistance.

(v) The PBM will provide a toll free number to assist beneficiaries in transferring their prescriptions from retail to the mail order program. With the beneficiary's permission, the PBM will contact the physician or other health care provider who prescribed the medication to assist in transferring the prescription to the mail order program.

(vi) In any case in which a beneficiary required under this paragraph (r) to obtain a maintenance medication prescription refill from national mail order pharmacy program and attempts instead to refill such medications at a retail pharmacy, the PBM will also maintain the toll free number to assist the beneficiary. This assistance may include information on how to request a waiver, consistent with paragraph (r)(4)(iii) of this section, or in taking any other appropriate action to meet the

beneficiary's needs and to implement the program.

(vii) The PBM will ensure that a pharmacist is available at all times through the toll-free telephone number to answer beneficiary questions or provide other appropriate assistance.

(6) This program will remain in effect indefinitely with any adjustments or modifications required by law.

Dated: July 31, 2015.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2015–19196 Filed 8–5–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[Docket ID ED–2015–OSERS–0061]

Final Priority and Definitions; Demonstration and Training Program: Career Pathways for Individuals With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final priority and definitions.

[CFDA Number: 84.235N.]

SUMMARY: The Assistant Secretary for Special Education and Rehabilitative Services announces a priority designed to demonstrate promising practices in the use of career pathways to improve employment outcomes for individuals with disabilities. Specifically, this priority will establish model demonstration projects that engage State vocational rehabilitation (VR) agencies in partnerships with other entities to develop and use career pathways to help individuals with disabilities eligible for VR services, including youth with disabilities, acquire necessary marketable skills and recognized postsecondary credentials. The Assistant Secretary may use this priority for competitions in fiscal year (FY) 2015 and later years.

DATES: This priority and these definitions are effective September 8, 2015.

FOR FURTHER INFORMATION CONTACT: Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW., Room 5042, Potomac Center Plaza (PCP), Washington, DC 20202–2800. Telephone: (202) 245–7425 or by email: *felipe.lulli@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the Demonstration and Training Program is to provide competitive grants to, or enter into contracts with, eligible entities to expand and improve rehabilitation and other services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act), or to further the purposes and policies in sections 2(b) and 2(c) of the Rehabilitation Act by supporting activities that increase the provision, extent, availability, and scope, as well as improve the quality of rehabilitation services under the Rehabilitation Act.

Program Authority: 29 U.S.C. 773(b).

Applicable Program Regulations: 34 CFR part 373.

We published a notice of proposed priority and definitions for this competition in the **Federal Register** on May 15, 2015 (80 FR 27874). That notice contained background information and our reasons for proposing the particular priority and definitions. There are differences between the proposed priority and the final priority which are explained in the *Analysis of Comments and Changes* section of this notice.

Public Comment: In response to our invitation in the notice of proposed priority and definitions, two parties submitted comments relevant to this priority.

Generally, we do not address technical and other minor changes.

Analysis of the Comments and Changes: An analysis of the comments and of any changes in the priority and definitions since publication of the notice of proposed priority follows.

Comment: One commenter inquired whether there were any Federal requirements for the legal or programmatic structure of an eligible consortium. We also identified a second issue implicit in the commenter's question, namely, when it is appropriate for VR agencies to apply as a group.

Discussion: We agree that the reference to ''a consortium of State VR agencies'' in the Eligible Applicants section of the proposed priority requires further definition. The Education Department General Administrative Regulations (EDGAR) at 34 CFR 75.127–129 authorize eligible entities to apply as a group. According to EDGAR, groups may take various forms, including consortia, provided that the constituent members are eligible entities and that the eligible applicants formally bind themselves to all the application statements and assurances, describe the activities they plan to conduct, and assume responsibility for compliance with all relevant Federal requirements. Accordingly, the final priority incorporates references to these requirements in the Eligibility and Application Requirements sections.

We also agree that further clarification is needed regarding the circumstances in which application by a group would be appropriate. Thus, we have added a requirement that groups must serve a defined metropolitan area or distinct population that exists across State lines.

Changes: In the Eligible Applicants section, we updated the final priority to use the broader term ''group'' instead of ''consortium.'' With regard to the circumstances for group applications, we have updated the Eligible Applicants section of the final priority to specify that State VR agencies may apply as a group if they serve individuals in a distinct geographic area shared by two or more adjacent States (*e.g.,* metropolitan areas, targeted occupational clusters or related industries whose employment base extends beyond a single adjacent State).

Also, in the Application Requirements paragraph (c)(3), we added a new requirement that State VR agencies applying as a group identify their shared geographic area and describe how they will coordinate their project activities within that area. In paragraph (e) of the Application Requirements section, we stipulate that applications by groups must include a copy of the members' signed agreement designating the agency authorized to sign the application on behalf of the group; binding each agency to every statement, assurance and obligation in the application; and detailing the agencies' assigned project roles and responsibilities.

Comment: One commenter stated that the project requirements in the proposed priority would not ensure that grantees provide individuals with the kind of career development support they need for success in a career pathway. The commenter described the comprehensive career development process in terms of three distinct elements: the individual's self-exploration of career-related skills, interests, and values; exploration of potential occupations and career goals aligned with the individual's skills, interests, and values; and career planning and management to achieve the individual's chosen employment and personal goals. The commenter stated that career planning and management may involve career-specific skills, job search skills, and soft skills involving communication,

teamwork, networking, problem solving, critical thinking, and professionalism.

In the commenter's view, the Project Requirements section of the proposed priority was inadequate because it did not require grantees to engage individuals in a comprehensive career development process. To correct this, the commenter recommended changes in the Project Requirements section to incorporate the three aspects of the comprehensive career development process, particularly in paragraphs (c)(6)(i) and (c)(6)(iv).

The same commenter made additional recommendations in support of job readiness. Specifically, the commenter proposed inserting additional examples of comprehensive support services, self-advocacy, and soft-skills in Project Requirements paragraphs (c)(4)(i), (c)(4)(iii), and (c)(6)(iv), respectively, as well as the addition of a new requirement regarding ''supportive relationships with family members, mentors, role models, and other caring adults.''

Discussion: We agree with the commenter's three-part description of a systematic comprehensive career development process. We also agree that the phrase used in the proposed priority—''career counseling, career exploration and career readiness skills''—does not fully reflect such a process. It does not, for example, capture the self-exploration or career planning and management components of the process. Accordingly, the final priority incorporates a number of changes to improve the quality of the program's career development activities, consistent with the commenter's three-part description of a comprehensive career development process.

We also agree that the proposed priority omitted some important elements of comprehensive support services, self-advocacy, and soft-skills requirements, including fostering supportive relationships. The final priority therefore expands the comprehensive support services, self-advocacy training, and soft skills services to be provided, together with peer support and mentoring.

On the other hand, we do not believe that a new requirement regarding supportive relationships with family members is necessary, because the proposed priority's Application Requirements paragraph (c)(3)(vi) already requires ''strategies for involving families.''

Changes: We have revised the final priority to include several changes to the Project Requirements section. Paragraph (c)(6)(i) has been revised to more fully reflect the nature and scope of the program's required career development services. In addition, paragraph (c)(4)(i) now incorporates benefits planning and physical and mental health services among the comprehensive support services. Further, we revised paragraph (c)(4)(iii) to incorporate mentoring and peer relationships as components of self-advocacy training. Finally, we revised paragraph (c)(6)(iv) to add communication, teamwork, networking, problem solving, critical thinking and professionalism as soft skills.

Comment: None.

Discussion: We identified several instances in which a particular requirement was cited in one part of the proposed priority but omitted in another place where it should have been cited.

The proposed priority's program description, for example, indicated that career pathway services are intended for individuals with disabilities who meet State VR eligibility requirements. However, this eligibility requirement was not reflected in the Project Requirements or Application Requirements sections of the proposed priority.

Also, certain requirements in the Project Requirements section were not addressed in the Application Requirements section. Paragraph (b) of the Project Requirements in the notice of proposed priority required the model project to be implemented at multiple sites and lead to one or more occupational clusters. However, the Application Requirements did not require applicants to identify those sites, clusters, or their criteria for selecting them. Also, while Project Requirements paragraph (c) enumerated six career pathway components, the Application Requirements section lacked any references to those components. Further, collaboration with federally funded career pathway initiatives was cited in paragraph (d) of the Project Requirements section, but the Application Requirements section did not require applicants to list or describe such collaboration(s).

With regard to employment outcomes, the proposed priority's Background section referenced competitive integrated employment for individuals with disabilities, but it did not require this employment outcome in either the Project Requirements section or the Application Requirements section's evaluation plan.

Finally, neither the Project Requirements nor the Application Requirements of the proposed priority specified whether grantees are expected to create new pathways or to access existing ones.

Changes: In the final priority, we have added references to ''VR-eligible individuals'' in paragraph (a) of the Project Requirements section and in paragraph (c)(4)(v) of the Application Requirements section.

In paragraph (c)(3) of the Application Requirements section, the final priority requires applicants to identify the project's proposed sites and targeted occupational clusters, and their criteria for selecting such sites and occupational clusters. We also added references to the six specified career pathway components in paragraph (c)(4)(v) of the Application Requirements section. In addition, we added the requirement that applicants describe their proposed collaboration with federally funded career pathway partners in Application Requirements paragraph (c)(4)(iii).

We have added an explicit reference to competitive integrated employment in paragraph (a) of the Project Requirements section. In Application Requirements paragraph (g), regarding evaluation plans, we added required data elements appropriate for measuring career pathways' effectiveness in creating competitive integrated employment opportunities for VR-eligible individuals.

In paragraph (a) of the Project Requirements section we added a statement clarifying that applicants may provide access to existing career pathways, create new ones, or both. Also, Application Requirements paragraph (c)(4)(iv) now requires applicants to describe how they would provide access to existing career pathways or create new pathways.

Final Priority

The Assistant Secretary for Special Education and Rehabilitative Services proposes a priority designed to demonstrate promising practices in the use of career pathways (as defined in this notice) in order to improve employment outcomes for individuals with disabilities (as defined in this notice). Specifically, the purpose of this priority is to establish model demonstration projects designed to promote State vocational rehabilitation (VR) agency partnerships in the development of and the use of career pathways to help individuals with disabilities eligible for VR services, including youth with disabilities (as defined in this notice), to acquire marketable skills and recognized postsecondary credentials (as defined in this notice).

Eligible Applicants: Under this priority, an applicant must be a State VR agency. State VR agencies may also apply as a group, consistent with 34

CFR 75.128, if they serve individuals in a distinct geographic area shared by two or more adjacent States. Applications by a group would be appropriate, for example, in cases of metropolitan areas, targeted occupational clusters or related industries whose employment base extends beyond a single State.

Project Requirements: Under this priority, the model demonstration proposed by an applicant must, at a minimum—

(a) Develop and implement a collaborative model project demonstrating promising practices and strategies in the use of career pathways to improve the skills of VR-eligible individuals with disabilities, including youth with disabilities, and help them attain credentials that lead to competitive integrated employment in high-demand occupations. The model must be implemented at multiple sites to ensure its replicability, and lead to one or more occupational clusters (as defined in this notice). The model project may involve providing access to existing career pathways, creating new pathways, or both;

(b) Establish partnerships between the VR agencies, employers, agencies, and entities that are critical to the development of career pathways and the alignment of education, training, employment, and human and social services. At minimum, the partnership should include representatives from local or State educational agencies responsible for providing transition services to students with disabilities under the Individuals with Disabilities Education Act and representatives from two-year and four-year institutions of higher education, American Job Centers, other workforce training providers (including apprenticeship, on-the-job and customized training providers), and employers who will work in collaboration to develop and provide postsecondary education and training for individuals with disabilities served under this project;

(c) Include the following career pathway components:

(1) Alignment of secondary and postsecondary education, training, employment, and human services with the skill needs of targeted industry sectors important to local, regional, or State economies;

(2) Rigorous, sequential, connected, and efficient curricula that connect basic education and skills training courses and that integrate education with training;

(3) Multiple entry and exit points for individuals with disabilities entering and exiting training;

(4) Comprehensive support services that are designed to ensure the individual's success in completing education and training programs:

(i) Financial supports, benefits planning, child care, physical and mental health services and transportation;

(ii) Educational supports (*e.g.,* tutors, on-campus supports such as writing labs, math labs, and disability services);

(iii) Self-advocacy training (*e.g.,* mentoring, peer relationships, understanding how to request services and supports needed in the transition from secondary to post-secondary education and employment, and increasing knowledge of rights under disability laws); and

(iv) Appropriate assistive technology services and devices;

(5) Flexible design of education and training programs and services to meet the particular needs of individuals with disabilities, including flexible work schedules, alternative class times and locations, and the innovative use of technology; and

(6) Education and training programs that focus on the attainment of secondary education and recognized postsecondary credentials, sector-specific employment, educational advancement over time and employment within a sector, including curriculum and instructional strategies designed to develop the following knowledge and skills:

(i) Comprehensive career development counseling and guidance, including self-exploration, career exploration and career planning and management;

(ii) Basic academic skills needed to demonstrate knowledge competencies in an occupation or occupational cluster, including remedial skills to address gaps in basic reading, writing, and math skills;

(iii) Career and technical skills leading to employment in technical careers, including employment in the skilled trades; and

(iv) Soft skills (*e.g.,* understanding, communication, teamwork, networking, problem solving, critical thinking and professionalism, learning styles, identifying strengths and weaknesses);

(d) Collaborate with other federally-funded career pathway initiatives conducting activities relevant to the work of its proposed project; and

(e) Develop and conduct an evaluation of the project's performance in achieving project goals and objectives, including an evaluation on the effectiveness of the practices and strategies implemented by the project.

Application Requirements: To be considered for funding under this program, an application must include the following:

(a) A detailed review of the literature that supports the potential effectiveness of the proposed model, its components, and processes to improve outcomes for individuals with disabilities;

(b) A logic model that communicates how the demonstration project will achieve its outcomes and provides a framework for project evaluation. The logic model must depict, at a minimum, the goals, activities, outputs, and outcomes of the proposed model demonstration project;

(c) A description of the applicant's plan for implementing the project, including a description of—

(1) A cohesive, articulated model of partnership and coordination among the participating agencies and organizations;

(2) The coordinated set of promising practices and strategies in the use and development of career pathways that are aligned with employment, training, and education programs and reflect the needs of employers and individuals with disabilities;

(3) The model demonstration project's proposed sites and targeted occupational clusters, and the proposed criteria for selecting such sites and occupational clusters. State VR agencies applying as a group must also identify the shared geographic area and describe how they will coordinate their project activities within the shared area.

(4) How the proposed project will—

(i) Identify local workforce needs, aligned with the skill needs of targeted industry sectors important to local, regional, or State economies;

(ii) Involve employers in the project design and in partnering with project staff to develop integrated community settings for assessments, job shadowing, internships, apprenticeships, and other paid and unpaid work experiences that are designed to lead to competitive integrated employment for individuals with disabilities, including youth with disabilities;

(iii) Collaborate with participating agencies and organizations, including career pathway partners;

(iv) Provide access to existing career pathways, create new pathways, or both, incorporating the six required career pathway components: secondary and postsecondary education and training aligned with targeted industry sector needs; rigorous, sequential, connected and efficient curricula; multiple entry and exit points; comprehensive support services; flexible design of education, training, work settings and assistive

technology; and focus on the attainment of secondary education, recognized postsecondary credentials, sector-specific employment, and related knowledge and skills.

(v) Conduct outreach activities to identify VR-eligible individuals with disabilities whom the career pathways approach could assist in achieving competitive integrated employment in the career clusters identified in their application; and

(vi) Develop strategies for involving families that will increase the likelihood for successful educational and employment outcomes for individuals with disabilities.

(d) The methods and criteria that will be used to select the sites at which the project activities will be implemented;

(e) Evidence (*e.g.,* letter of support or draft agreement) that the State VR agency has specific agreements with its partners in the development and implementation of the project. In the case of a group, the application must also include a signed agreement among the constituent State VR agencies that designates the agency legally authorized to submit the application on behalf of the group; binds each agency to every statement, assurance and obligation in the application; and details the agencies' assigned roles and responsibilities, in accordance with 34 CFR 75.128 and 75.129;

(f) A plan for evaluating the project's performance, including an evaluation on the effectiveness of the practices and strategies implemented by the project, in achieving project goals and objectives. Specifically, the evaluation plan must include a description of:

(1) Project goals, measurable objectives, and operational definitions;

(2) The data to be collected;

(3) How the data will be analyzed; and

(4) How the outcomes for individuals with disabilities served by the project compared with the outcomes of individuals with disabilities not receiving project services.

(g) For each career pathway accessed or created through the project, the evaluation plan must provide the following information:

(1) Description of the career pathway—including the respective occupational cluster(s) or career field(s), stackable credentials, and multiple entry/exit points; and

(2) Collection of the following data, at minimum:

(i) The relevant RSA–911 Case Service Report data for each project participant;

(ii) The number of participants who entered the career pathway;

(iii) The number of participants who completed training in the career pathway;

(iv) The number of participants who attained one or more recognized postsecondary credential and the types of credentials attained;

(v) The number of participants who achieved competitive integrated employment through the project; and

(vi) The corresponding weekly wage and employer benefits received by these participants.

(h) A plan for systematic dissemination of project findings and knowledge gained that will assist State and local agencies in adapting or replicating the model career pathways developed and implemented by the project. This plan could include elements such as development of a Web site, community of practice, and participation in national and State conferences;

(i) An assurance that the employment goal for all individuals served under this priority will be competitive integrated employment, including customized or supported employment; and

(j) An assurance that the project will collaborate with other federally-funded career pathway initiatives conducting activities relevant to its work.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Definitions

The following definitions are provided to ensure that applicants have a clear understanding of how we are using these terms in the priority. There are no differences between the proposed definitions and these final definitions.

Career Pathway means a combination of rigorous and high-quality education, training, and other services that—

(a) Aligns with the skill needs of industries in the economy of the State or regional economy involved;

(b) Prepares an individual to be successful in any of a full range of secondary or postsecondary education options, including apprenticeships registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et seq.*);

(c) Includes counseling to support an individual in achieving the individual's education and career goals;

(d) Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(e) Organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;

(f) Enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

(g) Helps an individual enter or advance within a specific occupation or occupational cluster. Source: Section 3(7) of WIOA.

Competitive integrated employment means work that is performed on a full-time or part-time basis (including self-employment)—

(a) For which an individual—

(1) Is compensated at a rate that—

(i)(A) Shall be not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate specified in the applicable State or local minimum wage law; and

(B) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or

(ii) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who

have similar training, experience, and skills; and

(2) Is eligible for the level of benefits provided to other employees;

(b) That is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons; and

(c) That, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions. Source: Section 7(5) of the Rehabilitation Act.

Individual with a disability means any individual who—

(a) Has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(b) Can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to Title I, III, or VI of the Rehabilitation Act. Source: Section 7(20) of the Rehabilitation Act.

Occupational cluster means a group of occupations and broad industries based on common knowledge and skills, job requirements or worker characteristics. Source: Adopted from Career Pathways Toolkit, DOL.

Recognized postsecondary credential means a credential consisting of an industry-recognized certificate or certification, a certificate of completion of an apprenticeship, a license recognized by the State involved or Federal Government, or an associate or baccalaureate degree. Source: Section 3(52) of WIOA.

Youth with a disability means an individual with a disability who—

(a) Is not younger than 14 years of age; and

(b) Is not older than 24 years of age. Source: Section 7(42) of the Rehabilitation Act.

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing this final priority only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. The benefits of the Demonstration and Training program have been well established over the years through the successful completion of similar projects, particularly those grants that demonstrated innovative service delivery practices. Specifically, this priority would establish model demonstrations showing that career pathways can be used to assist individuals with disabilities to achieve competitive integrated employment by obtaining recognized postsecondary credentials and thereby by meeting the needs of employers in high-demand career clusters. This priority is also directly responsive to the Presidential Memorandum to Federal agencies directing them to take action to address job-driven training for the Nation's workers.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for

coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: July 31, 2015.

Michael K. Yudin,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2015–19293 Filed 8–5–15; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2015–0105 FRL–9927–41–Region 7]

Approval and Promulgation of Air Quality Implementation Plans; Missouri; Update to Materials Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: The Environmental Protection Agency (EPA) is updating the materials submitted by Missouri that are incorporated by reference (IBR) into the state implementation plan (SIP). EPA is also notifying the public of the correction of certain typographical errors within the IBR table. The regulations affected by this update have been previously submitted by the state agency and approved by EPA. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), and the Regional Office.

DATES: This rule is effective on August 6, 2015.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219; or at *http://www.epa.gov/region07/air/rules/fedapprv.htm;* and the National Archives and Records Administration. For information on the availability of this material at NARA, call (202) 741–6030, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jan Simpson at (913) 551–7089, or by email at *simpson.jan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The SIP is a living document which the state revises as necessary to address its unique air pollution problems. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations to make them part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference Federally-approved SIPs, as a result of consultations between EPA and the Office of Federal Register. The description of the revised SIP document, IBR procedures and ''Identification of plan'' format are discussed in further detail in the May 22, 1997, **Federal Register** document.

On June 29, 1999, EPA published a document in the **Federal Register** (64 FR 34717) beginning the new IBR procedure for Missouri. On May 24, 2004 (69 FR 29435), and on October 8, 2009 (74 FR 51783), EPA published updates to the IBR material for Missouri.

In this document, EPA is publishing an updated set of tables listing the regulatory (*i.e.,* IBR) materials in the Missouri SIP taking into account the additions, deletions, and revisions to those materials previously submitted by the state agency and approved by EPA. We are removing the EPA Headquarters Library from paragraph (b)(3), as IBR materials are no longer available at this location. In addition, EPA has found errors in certain entries listed in 40 CFR 52.1320(c) and (e), as amended in the published IBR update actions listed above, and is correcting them in this document. Table (c) revisions include:

- Adding the inadvertent omission of the following explanation to the explanation column for 10–1.020(1) and (2): Only sections (1) and (2) are Federally approved.
- removing rescinded rule 10–2.040
- removing rescinded rule 10–2.150
- moving text from the explanation column to the EPA approval date column for 10–2.230, 10–2.290, 10–2.310, and 10–2.320
- removing outdated text in the explanation column for 10–2.300
- removing rescinded rule 10–3.060
- removing rescinded rule 10–4.040
- removing rescinded rule 10–4.140
- removing rescinded rule 10–5.030
- removing rescinded rule 10–5.250
- correcting the **Federal Register** citation in the EPA approval date column for 10–5.330
- correcting the **Federal Register** citation in the EPA approval date column and adding text in the explanation column for 10–5.340
- moving text from the explanation column to the EPA approval date column for 10–5.350, 10–5.360, 10–5.370, and 10–5.410
- correcting the **Federal Register** citation in the EPA approval date column for 10–5.442
- correcting the **Federal Register** citation in the EPA approval date column for 10–6.061
- correcting the state effective date and removing outdated text in the explanation column for 10–6.300
- removing outdated text in the explanation column for 10–6.405
- correcting the chapter title for Springfield to ''Springfield-Chapter 6-Air Pollution Control Standards''
- removing rescinded articles VII, IX and XX under Springfield

Table (d) is being revised by:

- removing text in the explanation column for (8)
- removing text in the explanation column for (21)

Table (e) is being revised by:

- removing text in the explanation column for (16)
- adding text in the explanation column for (11)–(62)
- removing outdated/confusing text in the explanation column for (43), (44), (48) and (53).

II. EPA Action

In this action, EPA is doing the following:

A. Announcing the update to the IBR material as of December 31, 2014;

B. Revising the entry in § 52.1320(b) to reflect the update and corrections;

C. Revising certain entries in § 52.1320(c), (d), and (e) as described above;

D. Correcting the date format in the ''State effective date'' or ''State submittal date'' and ''EPA approval date'' columns in § 52.1320(c), (d), and (e). Dates are numerical month/day/year without additional zeros;

E. Modifying the **Federal Register** citations in § 52.1320(c), (d), and (e) to reflect the beginning page of the preamble as opposed to the page number of the regulatory text.

EPA has determined that this rule falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation and section 553(d)(3), which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). This rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs. Under section 553 of the APA, an agency may find good cause where procedures are ''impractical, unnecessary, or contrary to the public interest.'' Public comment is ''unnecessary'' and ''contrary to the public interest'' since the codification only reflects existing law. Immediate notice in the CFR benefits the public by providing notice of the updated Missouri SIP compilation.

Statutory and Executive Order Reviews

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 Missouri 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* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

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

- Is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 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).

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).

EPA has also determined that the provisions of section 307(b)(1) of the CAA pertaining to petitions for judicial review are not applicable to this action. Prior EPA rulemaking actions for each individual component of the Missouri SIP compilations previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action. Thus, EPA sees no need in this action to reopen the 60-day period for filing such petitions for judicial review for this ''Identification of plan'' reorganization update action for the State of Missouri.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 7, 2015.

Mark Hague,

Acting Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart AA—Missouri

■ 2. In § 52.1320, paragraphs (b), (c), (d), and (e) are revised to read as follows:

§ 52.1320 Identification of Plan.

* * * * *

(b) *Incorporation by reference.* (1) Material listed in paragraphs (c) and (d) of this section with an EPA approval date prior to December 31, 2014, was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register**. Entries in paragraphs (c) and (d) of this section with EPA approval dates after December 31, 2014, will be

incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 7 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated state rules/regulations which have been approved as part of the SIP as of December 31, 2014.

(3) Copies of the materials incorporated by reference may be inspected at the Environmental Protection Agency, Region 7, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

(c) *EPA-approved regulations.*

EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources Chapter 1—Organization				
10–1.020(1) and (2)	Commission Voting and Meeting Procedures.	7/30/98	6/21/13, 78 FR 37457	Only sections (1) and (2) are Federally approved.
Chapter 2—Air Quality Standards and Air Pollution Control Regulations for the Kansas City Metropolitan Area				
10–2.090	Incinerators	2/25/70	3/18/80, 45 FR 17145	The state has rescinded this rule.
10–2.100	Open Burning Restrictions.	4/2/84	8/31/84, 49 FR 34484	
10–2.205	Control of Emissions from Aerospace Manufacture and Rework Facilities.	3/30/01	4/24/02, 67 FR 20036	
10–2.210	Control of Emissions From Solvent Metal Cleaning.	2/29/08	6/20/08, 73 FR 35074	
10–2.215	Control of Emissions from Solvent Cleanup Operations.	5/30/01	4/24/02, 67 FR 20036	
10–2.220	Liquefied Cutback Asphalt Paving Restricted.	6/3/91	6/23/92, 57 FR 27939	
10–2.230	Control of Emissions from Industrial Surface Coating Operations.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–2.260	Control of Petroleum Liquid Storage, Loading, and Transfer.	4/30/04	2/2/05, 70 FR 5379	
10–2.290	Control of Emissions From Rotogravure and Flexographic Printing Facilities.	3/30/92	9/6/94, 59 FR 43376 (correction). 8/30/93, 58 FR 45451	The state rule has Sections (6)(A) and (6)(B), which EPA has not approved.
10–2.300	Control of Emissions from the Manufacturing of Paints, Varnishes, Lacquers, Enamels and Other Allied Surface Coating Products.	11/20/91	3/26/03, 68 FR 14539	
10–2.310	Control of Emissions from the Application of Automotive Underbody Deadeners.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–2.320	Control of Emissions from Production of Pesticides and Herbicides.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–2.330	Control of Gasoline Reid Vapor Pressure.	7/30/13	9/4/14, 79 FR 52564	
10–2.340	Control of Emissions from Lithographic Printing Facilities.	9/30/03	10/30/03, 68 FR 61758	
10–2.360	Control of Emissions from Bakery Ovens.	11/30/95	7/20/98, 63 FR 38755	
10–2.385	Control of Heavy Duty Diesel Vehicle Idling Emissions.	7/30/12	3/18/14, 79 FR 15017	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–2.390	Kansas City Area Transportation Conformity Requirements.	7/27/07	10/18/07, 72 FR 59014	
Chapter 3—Air Pollution Control Regulations for the Outstate Missouri Area				
10–3.030	Open Burning Restrictions.	7/31/98	4/1/99, 64 FR 15688	The state has rescinded this rule.
10–3.040	Incinerators	2/1/78	3/18/80, 45 FR 17145	
Chapter 4—Air Quality Standards and Air Pollution Control Regulations for Springfield-Greene County Area				
10–4.080	Incinerators	12/16/69	3/18/80, 45 FR 17145	The state has rescinded this rule.
10–4.090	Open Burning Restrictions.	4/2/84	8/31/84, 49 FR 34484	
Chapter 5—Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area				
10–5.040	Use of Fuel in Hand-Fired Equipment Prohibited.	9/18/70	3/18/80, 45 FR 17145	
10–5.060	Refuse Not To Be Burned in Fuel Burning Installations.	9/18/70	3/18/80, 45 FR 17145	The state has rescinded this rule.
10–5.070	Open Burning Restrictions.	1/29/95	2/17/00, 65 FR 8060	
10–5.080	Incinerators	9/18/70	3/18/80, 45 FR 17145	The state has rescinded this rule.
10–5.120	Information on Sales of Fuels to be Provided and Maintained.	9/18/70	3/18/80, 45 FR 17145	
10–5.130	Certain Coals to be Washed.	5/30/12	8/19/14, 79 FR 48998	
10–5.220	Control of Petroleum Liquid Storage, Loading and Transfer.	9/30/07	4/2/08, 73 FR 17893	
10–5.240	Additional Air Quality Control Measures May Be Required When Sources Are Clustered in a Small Land Area.	9/18/70	3/18/80, 45 FR 17145	
10–5.295	Control of Emissions From Aerospace Manufacturing and Rework Facilities.	2/29/00	5/18/00, 65 FR 31489	
10–5.300	Control of Emissions from Solvent Metal Cleaning.	11/30/06	3/9/07, 72 FR 10610	
10–5.310	Liquefied Cutback Asphalt Restricted.	3/1/89	3/5/90, 55 FR 7712	
10–5.330	Control of Emissions from Industrial Surface Coating Operations.	8/30/11	1/23/12, 77 FR 3144	
10–5.340	Control of Emissions From Rotogravure and Flexographic Printing Facilities.	8/30/11	1/23/12, 77 FR 3144	The state rule has Section (6)(A)(B), which the EPA has not approved.
10–5.350	Control of Emissions From Manufacture of Synthesized Pharmaceutical Products.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–5.360	Control of Emissions from Polyethylene Bag Sealing Operations.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–5.370	Control of Emissions from the Application of Deadeners and Adhesives.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–5.385	Control of Heavy Duty Diesel Vehicle Idling Emissions.	7/30/2012	3/18/14, 79 FR 15017	
10–5.390	Control of Emissions from Manufacture of Paints, Varnishes, Lacquers, Enamels and Other Allied Surface Coating Products.	8/30/00	8/14/01, 66 FR 42605	
10–5.410	Control of Emissions From Manufacture of Polystyrene Resin.	11/20/91	4/3/95, 60 FR 16806 (correction). 8/24/94, 59 FR 43480	
10–5.420	Control of Equipment Leaks from Synthetic Organic Chemical and Polymer Manufacturing Plants.	3/11/89	3/5/90, 55 FR 7712	
10–5.440	Control of Emissions from Bakery Ovens.	12/30/96	2/17/00, 65 FR 8060	
10–5.442	Control of Emissions from Offset Lithographic Printing Operations.	8/30/11	1/23/12, 77 FR 3144	
10–5.450	Control of VOC Emissions from Traffic Coatings.	5/28/95	2/17/00, 65 FR 8060	
10–5.451	Control of Emissions from Aluminum Foil Rolling.	9/30/00	7/20/01, 66 FR 37906	
10–5.455	Control of Emissions from Solvent Cleaning Operations.	8/30/11	1/6/14, 79 FR 580	
10–5.480	St. Louis Area Transportation Conformity Requirements.	2/28/11	8/29/13, 78 FR 53247	
10–5.490	Municipal Solid Waste Landfills.	5/30/12	4/15/14, 79 FR 21137	
10–5.500	Control of Emissions From Volatile Organic Liquid Storage.	2/29/00	5/18/00, 65 FR 31489	
10–5.510	Control of Emissions of Nitrogen Oxides.	5/30/06	11/6/06, 71 FR 64888	
10–5.520	Control of Volatile Organic Compound Emissions From Existing Major Sources.	2/29/00	5/18/00, 65 FR 31489	
10–5.530	Control of Volatile Organic Compound Emissions From Wood Furniture Manufacturing Operations.	2/29/00	5/18/00, 65 FR 31489	
10–5.540	Control of Emissions From Batch Process Operations.	2/29/00	5/18/00, 65 FR 31489	
10–5.550	Control of Volatile Organic Compound Emissions From Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry.	2/29/00	5/18/00, 65 FR 31489	
10–5.570	Control of Sulfur Emissions From Stationary Boilers.	9/30/09	1/25/13, 78 FR 5303	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
10–6.010	Ambient Air Quality Standards.	5/30/10	9/20/12, 77 FR 58309	
10–6.020	Definitions and Common Reference Tables.	2/28/13	4/2/13, 79 FR 14613	
10–6.030	Sampling Methods for Air Pollution Sources.	2/28/06	12/5/06, 71 FR 70468	
10–6.040	Reference Methods	5/30/10	9/20/12, 77 FR 58309	
10–6.050	Start-up, Shutdown, and Malfunction Conditions.	7/30/10	3/5/14, 79 FR 12394	—Provisions of the 2010 $PM_{2.5}$ PSD—Increments, SILs and SMCs rule (75 FR 64865, October 20, 2010) relating to SILs and SMCs that were affected by the January 22, 2013 U.S. Court of Appeals decision are not SIP approved. —Provisions of the 2002 NSR reform rule relating to the Clean Unit Exemption, Pollution Control Projects, and exemption from record-keeping provisions for certain sources using the actual-to-projected-actual emissions projections test are not SIP approved. —In addition, we have not approved Missouri's rule incorporating EPA's 2007 revision of the definition of ''chemical processing plants'' (the ''Ethanol Rule,'' 72 FR 24060 (May 1, 2007) or EPA's 2008 ''fugitive emissions rule,'' 73 FR 77882 (December 19, 2008). —Although exemptions previously listed in 10 CSR 10–6.060 have been transferred to 10 CSR 10–6.061, the Federally-approved SIP continues to include the following exemption, ''Livestock and livestock handling systems from which the only potential contaminant is odorous gas.''
10–6.060	Construction Permits Required.	9/30/12	6/21/13, 78 FR 37451	—Section 9, pertaining to hazardous air pollutants, is not SIP approved.
10–6.061	Construction Permits Exemptions.	7/30/06	12/4/06, 71 FR 70315	Section (3)(A)2.D. is not included in the SIP.
10–6.062	Construction Permits By Rule.	5/30/07	9/26/07, 72 FR 54562	Section (3)(B)4. is not included in the SIP.
10–6.065	Operating Permits	9/30/05	2/21/07, 72 FR 7829	Section (4) Basic State Operating Permits, has not been approved as part of the SIP.
10–6.110	Submission of Emission Data, Emission Fees, and Process Information.	9/30/10	12/14/11, 76 FR 77701	Section (3)(A), Emissions Fees, has not been approved as part of the SIP.
10–6.120	Restriction of Emissions of Lead from Specific Lead Smelter-Refinery Installations.	3/30/05	6/12/06, 71 FR 33622	
10–6.130	Controlling Emissions During Episodes of High Air Pollution Potential.	5/30/10	9/20/12, 77 FR 58309	
10–6.140	Restriction of Emissions Credit for Reduced Pollutant Concentrations from the Use of Dispersion Techniques.	5/1/86	3/31/89, 54 FR 13184	
10–6.150	Circumvention	8/15/90	4/17/91, 56 FR 15500	
10–6.170	Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin.	8/30/98	3/31/00, 65 FR 17164	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–6.180	Measurement of Emissions of Air Contaminants.	11/19/90	7/23/91, 56 FR 33714	
10–6.210	Confidential Information	1/27/95	2/29/96, 61 FR 7714	
10–6.220	Restriction of Emission of Visible Air Contaminants.	9/30/08	12/9/09, 74 FR 68689	Subsection (1)(I) referring to the open burning rule, 10 CSR 10–6.045, is not SIP approved.
10–6.260	Restriction of Emission of Sulfur Compounds.	9/30/12	11/22/13, 78 FR 69995	Section (3)(A)(1–4) approved pursuant to 111d only.
10–6.280	Compliance Monitoring Usage.	3/30/02	8/27/02, 67 FR 54961	
10–6.300	Conformity of General Federal Actions to State Implementation Plans.	8/30/11	9/18/13, 78 FR 57267	
10–6.330	Restriction of Emissions from Batch-type Charcoal Kilns.	6/30/98	12/8/98, 63 FR 67591	
10–6.350	Emissions Limitations and Emissions Trading of Oxides of Nitrogen.	5/30/07	4/2/08, 73 FR 17890	
10–6.360	Control of NO_X Emissions From Electric Generating Units and Non-Electric Generating Boilers.	5/30/07	4/2/08, 73 FR 17890	
10–6.362	Clean Air Interstate Rule Annual NO_X Trading Program.	5/18/07	12/14/07, 72 FR 71073	
10–6.364	Clean Air Interstate Rule Seasonal NO_X Trading Program.	5/18/07	12/14/07, 72 FR 71073	
10–6.366	Clean Air Interstate Rule SO_2 Trading Program.	5/18/07	12/14/07, 72 FR 71073	
10–6.380	Control of NO_X Emissions From Portland Cement Kilns.	10/30/05	8/15/06, 71 FR 46860	
10–6.390	Control of NO_X Emissions From Large Stationary Internal Combustion Engines.	10/30/10	7/18/14, 79 FR 41908	
10–6.400	Restriction of Emission of Particulate Matter From Industrial Processes.	2/28/11	2/20/13, 78 FR 11758	
10–6.405	Restriction of Particulate Matter Emissions From Fuel Burning Equipment Used for Indirect Heating.	10/30/11	9/13/12, 77 FR 56555	
10–6.410	Emissions Banking and Trading.	9/30/12	11/22/13, 78 FR 69995	
	Missouri Department of Public Safety Division 50—State Highway Patrol Chapter 2—Motor Vehicle Inspection			
50–2.010	Definitions	4/11/82	8/12/85, 50 FR 32411	
50–2.020	Minimum Inspection Station Requirements.	10/11/82	8/12/85, 50 FR 32411	
50–2.030	Inspection Station Classification.	12/11/77	8/12/85, 50 FR 32411	
50–2.040	Private Inspection Stations.	5/31/74	8/12/85, 50 FR 32411	
50–2.050	Inspection Station Permits.	11/11/79	8/12/85, 50 FR 32411	
50–2.060	Display of Permits, Signs and Poster.	11/31/74	8/12/85, 50 FR 32411	
50–2.070	Hours of Operation	11/11/83	8/12/85, 50 FR 32411	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
50–2.080	Licensing of Inspector/Mechanics.	4/13/78	8/12/85, 50 FR 32411	
50–2.090	Inspection Station Operational Requirements.	8/11/78	8/12/85, 50 FR 32411	
50–2.100	Requisition of Inspection Stickers and Decals.	6/12/80	8/12/85, 50 FR 32411	
50–2.110	Issuance of Inspection Stickers and Decals.	12/11/77	8/12/85, 50 FR 32411	
50–2.120	MVI–2 Form	11/11/83	8/12/85, 50 FR 32411	
50–2.130	Violations of Laws or Rules Penalty.	5/31/74	8/12/85, 50 FR 32411	
50–2.260	Exhaust System	5/31/74	8/12/85, 50 FR 32411	
50–2.280	Air Pollution Control Devices.	12/11/80	8/12/85, 50 FR 32411	
50–2.290	Fuel Tank	5/3/74	8/12/85, 50 FR 32411	
50–2.350	Applicability of Motor Vehicle Emission Inspection.	5/1/84	8/12/85, 50 FR 32411	
50–2.360	Emission Fee	11/1/83	8/12/85, 50 FR 32411	
50–2.370	Inspection Station Licensing.	12/21/90	10/13/92, 57 FR 46778	
50–2.380	Inspector/Mechanic Licensing.	11/1/83	8/12/85, 50 FR 32411	
50–2.390	Safety/Emission Stickers.	11/1/83	8/12/85, 50 FR 32411	
50–2.401	General Specifications	12/21/90	10/13/92, 57 FR 46778	
50–2.402	MAS Software Functions.	12/21/90	10/13/92, 57 FR 46778	The SIP does not include Section (6), Safety Inspection.
50–2.403	Missouri Analyzer System (MAS) Display and Program Requirements.	12/21/90	10/13/92, 57 FR 46778	The SIP does not include Section (3)(B)4, Safety Inspection Sequences or (3)(M)5(II), Safety Inspection Summary.
50–2.404	Test Record Specifications.	12/21/90	10/13/92, 57 FR 46778	The SIP does not include Section (5), Safety Inspection Results.
50–2.405	Vehicle Inspection Certificate, Vehicle Inspection Report, and Printer Function Specifications.	12/21/90	10/13/92, 57 FR 46778	
50–2.406	Technical Specifications for the MAS.	12/21/90	10/13/92, 57 FR 46778	
50–2.407	Documentation, Logistics and Warranty Requirements.	12/21/90	10/13/92, 57 FR 46778	
50–2.410	Vehicles Failing Reinspection.	12/21/90	10/13/92, 57 FR 46778	
50–2.420	Procedures for Conducting Only Emission Tests.	12/21/90	10/13/92, 57 FR 46778	
Kansas City Chapter 8—Air Quality				
8–2	Definitions	12/10/98	12/22/99, 64 FR 71663	
8–4	Open burning	10/31/96	4/22/98, 65 FR 19823	
8–5	Emission of particulate matter.	12/10/98	12/22/99, 64 FR 71663	Only subsections 8–5(c)(1)b, 8–5(c)(1)c, 8–5(c)(2)a, 8–5(c)(3)a, 8–5(c)(3)b, 8–5(c)(3)c, 8–5(c)(3)d are approved in the SIP.
Springfield Chapter 6—Air Pollution Control Standards				
Article I	Definitions	12/04/08	10/21/10, 75 FR 64953	Only Section 6–2 is approved by EPA.
Article II	Administrative and Enforcement.	12/04/08	10/21/10, 75 FR 64953	Only Sections 6–151, 155, 156, and 171 are approved by EPA.
Article V	Incinerators	12/04/08	10/21/10, 75 FR 64953	Only Sections 6–311 through 314 are approved by EPA.

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
St. Louis City Ordinance 68657				
Section 6	Definitions	8/28/03	12/9/03, 68 FR 68521	The phrase other than liquids or gases in the Refuse definition has not been approved.
Section 15	Open Burning Restrictions.	8/28/03	12/9/03, 68 FR 68521	

(d) *EPA-approved state source-specific permits and orders.*

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS

Name of source	Order/Permit number	State effective date	EPA Approval date	Explanation
(1) ASARCO Inc. Lead Smelter, Glover, MO.	Order	8/13/80	4/27/81, 46 FR 23412	
(2) St. Joe Lead (Doe Run) Company Lead Smelter, Herculaneum, MO.	Order	3/21/84	6/11/84, 49 FR 24022	
(3) AMAX Lead (Doe Run) Company Lead Smelter, Boss, MO.	Order	9/27/84	1/7/85, 50 FR 768	
(4) Gusdorf Operating Permit 11440 Lackland Road, St. Louis County, MO.	Permit Nos: 04682–04693	* 4/29/80	10/15/84, 49 FR 40164	
(5) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	3/9/90	3/6/92, 57 FR 8076	
(6) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	8/17/90	3/6/92, 57 FR 8076	
(7) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	7/2/93	5/5/95, 60 FR 22274	
(8) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order (Modification).	4/28/94	5/5/95, 60 FR 22274	
(9) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order (Modification).	11/23/94	5/5/95, 60 FR 22274	
(10) Doe Run Buick Lead Smelter, Boss, MO.	Consent Order	7/2/93	8/4/95, 60 FR 39851	
(11) Doe Run Buick Lead Smelter, Iron County, MO.	Consent Order (Modification).	9/29/94	8/4/95, 60 FR 39851	
(12) ASARCO Glover Lead Smelter, Glover, MO.	Consent Decree CV596–98CC with exhibits A–G.	7/30/96	3/5/97, 62 FR 9970	
(13) Eagle-Picher Technologies, Joplin, MO.	Consent Agreement	08/26/99	4/24/00, 65 FR 21649	
(14) Doe Run Resource Recycling Facility near Buick, MO.	Consent Order	5/11/00	10/18/00, 65 FR 62295	
(15) St. Louis University	Medical Waste Incinerator	9/22/92	4/22/98, 63 FR 19823	
(16) St. Louis University	Permit Matter No. 00–01–004.	1/31/00	10/26/00, 65 FR 64156	
(17) St. Joseph Light & Power SO_2.	Consent Decree	5/21/01	11/15/01, 66 FR 57389	
(18) Asarco, Glover, MO	Modification of Consent Decree, CV596–98CC.	7/31/00	4/16/02, 67 FR 18497	
(19) Doe Run, Herculaneum, MO.	Consent Judgment, CV301–0052C–J1, with Work Practice Manual and S.O.P. for Control of Lead Emissions (Rev 2000).	1/5/01	4/16/02, 67 FR 18497	
(20) Springfield City Utilities James River Power Station SO_2.	Consent Agreement	12/6/01	3/25/02, 67 FR 13570	
(21) St. Louis University	Permit Matter No. 00–01–004.	8/28/03	12/9/03, 68 FR 68521	
(22) Doe Run Lead Smelter, Glover, MO.	Settlement Agreement	10/31/03	10/29/04, 69 FR 63072	

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS—Continued

Name of source	Order/Permit number	State effective date	EPA Approval date	Explanation
(23) Grossman Iron and Steel Company.	Permit No. SR00.045A	7/19/06	12/4/06, 71 FR 70312	
(24) Doe Run Herculaneum, MO.	Consent Judgment Modification, CV301–0052CCJ1.	12/20/05	5/4/07, 72 FR 25203	
(25) Doe Run Herculaneum, MO.	Consent Judgment Modification, 07JE–CC00552.	5/21/07 7/29/09 modification.	2/17/12, 77 FR 9529	This approval does not include any subsequent modifications after 2009.
(26) Holcim		4/19/2009	6/26/2012 77 FR 38007	§ 52.1339(c); Limited Approval.
(27) Doe Run Herculaneum, MO.	Consent Judgment Modification 07JE–CC00552.	10/19/11	10/20/14 and 79 FR 62574	Modification to section 2.B.1. of the 2007 Consent Judgment.
(28) Doe Run Herculaneum, MO.	Consent Judgment 13JE–CC00557.	6/19/13	10/20/14 and 79 FR 62574	

* St Louis County.

(e) *EPA approved nonregulatory provisions and quasi-regulatory measures.*

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(1) Kansas City and Outstate Air Quality Control Regions Plan.	Kansas City and Outstate.	1/24/72	5/31/72, 37 FR 10875	
(2) Implementation Plan for the Missouri portion of the St. Louis Interstate Air Quality Control Region.	St. Louis	1/24/72	5/31/72, 37 FR 10875	
(3) Effects of adopting Appendix B to NO_2 emissions.	St. Louis	3/27/72	5/31/72, 37 FR 10875	
(4) CO air quality data base	St. Louis	5/2/72	5/31/72, 37 FR 10875	
(5) Budget and manpower projections.	Statewide	2/28/72	10/28/72, 37 FR 23089	
(6) Emergency episode manual	Kansas City	5/11/72	10/28/72, 37 FR 23089	
(7) Amendments to Air Conservation Law.	Statewide	7/12/72	10/28/72, 37 FR 23089	
(8) Air monitoring plan	Outstate	7/12/72	10/28/72, 37 FR 23089	
(9) Amendments to Air Conservation Law.	Statewide	8/8/72	10/28/72, 37 FR 23089	
(10) Transportation control strategy.	Kansas City	5/11/73 5/21/73	6/22/73, 38 FR 16550	
(11) Analysis of ambient air quality data and recommendation to not designate the area as an air quality maintenance area.	Kansas City	4/11/74	3/2/76, 41 FR 8956	[FRL 484–4].
(12) Recommendation to designate air quality maintenance areas.	St. Louis, Columbia, Springfield.	5/6/74	9/9/75, 40 FR 41942	[FRL 418–5].
(13) Plan to attain the NAAQS	Kansas City, St. Louis.	7/2/79	4/9/80, 45 FR 24140	[FRL 1456–1]. Correction notice published 7/11/80.
(14) Schedule for I/M program and commitment regarding difficult transportation control measures (TCMs).	St. Louis	9/9/80	3/16/81, 46 FR 16895	[A–7–FRL–1778–3].
(15) Lead SIP	Statewide	9/2/80, 2/11/81, 2/13/81.	4/27/81, 46 FR 23412, 7/19/84, 49 FR 29218	[A7 FRL 1802–8], [MO 1515; OAR–FRL–2633–8]. Correction notice published 5/15/81.
(16) Report on recommended I/M program.	St. Louis	12/16/80	8/27/81, 46 FR 43139	[A7–FRL 1909–8].

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(17) Report outlining commitments to TCMs, analysis of TCMs, and results of CO dispersion modeling.	St. Louis	2/12/81, 4/28/81	11/10/81, 46 FR 55518	[A7–FRL 1958–3].
(18) 1982 CO and ozone SIP	St. Louis	12/23/82, 8/24/83	10/15/84, 49 FR 40164	[EPA Action MO 999; A–7–FRL–2691–8].
(19) Air quality monitoring plan	Statewide	6/6/84	9/27/84, 49 FR 38103	[EPA Action MO 1586; A–7–FRL–2682–5].
(20) Vehicle I/M program	St. Louis	8/27/84	8/12/85, 50 FR 32411	[MO–1619; A–7–FRL–2880–9].
(21) Visibility protection plan	Hercules Glades and Mingo Wildlife Area..	5/3/85	2/10/86, 51 FR 4916	[A–7–FRL–2967–5; MO 1809].
(22) Plan for attaining the ozone standard by December 31, 1987.	St. Louis	8/1/85	9/3/86, 51 FR 31328	[A–7–FRL–3073–3].
(23) PM_{10} plan	Statewide	3/29/88, 6/15/88	7/31/89, 54 FR 31524	[FRL–3621–8].
(24) Construction permit fees including Chapter 643 RSMo.	Statewide	1/24/89, 9/27/89	1/9/90, 55 FR 735	[FRL–3703–4].
(25) PSD NOx requirements including a letter from the state pertaining to the rules and analysis.	Statewide	7/9/90	3/5/91, 56 FR 9172	[FRL–3908–6].
(26) Lead plan	Herculaneum	9/6/90, 5/8/91	3/6/92, 57 FR 8076	[MO6–1–5333; FRL–4102–7].
(27) Ozone maintenance plan	Kansas City	10/9/91	6/23/92, 57 FR 27939	[Moll-1–5440; FRL–4140–7].
(28) Small business assistance plan.	Statewide	3/10/93	10/26/93, 58 FR 57563	[MO–14–5860; FRL–4700–8].
(29) Part D Lead plan	Herculaneum	7/2/93, 6/30/94, 11/23/94.	5/5/95, 60 FR 22274	[MO–17–1–6023A; FRL–5197–7].
(30) Intermediate permitting program including three letters pertaining to authority to limit potential to emit hazardous air pollutants.	Statewide	3/31/94, 11/7/94, 10/3/94, 2/10/95.	9/25/95, 60 FR 49340	[MO–21–1–6443(a); FRL–5289–6].
(31) Part D lead plan	Bixby	7/2/93, 6/30/94	8/4/95, 60 FR 39851	[MO–18–1–6024A; FRL–5263–9].
(32) Transportation conformity plans including a policy agreement and a letter committing to implement the state rule consistent with the Federal transportation conformity rule.	St. Louis, Kansas City.	2/14/95	2/29/96, 61 FR 7711	[MO–29–1–7151a; FRL–5425–2].
(33) Emissions inventory update including a motor vehicle emissions budget.	Kansas City	4/12/95	4/25/96, 61 FR 18251	[KS–6–1–6985, MO–31–1–7153; FRL 5448–9].
(34) Part D Lead Plan	Glover	8/14/96	3/5/97, 62 FR 9970	[MO–015–1015a; FRL–5682–5].
(35) CO Maintenance Plan	St. Louis	6/13/97, 6/15/98	1/26/99, 64 FR 3855	[MO 043–1043(a); FRL–6220–1].
(36) 1990 Base Year Inventory	St. Louis	1/20/95	2/17/00, 65 FR 8060	[MO 092–1092; FRL–6528–7].
(37) 15% Rate-of-Progress Plan	St. Louis	11/12/99	5/18/00, 65 FR 31485	[MO 103–1103; FRL–6701–3].
(38) Implementation plan for the Missouri inspection maintenance program.	St. Louis	11/12/99	5/18/00, 65 FR 31480	[MO 096–1096b; FRL–6701–6].
(39) Doe Run Resource Recycling Facility near Buick, MO.	Dent Township in Iron County.	5/17/00	10/18/00, 65 FR 62295	[MO 114–1114a; FRL–6885–6].
(40) Commitments with respect to implementation of rule 10 CSR 10–6.350, Emissions Limitations and Emissions Trading of Oxides of Nitrogen.	Statewide	8/8/00	12/28/00, 65 FR 82285	[Region 7 Tracking No. 113–1113a; FRL–6923–2].
(41) Contingency Plan including letter of April 5, 2001.	St. Louis	10/6/97, 4/5/01	6/26/01, 66 FR 33996	[Tracking No. MO–0132–1132, IL 196–3; FRL–7001–7].
(42) Ozone 1-Hour Standard Attainment Demonstration Plan for November 2004 including 2004 On-Road Motor Vehicle Emissions Budgets.	St. Louis	11/10/99, 11/2/00, 2/28/01, 3/7/01.	6/26/01, 66 FR 33996	[MO–0132–1132, IL 196–3;FRL–7001–7].

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(43) Doe Run Resources Corporation Primary lead Smelter, 2000 Revision of Lead SIP.	Herculaneum, MO	1/9/01	4/16/02, 67 FR 18497	[MO 151–1151; FRL–7170–6].
(44) Doe Run Resources Corporation Primary Lead Smelter, 2000 Revision of Lead SIP.	Glover, MO	6/15/01	4/16/02, 67 FR 18497	[MO 151–1151; FRL–7170–6].
(45) Maintenance Plan for the Missouri Portion of the St. Louis Ozone Nonattainment Area including 2014 On-Road Motor Vehicle Emission Budgets.	St. Louis	12/6/02	5/12/03, 68 FR 25414	[MO 181–1181; FRL–7494–6].
(46) Maintenance Plan for the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area for the second ten-year period.	Kansas City	12/17/02	1/13/04, 69 FR 1921	[MO 201–1201; FRL–7608–8].
(47) Vehicle I/M Program	St. Louis	10/1/03	5/13/04, 69 FR 26503	[R07–OAR–2004–MO–0001; FRL–7661–4].
(48) Revised Maintenance Plan of Doe Run Resource Recycling Facility near Buick, MO.	Dent Township in Iron County.	4/29/03	8/24/04, 69 FR 51953	[R07–OAR–2004–MO–0002; FRL–7805–1].
(49) Lead Maintenance Plan	Iron County (part) within boundaries of Liberty and Arcadia Townships.	1/26/04	10/29/04, 69 FR 63072	[R07–OAR–2004–MO–0003; FRL–7831–1].
(50) Revision to Maintenance Plan for the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area for the second ten-year period.	Kansas City	10/28/05	6/26/06, 71 FR 36210	[EPA–R07–OAR–2006–0286; FRL–8188–6].
(51) CAA 110(a)(2)(D)(i) SIP—Interstate Transport.	Statewide	2/27/07	5/8/07, 72 FR 25085	[EPA–R07–OAR–2007–0249 FRL–8310–5].
(52) Submittal of the 2002 Base Year Inventory for the Missouri Portion of the St. Louis 8-hour ozone nonattainment area and Emissions Statement SIP.	St. Louis	6/15/06	5/31/07, 72 FR 30272	[EPA–R07–OAR–2007–0383; FRL–8318–8].
(53) Maintenance Plan for the 8-hour ozone standard in the Missouri portion of the Kansas City area.	Kansas City	5/23/07	8/9/07, 72 FR 44778	[EPA–R07–OAR–2007–0619 FRL–8450–7].
(54) Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.	Statewide	2/27/07	7/11/11, 76 FR 40619	[EPA–R07–OAR–2011–0309 FRL–9429–1] This action addresses the following CAA elements, as applicable: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
(55) VOC RACT Requirements for the 8-hour ozone NAAQS.	St. Louis	1/17/07, 6/1/11, 8/30/11.	1/23/12, 77 FR 3144. 1/6/14, 79 FR 580	[EPA–R07–OAR–2011–0859 FRL–9621–1] [EPA–R07–OAR–2012–0767; FRL–9905–03–Region 7].
(56) CAA Section 110(a)(2) SIP–1978 Pb NAAQS.	City of Herculaneum, MO.	7/29/09	2/17/12, 77 FR 9529	[EPA–R07–OAR–2008–0538; FRL–9632–7].
(57) Regional Haze Plan for the first implementation period.	Statewide	8/5/09, supplemented 1/30/12.	6/26/12, 77 FR 38007	[EPA–R07–OAR–2012–0153; FRL–9688–1] §52.1339(c); Limited Approval.
(58) Section 110(a)(2) Infrastructure Requirements for the 1997 $PM_{2.5}$ NAAQS.	Statewide	2/27/07	6/21/13; 78 FR 37457	[EPA–R07–OAR–2013–0208; FRL–9825–7] This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II) prongs 3 and 4, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
(59) Section 110(a)(2) Infrastructure Requirements for the 2006 $PM_{2.5}$ NAAQS.	Statewide	12/28/09	6/21/13; 78 FR 37457	[EPA–R07–OAR–2013–0208; FRL–9825–7] This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II) prongs 3 and 4, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M)

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(60) Section 128 Declaration: Missouri Air Conservation Commission Representation and Conflicts of Interest Provisions; Missouri Revised Statutes (RSMo) RSMo 105.450, RSMo 105.452, RSMo 105.454, RSMo 105.462, RSMo 105.463, RSMo 105.466, RSMo 105.472, and RSMo 643.040.2.	Statewide	8/08/12	6/21/13; 78 FR 37457	[EPA–R07–OAR–2013–0208; FRL–9825–7].
(61) Section 110(a)(2) Infrastructure Requirements for the 2008 Pb NAAQS.	Statewide	12/20/11	8/19/14, 79 FR 48994	[EPA–R07–OAR–2014–0290; FRL–9915–28-Region 7] This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M).
(62) Implementation Plan for the 2008 Lead NAAQS.	City of Herculaneum, MO.	4/18/13	10/20/14, 79 FR 62574	[EPA–R07–OAR–2014–0448; FRL–9918–18-Region-7]

[FR Doc. 2015–19092 Filed 8–5–15; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2014–0441; FRL–9930–99]

Fluazifop-P-Butyl; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends a tolerance for residues of fluazifop-P-butyl in or on sweet potato, roots. Syngenta Crop Protection requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective August 6, 2015. Objections and requests for hearings must be received on or before October 5, 2015, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0441, 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; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2014–0441 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before October 5, 2015. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2014–0441, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or

other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 5, 2014 (79 FR 53009) (FRL–9914–98), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 4F8262) by Syngenta Crop Protection, P.O. Box 18300, Greensboro, NC 27419–8300. The petition requested that 40 CFR 180.411 be amended by amending the established tolerance for residues of the herbicide fluazifop-P-butyl in or on sweet potato, roots from 0.05 parts per million (ppm) to 1.5 ppm. That document referenced a summary of the petition prepared by Syngenta, the registrant, which is available in the docket, *http://www.regulations.gov.* No FFDCA-related comments were received on the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for fluazifop-P-butyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with fluazifop-P-butyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Fluazifop-P-butyl is the R enantiomer of fluazifop-butyl [(*R,S*)-2-(4-((5-(trifluoromethyl)-2-pyridinyl)oxy)phenoxy)propanoic acid, butyl ester]. The toxicology database for fluazifop-P-butyl consists of studies conducted using fluazifop-butyl (racemic mixture) and its enriched R-isomer, fluazifop-P-butyl. Comparison studies have shown similar toxicities from both compounds. Metabolism studies have been conducted in the rat with fluazifop-butyl, and absorption, excretion, and confirmatory metabolism studies in the dog with fluazifop-butyl, and hamster with fluazifop-P-butyl. Comparative metabolism studies in the rat show that both fluazifop-P-butyl and fluazifop-butyl mixed isomers are rapidly hydrolyzed to fluazifop acid and the [S] enantiomer is rapidly converted to the [R] enantiomer in the blood, yielding similar toxicities. *In vivo,* the S-isomer quickly converts to the R-isomer.

Oral dog and female rat studies show similar results, while male rats show greater toxicity. Fluazifop-butyl is rapidly absorbed through the gut after oral dosing and the ester linkage is hydrolyzed to produce the fluazifop acid in the blood. No parent fluazifop-ester was detected in plasma at any time. Male rats show similar fluazifop acid excretion to the female, but excretion is slower, because fluazifop is excreted in the bile and results in a higher percentage in the feces.

The liver and kidney are its target organs expressed for the most part as liver toxicity in the presence of peroxisome proliferation and exacerbation of age-related kidney toxicity. These data are reasonably consistent among the rat with fluazifop-butyl and fluazifop-P-butyl, dog with fluazifop-butyl, and hamster with fluazifop-P-butyl. Fluazifop-P-butyl shows similar toxicity by both the inhalation and oral routes.

Although the liver and kidney were the organs most consistently affected, other findings were used as endpoints for selection of the points of departure. A rat developmental study exhibiting diaphragmatic hernia effects was used as the basis to select the acute dietary endpoint for females 13–49 years of age. The short-term incidental oral and children's dermal endpoints were selected based upon a maternal body weight gain decrement exhibited in the developmental toxicity studies performed on rats. The chronic dietary (all populations), intermediate-term dermal and inhalation, as well as the intermediate-term incidental oral endpoints, were selected from the 2-generation reproduction study in rats. This study was significant in exhibiting decreased testes and epididymal weights in males, along with decreased uterine and pituitary weights in females. In regard to the short-term dermal for adults and inhalation endpoints used in this assessment, the developmental toxicity studies performed on rats were used as the basis for endpoint selection. These studies were notable in exhibiting decreased fetal weights, as well as hydroureter and delayed ossification effects. An additional endpoint was chosen that was specific for short-term dermal exposure to children, as a developmental effect is generally protective of pregnant women and fetuses. In this case, the maternal toxicity (body weight gain decrement) was chosen to be protective of children.

Indications of possible neurotoxicity were observed in the acute neurotoxicity study, including clinical signs indicative of toxicity (reduced activity, decreased rearing, hunched posture and/or piloerection), decreased body temperature, and decreased motor activity (total distance and number of rearings). No signs of neurotoxicity were observed in the subchronic neurotoxicity test at doses up to 70 mg/kg/day in males and 328 mg/kg/day in females. There was no observed immunotoxicity resulting from fluazifop-P-butyl exposure in the submitted study. There was no carcinogenicity observed in acceptable studies in the rat with fluazifop-butyl or in the hamster for fluazifop-P-butyl. The hamster was selected for cancer study, because liver peroxisome proliferation more closely resembled what was found for human liver cells. There was no mutagenicity observed for fluazifop-butyl or fluazifop-P-butyl.

In a dermal absorption and pharmacokinetic study in humans, most of the applied dose appeared to be in the stratum corneum and easily removed (the unrecovered test material was speculated to be in the outer layers of the skin). Peak plasma levels were shown to occur 24 to 31 hours after application in these men. The one half-life for excretion was about 18 hours. Specific information on the studies received and the nature of the adverse effects caused by fluazifop-P-butyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''*Fluazifop-P-Butyl. Human-Health Risk Assessment for Sweet Potato Label Amendment and Resulting Tolerance Increase.''* at pages 28–36 in docket ID number EPA–HQ–OPP–2014–0441.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for fluazifop-P-butyl used for human risk assessment is shown in Table 1 of this unit.

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–49 years of age).	NOAEL = 50 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.50 mg/kg/day.	MRIDs: 00088857, 92067047, 00088858, 92067048, Rat developmental. Developmental LOAEL = 200 mg/kg/day based on diaphragmatic hernia.
Acute dietary (General population including infants and children).	.....	.....	An appropriate endpoint for the general population attributable to a single dose was not identified in the available studies.
Chronic dietary (All populations)	NOAEL = 0.74 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = cPAD = 0.0074 mg/kg/day.	MRIDs: 00088859, 92067050, Rat reproduction study; reproductive LOAEL = 5.8 mg/kg/day based on decreased testes and epididymal weights.
Incidental oral short-term (1 to 30 days).	NOAEL = 100 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	MRIDs: 46082913, 46158401, Rat developmental study; maternal LOAEL = 300 mg/kg/day based on maternal body weight gain decrement during GD 7–16.
Dermal short-term (1 to 30 days: Children).	NOAEL = 100 mg/kg/day. DAF= 9% (low exposure) or 2% (high exposure). UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	MRIDs: 46082913, 46158401, Rat developmental study; maternal. LOAEL = 300 mg/kg/day based on maternal body weight gain decrement during GD 7–16.
Dermal short-term (1 to 30 days: Adults).	NOAEL = 2.0 mg/kg/day. DAF = 9% (low exposure) or 2% (high exposure). UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	MRIDs: 46082903, 46082013, Rat developmental study; Developmental LOAEL = 5.0 mg/kg/day based on fetal weight decrement, hydroureter, and delayed ossification.
Inhalation short-term (1 to 30 days).	Inhalation (or oral) study NOAEL = 2.0 mg/kg/day (inhalation absorption rate = 100%). UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	MRIDs: 46082903, 46082013, Rat developmental study; Developmental LOAEL = 5.0 mg/kg/day based on fetal weight decrement, hydroureter, and delayed ossification.

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Cancer (Oral, dermal, inhalation).	Not likely to be carcinogenic to humans.		

Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. UF_S = use of a short-term study for long-term risk assessment. UF_{DB} = to account for the absence of key data (*i.e.,* lack of a critical study). FQPA SF = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable. DAF = dermal absorption factor.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fluazifop-P-butyl, EPA considered exposure under the petitioned-for tolerance as well as all existing fluazifop-P-butyl tolerances in 40 CFR 180.411. EPA assessed dietary exposures from fluazifop-P-butyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for fluazifop-P-butyl. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Survey/What We Eat in America (NHANES/WWEIA) database. The acute dietary analysis was conducted using 100% crop treated assumptions and tolerance-level residues, adjusted as appropriate using factors from the metabolism studies, to account for residues of concern not measured by the analytical method.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used the food consumption data from the USDA 2003–2008 NHANES/WWEIA database. As to residue levels in food, the chronic dietary analysis was conducted assuming mean residue levels from crop field trials with a ratio adjustment for additional metabolites of concern, average percent crop treated estimates, and experimentally-determined processing factors.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that fluazifop-P-butyl does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows: For the acute dietary analysis, 100 PCT was assumed for all crops. The following average percent crop treated estimates were used in the chronic dietary risk assessments for the following crops that are currently registered for fluazifop-P-butyl: Apricots, 2.5%; asparagus, 2.5%; carrots, 15%; cherries, 1%; cotton, 1%; dry beans/peas. 1%; garlic, 10%; grapefruit, 15%; grapes, 2.5%; nectarines, 1%; onions, 10%; oranges, 2.5%; peaches, 2.5%; peanuts, 1%; pecans, 1%; peppers, 2.5%; plums, 2.5%; potatoes, 1%; prunes, 2.5%; soybeans, 2.5%; and sugar beets, 1%; 100 PCT was assumed for sweet potatoes and all other registered crops not listed above.

To determine PCT values, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for each chemical/crop combination from the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account

through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which fluazifop-P-butyl may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for fluazifop-P-butyl in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of fluazifop-P-butyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Estimated drinking water concentrations (EDWCs) in ground water were modeled using Tier I SCIGROW (version 2.3) and surface water EDWCs were modeled using Tier II PRZM (Pesticide Root Zone Model) and EXAMS (Exposure Analysis Modeling System). Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the acute dietary risk assessment, the surface water concentration value of 33.4 ppb was used to assess the contribution from drinking water. For the chronic dietary risk assessment, the surface water concentration value of 6.6 ppb was used to assess the contribution from drinking water.

3. From non-dietary exposure. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Fluazifop-P-butyl is currently registered for the following uses that could result in residential exposures: Non-agricultural outdoor buildings, building foundations, curbs, driveways, fencerows, non-agricultural areas (wildlife refuge), non-crop areas, ornamentals (lawns, flowering shrubs, flowering plants, gardens, ground covers, plants, trees, turf, and woody shrubs), patios, pathways, rights-of-way, sidewalks, and storage yards. EPA assessed residential exposure using the following assumptions. For handlers, there is a potential for short-term inhalation and dermal exposure. Residential handler exposure scenarios include handwand, hose and sprayer, backpack, sprinkler can, and RTU hose end sprayer.

There is also the potential for short-term post-application exposure for dermal exposure to all groups: Adult and child (1 to <2 years) turf-high contact; adult and youth (11–16 years) mowing; adult, child (6 to <11 years) and youth (11–16 years) golfing; adult and child (6 to <11 years) garden. Two separate dermal absorption values were used: 9% is used for assessing dermal exposures while golfing or mowing a lawn, since these are representative of low exposure activities (*i.e.,* the Agency assumes that 9% of dermal exposures will be absorbed), whereas 2% is used for assessing dermal exposures from high-contact lawn activities, since these are representative of high-exposure activities (*i.e.,* the Agency assumes that 2% of dermal exposures will be absorbed). In addition, there is potential for short-term post-application incidental oral exposure for children (1 to <2 years). Chemical-specific dislodgeable foliar residue (DFR) data are available and were used for the residential post application exposure assessment for gardens. Since Turf Transferable Residue (TTR) data are not available for fluazifop-P-butyl, default TTR values were used for the residential post application exposure assessment for turf. Given the conservatisms associated with default TTR values and the potential compounding nature of conservatisms in the turf assessment, EPA is able to rely upon the calculated exposure estimates with confidence that exposure is not being underestimated. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' EPA has not found fluazifop-P-butyl to share a common mechanism of toxicity with any other substances, and fluazifop-P-butyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that fluazifop-P-butyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* No increased offspring sensitivity over parent was seen in the rabbit pre-natal developmental studies or the rat post-natal reproduction study, and no evidence of neurotoxicity was observed. Several rat developmental toxicity studies conducted on both fluazifop-butyl and fluazifop-P-butyl indicate fetal effects (ranging from delayed ossification, fetal weight decrements, increased incidence of small fetuses, cervical arches and centrum in fetuses and litters at levels from 5 to 20 mg/kg/day to diaphragmatic hernia at 200 mg/kg/day) in the absence of maternal toxicity.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for assessing potential prenatal and postnatal toxicity of fluazifop-P-butyl to infants and children is complete.

ii. As there is limited indication of developmental neurotoxicity resulting from exposure to fluazifop-P-butyl with the current data sets, there is no need for a developmental neurotoxicity study. There were no developmental or central nervous system malformations seen in any of the developmental toxicity studies with rats or rabbits and

no evidence of neurotoxicity or neuropathology in adult animals in the available studies. The toxicological significance of the marginal increases in brain weights at high doses is unknown in the absence of corroborative histopathological lesions. EPA therefore concludes that there is not a concern for developmental neurotoxicity resulting from exposure to fluazifop-butyl or fluazifop-P-butyl.

iii. While there was quantitative evidence of increased susceptibility in the fetuses of rats exposed *in utero* to fluazifop-butyl and fluazifop-P-butyl, EPA concludes that there is no residual uncertainty for prenatal or postnatal toxicity that would warrant an additional 10X safety factor. The available studies clearly identify well-defined NOAELs and LOAELs that are consistent across the five developmental rat toxicity studies. In addition, the Agency has selected, based on these studies, a developmental endpoint of concern (diaphragmatic hernia) for assessing acute dietary risk. As this endpoint is relevant to single exposures, the acute risk assessment based on this endpoint will be protective of any fetal effects resulting from a single exposure. Further, the Agency has selected, based these studies, a developmental endpoint of concern (delayed ossifications) for repeat exposure scenarios, which will be protective of any developmental effects in those scenarios.

iv. There are no residual uncertainties identified in the exposure databases. There is an adequate toxicity database for fluazifop-P-butyl and exposure data are complete. The dietary and residential assessments are based on reliable data and will not underestimate exposure/risk. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to fluazifop-P-butyl in drinking water. EPA used similarly conservative assumptions to assess post application exposure of children as well as incidental oral exposure of toddlers. Although EPA has required additional data on transferable residues from treated turf for fluazifop-P-butyl, EPA is confident that it has not underestimated turf exposure due to the conservativeness of the default turf transfer value and conservative assumptions in the short-term turf assessment procedures (*e.g.,* assuming residues do not degrade over the thirty day assessment period and assuming high-end activities on turf for every day of the assessment period). The additional data on transferable turf residues have been required in case refinement of exposure assessments is needed in the future and to further EPA's general understanding of the availability of turf transferable pesticide residues. These assessments will not underestimate the exposure and risks posed by fluazifop-P-butyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to fluazifop will occupy 14% of the aPAD for females 13–49 years old, the only relevant population subgroup for the acute dietary endpoint.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fluazifop-P-butyl from food and water will utilize 64% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of fluazifop-P-butyl is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Fluazifop-P-butyl is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to Fluazifop-P-butyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 210 for adults and 3100 for children. Because EPA's level of concern for fluazifop-P-butyl is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, fluazifop-P-butyl is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for fluazifop-P-butyl.

5. *Aggregate cancer risk for U.S. population.* Fluazifop-P-butyl has been classified as ''Not likely to be carcinogenic to humans''; therefore, EPA concludes that fluazifop-P-butyl will not pose a cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to fluazifop-P-butyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (High Performance Liquid Chromatography/Ultra-Violet Spectrometry (HPLC/UV)) is available to enforce the tolerance expression. The method is available in Pesticide Analytical Methods (PAM), Volume II: Method I for animal tissues and milk and Method II for crops. The stated detection limits are 0.02–0.05 ppm for crops, 0.01 ppm for milk, and 0.02 ppm for animal tissues. Improved enforcement methods based on liquid chromatography and tandem mass spectroscopy, LC/MS/MS, are available as Method GRM044.01A and Method GRM044.02A. Both of these methods have been validated at 0.01 ppm on a wide variety of crop matrices.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for fluazifop-P-butyl.

V. Conclusion

Therefore, the tolerance is amended for residues of fluazifop-P-butyl in or on sweet potato, roots from 0.05 ppm to 1.5 ppm.

VI. Statutory and Executive Order Reviews

This action amends a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 23, 2015.

Susan Lewis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.411, revise the commodity ''Sweet potato, roots'' in the table in paragraph (a) to read as follows:

§ 180.411 Fluazifop-P-butyl; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Sweet potato, roots	1.5

* * * * *

[FR Doc. 2015–18825 Filed 8–5–15; 8:45 am]

BILLING CODE 6560–50–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

40 CFR Part 1600

Organization and Functions of the Chemical Safety and Hazard Investigation Board

AGENCY: Chemical Safety and Hazard Investigation Board.

ACTION: Final rule.

SUMMARY: This rule amends the quorum and voting regulations of the Chemical Safety and Hazard Investigation Board (CSB). The amendments add a requirement for the Chairperson to place notation votes that have been calendared for discussion at a Board Meeting to the agenda of a public meeting within 90 days of the calendared notation vote. The rule also adds a requirement for the Chairperson to conduct a minimum of four public meetings per year in Washington, DC.

DATES: Effective August 6, 2015.

SUPPLEMENTARY INFORMATION: This final rule will promote increased transparency and accountability for Board activities. It aligns with the Open Government principles of transparency, participation, and collaboration, as outlined in the Memorandum on Transparency and Open Government (74 FFR 4685, Jan. 26, 2009).

The Board conducts most votes through a process of notation voting. In notation voting, Board Members may vote to approve, disapprove, or calendar a notation item for discussion at a public meeting. In recent years, notation items have been calendared but then not placed on the agenda for discussion at a public meeting of the Board. The addition of language to 40 CFR 1600.5(b) will ensure that calendaring is used in the way it was intended. It will require the consideration of calendared notation votes at a public meeting within 90 days of the calendaring action. Prior to the adoption of this amendment to the rule, calendaring

could amount to a veto by a single Member even when other Members wished to vote on the item. This added language will prevent that action and preserve only the original intent of calendaring. 40 CFR 1600.5(b) of this rule was amended to state that a ''notation vote to schedule a public meeting may not be calendared.'' This change is intended to require a straight vote when one or more members may be reluctant to schedule a public meeting. The result is intended to provide an opportunity for important substantive business of the Board to be discussed publicly.

New paragraph (c) adds provisions to ensure that the Board meets at least quarterly to review important CSB mission work and reaffirms the authority of all Board Members to add items for discussion to the agendas of such CSB public meetings. This provision reinforces the policy of the Board (in Board Order 1, Section 9.b.2) that permits members to request public meeting agenda additions or changes. The amended rule also requires that the Board's quarterly meetings consider, at a minimum, calendared notation votes, important mission-related activities, and quarterly agency action plan progress. This portion of the rule is also intended to increase the transparency of Board actions, to promote the Board's accountability to the public, and to ensure regular, relevant feedback is received from the public related to the agency's mission work.

Although not required for this action, the Board published the proposed amendments in the **Federal Register** and provided thirty days for public comment.

The CSB received two written comments during the written comment period and several oral public comments at a meeting on June 18, 2015. The written comments have been posted to the CSB Web site at *http://www.csb.gov/about-the-csb/public-comments/,* and the oral comments concerning the rule are in the transcript of the discussion which took place on June 18, 2015.

One written comment and each of the oral comments were favorable. The written comment from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), supported the rule because it will increase the transparency of the Board's actions and facilitate stakeholder involvement and CSB accountability. The USW fully supports the decision to hold regular quarterly business meetings, but noted that a method for participation by phone for those not in the Washington area is important. The comment also supported the rule's new requirements that calendared notation items be discussed in public within 90 days and that all Board Members may add items to public meeting agendas.

The USW also noted that Board Members should not cancel any investigation without sufficient notification to stakeholders. Earlier this year, the CSB voted to terminate three investigations at a meeting on January 28, 2015, even though the **Federal Register** notice (80 FR 2392 (Jan. 16, 2015)) did not provide specific notice that the Board might take such an action. The Board received criticism for providing inadequate notice. New section (ii) of this rule provides in pertinent part that each quarterly meeting shall include as an agenda item a ''review by the Board of the schedule for completion of all open investigations, studies, and other important work of the Board.'' If the Board were considering the cancellation of a particular investigation, such a discussion should occur at a quarterly meeting under this general agenda item. Without specifically stating such a possibility, interested members of the public might not be aware that the Board could vote to cancel a specific investigation at a quarterly public meeting.

An oral public comment from the American Chemistry Council was supportive of the amended rule.

The CSB also received a negative comment from Public Employees for Environmental Responsibility (PEER). PEER commented that the thirty day comment period was insufficient. However, as noted above, this rule could have been published as a final rule without any public comment period, and the Board also scheduled a public meeting to discuss the proposed changes and to provide an additional opportunity for public input.

PEER also noted that the rule could force the Board to hold a public meeting every single workday to accommodate this requirement to consider calendared notation items within ninety days. The Board does not share this concern. Because the Board will hold quarterly and other public meetings, the Board would rarely need to convene a special meeting solely to consider a calendared notation item.

PEER expressed concern that the Washington, DC, location for business meetings was not convenient to all stakeholders. With respect to this concern, the CSB has provided and plans to continue to provide an opportunity for teleconference or webcast participation in the four meetings in Washington, DC. The CSB will also continue to conduct public meetings, as appropriate, throughout the United States.

PEER recommended undertaking a cost benefit analysis of the rule before finalizing it due to a concern that the proposed rule could negatively impact public meetings held in communities in which an accident has occurred. PEER noted that the CSB appears to lack the personnel and resources to hold both Washington, DC and community-based meetings effectively. The Board shares this important concern. However, the Board has determined that this concern is a basis for caution, not a reason to delay adoption of the rule.

The Board contemplates that the cost of regular business meetings in Washington, DC, will be minimal as such meetings will be conducted at CSB headquarters, limited in scope, and should not involve excessive staff time to prepare and to conduct. The Board will evaluate per meeting costs over the next year to ensure that these costs are reasonable in relation to the anticipated benefits, and consider the need to seek additional resources to ensure that the new rule does not negatively impact community based public meetings.

Having considered these comments, the Board has determined that the rule should be finalized without additional changes at this time. The Board plans to review the rule a year from its adoption to ensure the revisions have succeeded in accomplishing the primary objectives of improving transparency and accountability to stakeholders.

Statutory Authority: 5 U.S.C. 301, 552(a)(1); 42 U.S.C. 7412(r)(6)(N).

Regulatory Impact

Administrative Procedure Act: 5 U.S.C. 553(b)(3)(A), provides that when regulations involve matters of agency organization, procedure, or practice, the agency may publish regulations in final form without notice and comment. Because this rule is intended to promote public participation and transparency for Board activities, however, the Board provided thirty days for public comment and an opportunity for public comments on June 18, 2015, when Board Members met in Washington, DC (80 FR 32339 (June 8, 2015)).

Small Business Regulatory Enforcement Fairness Act: This regulation is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. Because this regulation involves internal agency procedures and quarterly business meetings, this regulation: a. Does not have an annual

effect on the economy of $100 million or more. b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. c. Does not have a significant adverse effect on competition, employment, investment, productivity, innovation or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Regulatory Flexibility Act: The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a rule that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on such small entities. This analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The CSB has considered the impact of this rule under the Regulatory Flexibility Act, and certifies that a final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act: The CSB reviewed this rule to determine whether it involves issues that would subject it to the Paperwork Reduction Act (PRA). The CSB has determined that that the rule does not require a ''collection of information'' under the PRA.

Unfunded Mandates Reform Act of 1995: The rule does not require the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531. This rule does not include a federal mandate that may result in the annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of more than the annual threshold established by the Act ($128 million in 2006, adjusted annually for inflation).

List of Subjects in 40 CFR Part 1600

Administrative practice and procedure.

Dated: July 22, 2015.

Rick Engler,

Board Member.

Accordingly, for the reasons set forth in the preamble, the Chemical Safety and Hazard Investigation Board amends 40 CFR part 1600 as follows:

PART 1600—ORGANIZATION AND FUNCTIONS OF THE CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

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

Authority: 5 U.S.C. 301, 552(a)(1); 42 U.S.C. 7412(r)(6)(N).

■ 2. Amend § 1600.5 by revising paragraph (b) and adding a new paragraph (c) to read as follows:

§ 1600.5 Quorum and voting requirements.

* * * * *

(b) *Voting.* The Board votes on items of business in meetings conducted pursuant to the Government in the Sunshine Act. Alternatively, whenever a Member of the Board is of the opinion that joint deliberation among the members of the Board upon any matter at a meeting is unnecessary in light of the nature of the matter, impracticable, or would impede the orderly disposition of agency business, such matter may be disposed of by employing notation voting procedures. A written notation of the vote of each participating Board member shall be recorded by the General Counsel who shall retain it in the records of the Board. If a Board member votes to calendar a notation item, the Board must consider the calendared notation item at a public meeting of the Board within 90 days of the date on which the item is calendared. A notation vote to schedule a public meeting may not be calendared. The Chairperson shall add any calendared notation item to the agenda for the next CSB public meeting if one is to occur within 90 days or to schedule a special meeting to consider any calendared notation item no later than 90 days from the calendar action.

(c) *Public Meetings and Agendas.* The Chairperson, or in the absence of a chairperson, a member designated by the Board, shall schedule a minimum of four public meetings per year in Washington, DC, to take place during the months of October, January, April, and July.

(1) *Agenda.* The Chairperson, or in the absence of a chairperson, a member designated by the Board, shall be responsible for preparation of a final meeting agenda. The final agenda may not differ in substance from the items published in the Sunshine Act notice for that meeting. Any member may submit agenda items related to CSB business for consideration at any public meeting, and the Chairperson shall include such items on the agenda. At a minimum, each quarterly meeting shall include the following agenda items:

(i) Consideration and vote on any notation items calendared since the date of the last public meeting;

(ii) A review by the Board of the schedule for completion of all open investigations, studies, and other important work of the Board; and

(iii) A review and discussion by the Board of the progress in meeting the CSB's Annual Action Plan.

(2) *Publication of agenda information.* The Chairperson shall be responsible for posting information related to any agenda item that is appropriate for public release on the CSB Web site no less than two days prior to a public meeting.

[FR Doc. 2015–18318 Filed 8–5–15; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[GN Docket No. 12–268; FCC 15–69]

Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this *Second Order on Reconsideration,* the Commission addresses petitions for reconsideration of our Order adopting rules to implement the broadcast television spectrum incentive auction. Based on the rules we adopted in the *Incentive Auction R&O,* we are now developing the detailed procedures necessary to govern the auction process. As we have stated before, our intention is to begin accepting applications to participate in the incentive auction in the fall of 2015, and to start the bidding process in early 2016. We issue this *Order* now in order to provide certainty for prospective bidders and other interested parties in advance of the incentive auction. We largely affirm our decisions in the Incentive Auction R&O, although we make certain clarifications and modifications in response to issues raised by the petitioners.

DATES: Effective September 8, 2015, except for the amendment to § 73.3700(c)(6) which contains new or modified information collection requirements that have not been approved by Office of Management and Budget (OMB). The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Aspasia Paroutsas, (202) 418–7285, or by email at *Aspasia.Paroutsas@fcc.gov,* Office of Engineering and Technology.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Order on Reconsideration* in GN Docket No. 12–268, FCC 15–69, adopted on June 17, 2015 and released on June 19, 2015. The full text may also be downloaded at: *www.fcc.gov.* People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Synopsis of Second Order on Reconsideration

1. Market Variation

1. We deny ATBA's and the Affiliates Associations' petitions for reconsideration of the decision to accommodate market variation as necessary in the 600 MHz Band Plan. First, Affiliates Associations argue that we ''should consider focusing resources on recovering sufficient spectrum in the most constrained markets to allow a truly national plan, even if that means accepting a lower spectrum clearing target.'' We disagree. Because the amount of UHF spectrum recovered through the reverse auction and the repacking process depends on the extent of broadcaster participation and other factors in each market, we must have the flexibility to accommodate market variation. We agree with CTIA that market variation is essential to avoiding the ''lowest common denominator'' effect of establishing nationwide spectrum offerings based only on what is available in the most constrained market despite the availability of more spectrum in the vast majority of the country. Allowing for market variation also will enable us to ensure that broadcasters have ample opportunity to participate in the reverse auction in markets where interest is high.

2. Second, we disagree with ATBA's claim that accommodating market variation will result in reclaiming and repurposing more spectrum than for which there is demand. The purpose of accommodating market variation is to prevent constrained markets from decreasing the amount of repurposed spectrum that will be available in most areas nationwide, not to increase the amount that is repurposed in areas that lack broadcaster participation and/or demand from wireless carriers. Further, the Middle Class Tax Relief and Job Creation Act of 2012 (''Spectrum Act'') ensures a voluntary, market-based auction by requiring the forward auction to raise enough proceeds to satisfy the minimum proceeds requirements—in particular, the winning bids of reverse auction participants—before licenses can be reassigned or reallocated. In other words, the Commission cannot repurpose any spectrum through the incentive auction process unless there is sufficient demand for the spectrum from wireless carriers participating in the forward auction. While ATBA expresses concern about displacement of LPTV stations in rural and underserved areas where they claim demand for wireless spectrum will be minimal, there are critical advantages to having a generally consistent band plan, including limiting the amount of potential interference between broadcast and wireless services and helping wireless carriers achieve economies of scale when deploying their new networks. Accordingly, the Commission must recover spectrum in rural areas as well as urban ones. As we noted in the *Incentive Auction R&O,* however, ''[i]n no case will we offer *more* spectrum in an area than the amount we decide to offer in most markets nationwide.''

3. As we explained in the *Incentive Auction R&O,* 79 FR 48442, August 15, 2014, we fully recognize the advantages of a generally consistent band plan. Nevertheless, the flexibility to accommodate a limited amount of market variation is absolutely necessary to address the challenges associated with the 600 MHz Band Plan. In affirming this threshold decision, we make no determination on the issues related to market variation, including how much market variation to accommodate, on which we sought comment in the *Incentive Auction Comment PN.* We will resolve those issues in the forthcoming *Incentive Auction Procedures PN.* Accordingly, we decline to address the Affiliates Associations' request for clarification regarding issues related to market variation. Likewise, NAB's arguments that market variation will unnecessarily complicate the auction are untimely because we have not yet adopted the final auction procedures. We likewise decline to address the timing and status of auction and repacking software, as these matters will be addressed in the Incentive Auction Procedures PN.

2. Guard Bands

4. We deny ATBA's and Free Access' petitions to reconsider the size of the guard bands. We also deny Free Access' petition to reconsider incorporating remainder spectrum into the 600 MHz guard bands. First, we agree with Google/Microsoft and WISPA that the guard bands adopted in the *Incentive Auction R&O* are permitted under the Spectrum Act. As Google/Microsoft and WISPA point out, ATBA and Free Access apply an incorrect standard for determining guard band size. In the *Incentive Auction R&O,* we specifically rejected suggestions that the ''technically reasonable'' standard in the statute requires us to restrict guard bands to ''the minimum size necessary'' to prevent harmful interference. The Spectrum Act clearly permits the Commission to establish ''technically reasonable'' guard bands in the 600 MHz Band. Petitioners provide no basis to revisit our interpretation of the ''technically reasonable'' standard set forth in the *Incentive Auction R&O.*

5. Second, ATBA claims that the record does not support adopting guard bands larger than three megahertz. This claim is without merit. Most commenters supported guard bands within the size range we adopted, with some commenters recommending much larger guard bands. Furthermore, the guard bands are tailored to the technical properties of the 600 MHz Band under each spectrum recovery scenario, as well as to the unique goals of the incentive auction. Our technical analysis, provided in the Technical Appendix of the *Incentive Auction R&O,* corroborated our conclusion that the guard bands adopted are technically reasonable to prevent harmful interference.

6. Third, ATBA claims that the Commission is improperly using the auction as a ''means to reallocate spectrum'' from licensed services to unlicensed services. We disagree. As discussed above, the Spectrum Act allows us to establish ''technically reasonable'' guard bands to protect against harmful interference. We considered a number of factors in creating the guard bands, including the technical properties of the 600 MHz Band, the need to accommodate different spectrum recovery scenarios (because we will not know in advance of the auction how much spectrum will be repurposed), the need to generate sufficient forward auction proceeds, and the problems that would be associated with auctioning ''remainder spectrum.'' Therefore, we reject the argument that we are sizing the guard bands solely to facilitate unlicensed use. The fact that the Spectrum Act allows us to make guard bands available for unlicensed use does not mean that we are reallocating spectrum from licensed services to unlicensed use.

7. Additionally, we deny Free Access' petition to reconsider incorporating remainder spectrum into the 600 MHz guard bands. In the *Incentive Auction R&O,* we determined that adding remainder spectrum to the guard bands would enhance interference protection for licensed services and avoid unduly complicating the bidding procedures. Further, incorporating the remainder spectrum creates guard bands that, under every band plan scenario, are no larger than ''technically reasonable.'' Because the guard bands we establish by incorporating the remainder spectrum will be no larger than ''technically reasonable,'' we have complied with the requirements of the Spectrum Act.

3. Band Plan Technical Considerations

8. We dismiss, and on alternative and independent grounds, we deny Artemis' petition for reconsideration. We agree with Mobile Future that Artemis should have raised its arguments previously, and that not doing so is grounds for dismissing its petition. While Artemis asserts it could not have made its claims before because it was still in the process of testing when the *Incentive Auction R&O* was issued, Artemis concedes that it has been developing its technology for over a decade. It has not shown why it was unable to raise these facts and arguments before adoption of the *Incentive Auction R&O.* Furthermore, during the course of the proceeding, the Wireless Bureau released a *Band Plan PN,* which provided sufficient detail about the band plans under consideration (including both FDD and TDD options) to allow Artemis to comment on those that could potentially impact its technology. In addition to the original comment cycle, we released a number of supplemental public notices on key issues, and received additional ex parte filings until the Sunshine Notice took effect and the *Incentive Auction R&O* was adopted. Even if, as Artemis claims, it was still testing its technology when the *Incentive Auction R&O* was issued, it has not adequately explained why it could not have raised its claims regarding the need for minimum spectrum efficiency requirements or about the alleged advantages of TDD earlier. Accordingly, we find that grant of the Artemis petition is not warranted under section 1.429(b)(1) because it does not ''relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission.'' Artemis also appears to justify its petition on the grounds that it ''could not anticipate the final technical details of the 600 MHz plan until the *Incentive Auction R&O* was published,'' or that ''no one could have known that TDD was so highly efficient for high-order multiplexing,'' or that it is ''new knowledge'' that pCell and high-order spatial multiplexing are more efficient with TDD or can achieve LTE-compatible high spectrum efficiency gains. Although it has not explicitly asserted that reconsideration is warranted under section 1.429(b)(2) of our rules, Artemis would not succeed on this claim. Artemis has not demonstrated that the facts underlying its petition could not reasonably have been known prior to our adoption of the *Incentive Auction R&O,* particularly given that we specifically sought comment on a possible TDD framework (among other band plans) in both the *Incentive Auction NPRM* and in a *Band Plan PN.* Furthermore, Artemis has not explained why it lacked the knowledge to file an ex parte with the Commission concerning spectral efficiency after it publicly announced its pCell technology, which was prior to the adoption of the *Incentive Auction R&O.*

9. But even if its petition had been appropriately filed at this juncture, we would deny it on alternative and independent grounds because we also find that Artemis has failed to demonstrate that its petition to modify the 600 MHz band plan to allow TDD warrants reconsideration under the public interest prong of the rule. As Mobile Future points out, we already considered whether to adopt a TDD-based framework for the Band Plan, ''and chose to adopt an FDD-based plan after the proposal received overwhelming support in the record.'' Furthermore, we disagree with Artemis' claim that because we evaluated FDD against TDD ''in light of [then] current technology,'' Artemis' findings on the spectral efficiencies of its technology compel us to reconsider our decision. Artemis has not established that it is in the public interest to reconsider our decision and modify our FDD Band Plan to allow for TDD-based operation on the description of its technology. Artemis' arguments for adopting a TDD framework for the 600 MHz Band are not independent arguments for the adoption of TDD. Rather, Artemis argues that to achieve high spectral efficiency, carriers must use technology like its technology, which works most effectively with TDD networks. In fact, Artemis admits its technology can work in an FDD environment, just not as efficiently. Furthermore, as we noted above, in deciding on a paired uplink and downlink Band Plan supporting an FDD-based framework, we weighed a number of technical factors, including ''current technology, the Band's propagation characteristics, and potential interference issues present in the band,'' as well as considering our central goal of allowing market forces to determine the highest and best use of spectrum, our desire to support a simple auction design, and five key policy goals. Further, we declined to allow a mix of TDD and FDD in the 600 MHz Band because it ''would require additional guard bands and increase the potential for harmful interference both within and outside the Band.'' In arguing that TDD is preferable to FDD, Artemis fails to address the vast majority of the factors we considered in adopting the 600 MHz Band Plan. In short, Artemis has not proven that it is in the public interest to reconsider our 600 MHz Band Plan and grant it the relief it seeks. In its ex parte filing, Artemis raises some additional points to support its arguments. To the extent these are not mere unsupported assertions, we find they are not new arguments, but ones that have already been raised by commenters in the underlying record and already considered in reaching our conclusions in the *Incentive Auction R&O.*

10. In addition, we find Artemis has failed to demonstrate that it would be in the public interest to grant its petition for reconsideration to implement spectrum efficiency standards in the 600 MHz Band. We agree with CTIA that for the 600 MHz Band, spectrum efficiency rules ''are unprecedented, are not required under the Spectrum Act, and are unnecessary.'' The Commission has generally found it unnecessary to implement spectrum efficiency standards for auctioned spectrum bands because the competitive bidding process itself is considered an effective tool for promoting efficient spectrum use. Moreover, consistent with the Spectrum Act's directive, we have adopted ''flexible use'' service rules for the 600 MHz Band. Flexible use allows licensees to pursue any technology most expedient for achieving their operational goals in responding to marketplace pressures and consumer demand. In mobile broadband spectrum bands similar to the 600 MHz Band where the Commission has followed a policy of ''flexible use,'' the Commission has not adopted spectrum efficiency standards. Rather, in cases where the Commission has adopted spectrum efficiency standards, it has done so because those spectrum bands were not subject to competitive bidding and/or the licenses granted were non-exclusive, shared spectrum licenses.

Indeed, as CTIA notes, the 600 MHz technical rules ''are modeled after requirements in other spectrum bands that have allowed spectrum to be put to its highest and best use and promote the public interest . . . [and] have proven highly successful, and there is no basis to depart from this framework in the 600 MHz band.'' We agree. We note that, although we do not find it necessary to mandate these requirements, licensees can voluntarily choose to use Artemis' technology or similar technology to improve their spectral efficiency.

A. Repacking the Broadcast Television Bands

1. Implementing the Statutory Preservation Mandate

a. OET–69 and TVStudy

11. *Use of TVStudy.* In the *Incentive Auction R&O,* the Commission adopted the use of *TVStudy* software and certain modified inputs in applying the methodology described in OET–69 to evaluate the coverage area and population served by television stations in the repacking process. The Affiliates Associations seek reconsideration of those decisions, arguing that the Spectrum Act's reference to the methodology described in OET–69 prohibits the Commission from changing either the implementing software or inputs to the methodology.

12. In addition, the Affiliates Associations, as well as Cohen, Dippell and Everist, P.C. (''CDE''), complain that the use of *TVStudy* produces different results than the old software, and that we failed to address in the *Incentive Auction R&O* potential losses in coverage area. CTIA, in its Opposition, supports the Commission's use of *TVStudy* to determine coverage area and population served of broadcast stations. We decline to consider at this time the Affiliates Associations' and CDE's requests. The arguments the Affiliates Associations and CDE raise are the subject of a recent decision by the United States Court of Appeals for the DC Circuit. We will take appropriate action regarding these arguments in a subsequent Order.

13. *Vertical Antenna Pattern.* When the OET–69 methodology was developed, the regulatory framework for the digital transition of LPTV stations, including Class A stations, had not yet been established. The Commission subsequently amended its rules to allow for use of OET–69 to evaluate Class A stations. In so doing, the Commission determined that the assumed vertical antenna patterns for full power stations in Table 8 of OET–69 were not appropriate for Class A stations because they could underestimate service and interference potential. The Commission adopted an assumption that the downward relative field strengths for digital Class A stations are double the values specified in Table 8 up to a maximum of 1.0. Thus, when processing digital Class A station applications, the Commission doubles the Table 8 values for purposes of predicting interference. In addition, the Commission's rules do not call for the use of any vertical pattern when predicting digital Class A coverage area. This distinction between full power and Class A stations is not reflected in the *TVStudy* software, which uses the same vertical antenna patterns for Class A and full power stations.

14. Expanding Opportunities for Broadcasters Coalition (''EOBC'') urges the Commission to revise the vertical antenna pattern inputs for Class A stations in *TVStudy* to conform to the Commission's rules in order to avoid underestimating the coverage areas of a number of Class A stations. EOBC claims that revising the antenna pattern inputs in *TVStudy* will eliminate population losses that appear in the *TVStudy* results when compared with those of the legacy OET software. For example, EOBC indicates that *TVStudy* shows a 95.7 percent population loss for KSKT–CA which disappears when the correct inputs are used. No other commenters commented on EOBC's request.

15. We agree with EOBC, and revise the vertical antenna pattern inputs for Class A stations in *TVStudy* to reflect the same values we use when evaluating Class A license applications. The Commission previously has determined that those vertical antenna pattern settings better represent the performance characteristics of antennas used by Class A stations and, therefore, we conclude that they will enable more accurate modeling of the service and interference potential of those stations during the repacking process. Therefore, *TVStudy* will use no vertical antenna pattern when calculating Class A stations' protected contours and will double the vertical antenna pattern values included in Table 8 of OET–69 (to a maximum value of 1.0) for calculating interference. We note that our modified approach will reduce or eliminate the differences in results that EOBC observed between *TVStudy* and *tv process,* the Media Bureau's application processing software.

16. *Power Floors. TVStudy* uses minimum effective radiated power (''ERP'') values, or power floors, to replicate a television station's signal contours when conducting pairwise interference analysis in the repacking process. When *TVStudy* is used to conduct this analysis, it uses each station's specific technical parameters and a set of default configuration parameters. Its power floor for full power stations is set to one kilowatt for stations on low-VHF channels, 3.2 kilowatts for stations on high-VHF channels, and 50 kilowatts for stations on UHF channels. Similarly, its power floor for Class A digital TV stations is set to 0.07 kilowatts for stations on VHF channels and 0.75 kilowatts for stations on UHF channels. These power floors, which were established for full power stations during the digital television (''DTV'') transition, originally were intended to ensure that all stations would be able to provide service competitively within their respective markets prior to knowing the precise technical details about how their digital television stations would eventually be constructed. In other words, they were set high to protect stations' ability to ''grow into'' the power level needed to replicate their analog service areas. In comparison, section 73.614 of our rules specifies a power floor of 100 watts for full power stations (our rules do not specify a power floor for Class A stations).

17. EOBC observes that use of these power floors in *TVStudy* produces some anomalous results when replicating particular stations' contours on different channels in the context of the pairwise interference analysis. EOBC provides as an example a full power station licensed to operate on channel 18 with an ERP of 1.62 kW. When *TVStudy* replicates that station's contour on a different channel, it uses a minimum ERP of 50 kW, which makes the station appear more resistant to interference than it actually is. EOBC requests that the Commission either rationalize the use of power floors or eliminate them. No other commenters commented on EOBC's request.

18. We will reduce the power floors in *TVStudy* to address the issue raised by EOBC. Specifically, we will reduce the power floors in *TVStudy* to 100 watts for full power stations and 24 watts for Class A stations. A 100 watt power floor for full power stations accords with our rules. Our rules do not provide for a minimum ERP for Class A stations, but we find that a 24 watt value is reasonable because it represents the lowest ERP of any Class A station currently licensed. We do not anticipate that these lower power floors will reduce our repacking flexibility significantly.

19. The modified power floors we adopt will allow replication of stations'

existing coverage areas on different frequencies without artificially inflating their ERP values. Currently, when it replicates a television station's signal contour on a different channel, *TVStudy* assigns the station a default ERP value if the value necessary for replication is below the power floor. Because the default value exceeds the value actually required to replicate the station's contour, the use of power floors artificially inflates a station's predicted coverage area in such situations. The result is inaccuracy: The station's signal is predicted to be stronger than it actually would be, so *TVStudy* predicts coverage in areas that in fact would not receive service, and does not predict interference from undesired signals in other areas. Pursuant to EOBC's request, we adopt modified power floors to correct such inaccuracies.

20. We decline to adopt EOBC's alternative request to eliminate the use of power floors in *TVStudy.* Power floors remain necessary with regard to stations presently operating with very low power levels. Otherwise, their assigned ERP values on new frequencies, particularly on lower frequencies, might be unreasonably low. For example, due to differences in signal propagation between VHF and UHF channels, the signal of a UHF station operating with a low power level could be replicated on a VHF channel with a power level of less than 10 watts or even a fraction of a watt. We are concerned that the signals of such stations within their service contours, in the event that they were assigned to new channels, might be so weak as to not be adequately receivable by the stations' existing viewers due to noise and other environmental considerations. Furthermore, if such stations are full power stations, their ERP values would not comply with the minimum specified in our rules.

b. Preserving Coverage Area

21. We grant Disney's, Dispatch's, and CDE's requests for reconsideration regarding the preservation of coverage area and affirm that we will make all reasonable efforts to preserve the coverage areas of stations operating pursuant to waivers of HAAT or ERP, provided such facilities are otherwise entitled to protection under the *Incentive Auction R&O.* We agree with Disney, Dispatch, and CDE that there is no basis to deny a station protection for its existing coverage area in the repacking process merely because its licensed facilities were authorized pursuant to a waiver of our technical rules.

c. Preserving Population Served

22. We dismiss Block Stations' Petition for Reconsideration of the approach we adopted. Under Commission rules, if a petition for reconsideration simply repeats arguments that were previously fully considered and rejected in the proceeding, it will not likely warrant reconsideration. We adopted Option 2 in the *Incentive Auction R&O* based on careful consideration of the record, and of the advantages and disadvantages of each of the options proposed. In particular, we concluded that ''Option 2 provides the most protection to television stations' existing populations served consistent with our auction design needs.'' We specifically declined to adopt Option 1 because it would not preserve service to existing viewers as of February 22, 2012, and because it would require analysis of interference relationships on an aggregate basis rather than on a pairwise basis. Block Stations provide no basis to revisit our analysis or reconsider our approach.

2. Facilities To Be Protected

a. Stations Affected by the Destruction of the World Trade Center

23. We grant NBC Telemundo's request that we extend to WNJU the same discretionary repacking protection afforded to other stations affected by the destruction of the World Trade Center. Based on an examination of the record, we find that WNJU is similarly situated to the five other World Trade Center stations for which we already granted discretionary repacking protection. As with the other five stations affected by the destruction of the World Trade Center, we have permitted NBC Telemundo to elect protection by the Pre-Auction Licensing Deadline of either: (1) its licensed Empire State Building facilities or (2) proposed facilities at One World Trade Center. Providing NBC Telemundo with such flexibility will not significantly impact our repacking flexibility.

b. Pending Channel Substitution Rulemaking Petitions

24. We deny the Bonten/Raycom and Media General Petitions. Petitioners claim that Congress intended for the Commission to grant the pending VHF-to-UHF petitions, but as we explained in the *Incentive Auction R&O,* the language in section 1452(g)(1)(B) is permissive. Section 1452(g)(1)(B) allows the Commission to reassign a licensee from VHF to UHF if either of the two statutory conditions in this provision is met, but it does not mandate such reassignment. If Congress intended to remove our discretion and require us to grant the pending VHF-to-UHF petitions, it would have explicitly provided that the Commission ''shall'' reassign a licensee from VHF to UHF ''if'' a request for reassignment was pending on May 31, 2011. Petitioners offer no basis to revisit our interpretation.

25. We disagree with petitioners' claims that the Commission disregarded the public interest benefits that would result from protecting the facilities requested in the pending petitions and overstated the impact on repacking flexibility. As we explained in the *Incentive Auction R&O,* the exercise of discretion to protect facilities beyond those required by the Spectrum Act requires a careful balancing of numerous factors. We applied those factors and found that there were minimal equities in favor of protecting the facilities requested because the petitioners had not acted in reliance on Commission grants, had not made any investment in constructing their requested facilities, and had not begun operating the proposed facilities to provide service to viewers. On the other hand, we explained that protecting the requested facilities would add new stations to the UHF Band and thereby encumber additional UHF spectrum. Petitioners offer no basis to alter this balancing. While they claim that the number of pending petitions is minimal and speculate that this will not ''significant[ly] effect'' repacking, they fail to acknowledge the minimal equities in favor of protecting *proposed* facilities that have not been constructed and are not serving viewers.

26. Petitioners claim further that we should have weighed the benefits to the public of restoring over-the-air service to pre-DTV transition viewers that would purportedly result from their channel substitution requests. Declining to protect petitioners' proposed facilities in the repacking process, however, does not preclude grant of their petitions after conclusion of the repacking process. Despite petitioners' claim, we did not direct the Media Bureau to ''summarily dismiss'' the pending petitions without public comment. Rather, we directed the Media Bureau to dismiss any of these petitions for which issuance of an NPRM would not be appropriate, such as ''if the proposed facility would result in an impermissible loss of existing service'' or ''the petition fails to make a showing as to why a channel change would serve the public interest.'' Dismissal of channel substitution petitions without issuing an NPRM under such circumstances is consistent with past

Bureau practice. For petitions that are not dismissed, we directed the Media Bureau to hold them in abeyance, rather than granting them now but leaving them unprotected in the repacking process. Petitioners do not dispute our conclusion that allowing VHF stations to move their existing service into the UHF Band on an unprotected basis pending the outcome of the repacking process presents a significant potential for viewer disruption if the station's operations in the UHF Band are displaced.

27. We agree with petitioners that we could protect the requested facilities but preclude them from submitting UHF-to-VHF bids in the reverse auction, but this does not change our ultimate conclusion. Imposing such a condition would prevent the stations from demanding a share of incentive auction proceeds in exchange for relinquishing their newly granted rights, but would not mitigate the detrimental impact on our repacking flexibility of granting protection to the requested facilities. The detrimental impact protecting the proposed facilities would have on our repacking flexibility and fulfillment of auction goals outweighs the minimal equities in favor of protection.

28. We also disagree with petitioners that their requests are similarly situated to the two VHF-to-UHF petitions that were filed before the Media Bureau's May 31, 2011 freeze, both of which resulted in an *NPRM* after that date, and were subsequently granted. As explained in the *Incentive Auction R&O,* the granted petitions involved materially different facts. In one case, the station's tower collapsed, a fact that does not apply to the petitioners. In the other case, the change to a UHF channel resulted in a significant population gain, a fact that likewise does not apply to the petitioners. Moreover, the granted petitions explained why expedited consideration was needed, whereas the petitioners failed to provide a timely explanation of such need. In addition, the granted petitions were granted before the Spectrum Act was passed. In contrast, further action on the pending petitions required consideration of a number of new issues raised by the statute, including issues that the Commission was considering in the pending rulemaking proceeding. Bonten/Raycom assert that the same considerations applied both before and after passage of the Spectrum Act because the Commission was aware that Congress was considering incentive auction legislation when the Media Bureau granted the two VHF-to-UHF petitions. At the time the Media Bureau acted on the two petitions, however, it was unknown whether or when Congress would pass legislation providing for an incentive auction, and there was no basis to predict that any future legislation would specifically address the pending VHF-to-UHF petitions.

29. We also reject petitioners' claim that refraining from processing the pending petitions amounts to a retroactive freeze without notice. The May 31, 2011 freeze was issued at the Bureau level, and the Media Bureau's statement that it would ''continue its processing of [channel substitution] rulemaking petitions that are already on file'' is not binding on the Commission. In any event, the Bureau's statement was made before enactment of the Spectrum Act. To the extent the petitioners relied on the Bureau's freeze as entitling them to move into the UHF Band, such reliance was misplaced in light of Congress's subsequent passage of the Spectrum Act, which seeks to repurpose UHF spectrum for new uses and specifically addresses the pending VHF-to-UHF petitions. Indeed, despite the Media Bureau's statements in its May 31, 2011 freeze Public Notice, the Commission in the 2012 *Incentive Auction NPRM* analyzed section 1452(g)(1)(B) and put the pending VHF-to-UHF petitioners on notice that it proposed to refrain from acting on their petitions.

c. Out-of-Core Class A-Eligible LPTV Stations

30. *Background.* The Community Broadcasters Protection Act of 1999 (''CBPA'') provided certain qualifying LPTV stations with ''primary'' Class A status. The CBPA provided for a two-step process for obtaining a Class A license. First, by January 28, 2000, an LPTV licensee seeking Class A status was required to file a certification of eligibility certifying compliance with certain criteria. If the Commission granted the certification, the licensee's station became a ''Class A-eligible LPTV station.'' Second, a Class A-eligible LPTV station was required to file an application for a Class A license. While the CBPA prohibited the Commission from granting Class A status to LPTV stations operating on ''out-of-core'' channels (channels 52–69), it provided such stations with an opportunity to achieve Class A status on an in-core channel (channels 2–51).

31. Although the Commission's rules implementing the CBPA were adopted in 2000, we explained in the *Incentive Auction R&O* that approximately 100 formerly out-of-core Class A-eligible LPTV stations had obtained an in-core channel but had not obtained a Class A license as of February 22, 2012. We determined that such stations are not entitled to mandatory preservation. We explained that the fact that such stations may obtain a Class A license after February 22, 2012 does not alter this conclusion because section 1452(b)(2) of the Spectrum Act mandates preservation of only the full power and Class A facilities that were actually in operation as of February 22, 2012. With one exception—KHTV–CD, Los Angeles, California—we also declined to exercise discretionary protection to preserve the facilities of such stations.

32. Abacus Television (''Abacus'') and The Videohouse, Inc. (''Videohouse''), the licensees of formerly out-of-core Class A-eligible LPTV stations that filed for and received Class A licenses after February 22, 2012, seek reconsideration of our decision not to protect Class A-eligible LPTV stations that did not hold Class A licenses as of February 22, 2012. They argue that they are entitled to preservation under the CBPA. They further claim that they are similarly situated to KHTV–CD, insofar as they have also allegedly taken steps to remove their secondary status in a timely manner, and therefore should be extended discretionary protection. Moreover, they argue that they are similarly situated to other stations the Commission elected to protect in the repacking process. In late-filed pleadings, the LPTV Spectrum Rights Coalition (''LPTV Coalition'') and Abacus dispute the number of formerly out-of-core Class A-eligible LPTV stations that did not hold Class A licenses as of February 22, 2012.

33. *Discussion.* For reasons set forth below, we dismiss and otherwise deny the Abacus and Videohouse petitions. Asiavision, Inc. (''Asiavision'') and Latina Broadcasters of Daytona Beach, LLC (''Latina'') did not file timely Petitions for Reconsideration of the *Incentive Auction R&O.* Rather, in Oppositions, they present arguments similar to those raised in the Abacus and Videohouse Petitions as to why the Commission should have decided in the *Incentive Auction R&O* to protect their stations in the repacking process. We treat these pleadings as late-filed petitions for reconsideration and dismiss them. Asiavision and Latina did not seek a waiver of the deadline for seeking reconsideration. Moreover, to the extent Asiavision and Latina argue that the Commission should treat all similarly situated Class A stations the same if the Abacus and Videohouse Petitions are granted, their arguments are moot in light of our dismissal and denial of the Abacus and Videohouse Petitions. We will nonetheless treat

these pleadings as informal comments. As an initial manner, petitioners offer no basis to revisit our conclusion that section 1452(b)(2) mandates preservation of only full power and Class A facilities that were actually in operation as of February 22, 2012. The only Class A facilities in operation as of February 22, 2012 were those that were licensed as Class A facilities on that date or were the subject of an application for a license to cover a Class A facility. The license to cover application signifies that the Class A-eligible LPTV station had constructed its facility and was operating consistent with the requirements applicable to Class A stations. We note that some Class A-eligible LPTV stations filed prior to February 22, 2012 an application to convert an LPTV construction permit to a Class A construction permit. We refer to this application below as a ''Class A construction permit application.'' We clarify that a Class A-eligible LPTV station with an application for a Class A construction permit on file or granted as of February 22, 2012 is not entitled to mandatory protection. An application for a Class A construction permit seeks protection of facilities authorized in an LPTV construction permit. Grant of a construction permit standing alone, however, does not authorize operation of those facilities. Nonetheless, for the reasons discussed below, we exercise discretion to protect those stations that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012.

34. Petitioners do not dispute that, on February 22, 2012, they were not Class A licensees nor did they have an application for a license to cover a Class A facility on file, and thus are not entitled to mandatory preservation. In declining to exercise discretionary protection for such stations, we explained that there were approximately 100 stations in this category and that protecting them would increase the number of constraints on the repacking process, thereby limiting our repacking flexibility. In late-filed pleadings, the LPTV Coalition and Abacus dispute the number of stations in this category. As an initial matter, we dismiss these filings as late-filed petitions for reconsideration, but will treat them as informal comments. The number of formerly out-of-core Class A-eligible LPTV stations that had not filed an application for a license to cover a Class A facility as of February 22, 2012 was readily available via CDBS station records before the deadline for filing Petitions for Reconsideration. Thus, there were no extraordinary circumstances precluding parties from presenting their arguments in a timely fashion. Accordingly, we deny Abacus's Petition for Leave to File Supplemental Reconsideration and the LPTV Coalition's Petition for Leave to Amend. We affirm the statement in the *Incentive Auction R&O* that there are approximately 100 formerly out-of-core Class A-Eligible LPTV stations that had not filed an application for a license to cover a Class A facility as of February 22, 2012. While the LPTV Coalition asserts that they have not been provided with a list of such stations, the stations falling in this category can be identified using the Consolidated Database System (''CDBS''). Parties have provided no data or analysis undermining our findings on the number of stations in this category.

35. We also reject on alternative and independent grounds petitioners' claims that they are entitled to protection under the CBPA. As an initial matter, petitioners' claims are late. To the extent they believe they were entitled to issuance of a Class A license when they were assigned in-core channels, they should have objected several years ago when the Media Bureau issued their in-core construction permits without also issuing a Class A license. In any event, we reject petitioners' view. While petitioners note that the CBPA required the Commission to issue Class A licenses to out-of-core Class A-eligible LPTV stations ''simultaneously'' upon assignment of their in-core channels, in order to effectuate this requirement, such stations were ''require[d] . . . to file a Class A application simultaneously'' with an application for an in-core construction permit. When petitioners filed for construction permits to move to in-core channels, however, they did not file an application for a Class A license or a Class A construction permit. Rather, it was not until January 2013 when petitioners first filed applications for a Class A authorization (*i.e.,* either a Class A license or Class A permit), after they were assigned to in-core channels and after the enactment of the Spectrum Act. Under petitioners' view, the CBPA required the Commission to issue a Class A license when it assigned petitioners in-core channels, even though they had not yet submitted applications for a Class A authorization (either a license or permit). Yet the CBPA provides that the Commission shall issue a Class A license to an ''applicant for a class A license'' that is assigned a channel within the core, thereby requiring the station to have an application on file. Moreover, petitioners' view runs afoul of the Communications Act and the CBPA, both of which require the filing of an application before the Commission may issue a license.

36. Petitioners also note language from the *Class A R&O* stating that the Commission ''will not impose any time limit on the filing of a Class A application by LPTV licensees operating on channels outside the core.'' This language declines to impose a deadline on the simultaneous filing of applications for an in-core LPTV construction permit and a Class A authorization. It does not endorse the filing of an application for a Class A authorization after filing an application for an in-core construction permit. As noted in the *Incentive Auction R&O,* the Media Bureau did grant the applications of some stations that filed applications for Class A authorizations after applying for or obtaining an in-core construction permit if otherwise consistent with the Commission's rules. As a general matter, however, stations that refrained from applying for a Class A authorization until after applying for or obtaining an in-core construction permit are not eligible for the simultaneous grant of a Class A authorization along with the grant of their in-core LPTV construction permit.

37. While petitioners note that the CBPA requires the Commission to ''preserve the service areas of low-power television licensees pending the final resolution of a class A application,'' this provision applies only ''pending the final resolution of a class A application.'' Petitioners, however, did not have applications for Class A licenses or Class A permits that were ''pending . . . final resolution'' on February 22, 2012, thus this provision of the CBPA does not apply.

38. Petitioners also note language from the *Class A R&O* in which the Commission stated that it would ''commence contour protection for [out-of-core stations] upon issuance of a construction permit for an in-core channel.'' This language clarified that protection of a station's contour would not have to wait until the filing of an application for ''a license to cover construction'' of the in-core channel. To implement this approach, the Media Bureau required an out-of-core Class A eligible LPTV station to file an FCC Form 346 for a construction permit for an in-core LPTV facility and, at the same time, an FCC Form 302–CA for a Class a construction permit. When petitioners filed an FCC Form 346, however, they did not file the FCC Form

302–CA and thus were not entitled to contour protection.

39. Petitioners further claim that they are similarly situated to KHTV–CD, a formerly out-of-core Class A-Eligible LPTV station that filed an application for a license to cover a Class A facility after February 22, 2012 but to which we extended discretionary protection. As an initial matter, we dismiss petitioners' arguments on procedural grounds. The *Incentive Auction NPRM* squarely raised the question of which facilities to protect in the repacking process, proposing to interpret the Spectrum Act as mandating preservation only of full-power and Class A facilities that were licensed, or for which an application for license to cover was on file, as of February 22, 2012. Recognizing that it was not a Class A licensee as of February 22, 2012, KHTV–CD put forth in response to the *Incentive Auction NPRM* evidence demonstrating why it should be afforded discretionary protection. Like KHTV–CD, petitioners were not Class A licensees as of February 22, 2012. Unlike KHTV–CD, however, petitioners did not attempt to demonstrate in response to the *Incentive Auction NPRM* why they should be afforded discretionary protection. Rather, on reconsideration, petitioners for the first time attempt to explain why they also should be extended discretionary protection. They have not shown, however, why they were unable to raise these facts and arguments before adoption of the *Incentive Auction R&O*. Indeed, all of the evidence put forth by petitioners, including the date when they were granted a Class A license, preceded adoption of the *Incentive Auction R&O*. Accordingly, we dismiss petitioners' claims that they are entitled to discretionary protection because they rely on facts and arguments not presented to the Commission before the *Incentive Auction R&O* was adopted and petitioners have not attempted to demonstrate compliance with the exceptions for such filings found in section 1.429(b) of our rules.

40. As an alternative and independent ground, we deny petitioners' claims that they are similarly situated to KHTV–CD. First, as described in the *Incentive Auction R&O*, KHTV–CD filed an application for a license to cover its Class A facility just two days after enactment of the Spectrum Act on February 22, 2012. By contrast, despite receiving in-core construction permits in 2009 (Videohouse) and 2012 (Abacus), petitioners did not file applications for licenses to cover their Class A facilities until January 2013, almost a year after enactment of the Spectrum Act. Second, KHTV–CD documented repeated efforts over the course of a decade to locate an in-core channel and convert to Class A status, including filing in July 2001 an initial application for a license to cover a Class A facility. By contrast, petitioners do not document any efforts to locate an in-core channel before 2009, almost a decade after passage of the CBPA. Third, beginning in 2001, KHTV–CD had either an application for a license to cover a Class A facility or an application for a Class A construction permit on file with the Commission in which it certified that it was meeting, and would continue to meet, all Class A operating requirements and applicable full power requirements. By contrast, petitioners did not make these certifications in an application filed with the Commission until January 2013. Petitioners vaguely assert that their service includes ''locally produced, locally originated programming,'' but, unlike KHTV–CD, they do not state, nor did they certify in an application filed with the Commission before January 2013, that they were meeting and would continue to meet, all Class A operating requirements and applicable full power requirements.

41. We also reject petitioners' claim that they are similarly situated to stations in other categories the Commission elected to protect in the repacking process. As an initial matter, with the exception of new full power stations not licensed as of February 22, 2012, all of the stations in these categories were full-power or Class A licensees as of February 22, 2012 and thus entitled to mandatory preservation, unlike petitioners, who remained LPTV licensees as of February 22, 2012. In the *Incentive Auction R&O*, we exercised discretion to protect certain modifications of these licensed full-power or Class A facilities because the impact on repacking flexibility would be minimal while, on the other hand, there were significant equities in favor of preservation. We explained why the balance was different for formerly out-of-core Class A-eligible LPTV stations that had not filed applications for licenses to cover Class A facilities as of February 22, 2012. Petitioners offer no basis to revisit this balance.

42. Based on examination of the record, we will exercise discretion to protect stations in addition to KHTV–CD that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012. We find that there are significant equities in favor of protection of these stations that outweigh the limited adverse impact on our repacking flexibility. By filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status. Under the Commission's rules, these stations were required to make the same certifications as if they had applied for a license to cover a Class A facility. Among other things, each was required to certify that it ''does, and will continue to, broadcast'' a minimum of 18 hours per day and an average of at least three hours per week of local programming and that it complied with requirements applicable to full-power stations that apply to Class A stations. Thus, prior to the enactment of the Spectrum Act, such stations had certified in an application filed with the Commission that they were operating like Class A stations. In addition, the licensees of these stations may not have known that the stations were not entitled to mandatory protection under the Spectrum Act. By contrast, as noted above, petitioners did not certify continuing compliance with Class A requirements in an application filed with the Commission until after the enactment of the Spectrum Act, and they had no justification for not seeking discretionary protection in response to the *Incentive Auction NPRM*.

43. As requested by the LPTV Coalition, we clarify certain issues pertaining to those Class A stations that will not be protected in the repacking process. First, as explained in the *Incentive Auction R&O,* if such a station is displaced in the repacking process, it may file a displacement application during one of the filing opportunities for alternate channels. The Media Bureau has delegated authority to determine whether such stations should be permitted to file for a new channel along with priority stations or during the second filing opportunity. Second, such Class A stations are not eligible to participate in the reverse auction and thus may not submit channel sharing bids. We have recently proposed, however, to allow Class A stations to channel share outside of the auction context. Third, such stations are not eligible to receive reimbursement for relocation costs. The reimbursement mandate set forth in section 1452(b)(4) applies only to full power and Class A television licensees that are involuntarily ''reassigned'' to new channels in the repacking process pursuant to section 1452(b)(1)(B)(i). The unprotected Class A stations will not be protected in the repacking process, and thus will be not ''reassigned under

[section 1452(b)(1)(B)(i)]'' as required to fall within section 1452(b)(4).

d. LPTV and TV Translator Stations

(i) Repacking Protection

44. We deny ATBA's, Mako's, and USTV's requests. ATBA's request is incompatible with our auction design: granting it would compromise the basic auction design principle of speed, which ''is critical to the successful implementation of the incentive auction.'' In addition, channel assignments will be provisional until the final TV channel assignment plan is established after the final stage rule is satisfied, so the analysis ATBA advocates during the reverse auction bidding process would not be useful in assessing the potential impact on LPTV service.

45. Moreover, we cannot conclude that we must further analyze the potential impact of the incentive auction on the LPTV service before conducting the repacking process. As we explained in the *Incentive Auction R&O,* the Spectrum Act does not require protection of LPTV stations, which always have been subject to displacement by primary services. Although we have limited discretion to extend repacking protection beyond the requirements of the statute, we have done so only with respect to the facilities of ''broadcast television licensees'' as defined in the Spectrum Act, that is, full-power or Class A stations. Based on careful consideration of the factors relevant to our exercise of discretion, we declined to extend repacking protection to LPTV stations. Accordingly, we deny Free Access' claim that, for a given PEA, we cannot repurpose more spectrum than is vacant before the reverse auction or than is relinquished in the reverse auction, until all LPTV and translator stations are relocated. Such an approach would require protection of LPTV stations in the repacking process, which we decline to do for the reasons stated above and in the *Incentive Auction R&O.* Moreover, despite Free Access' claims, we have already rejected the argument that LPTV stations' spectrum usage rights are protected from taking by the Fifth Amendment. Nevertheless, recognizing the important services provided by the LPTV stations, we adopted a number of measures to mitigate the potential impact of the repacking process on LPTV stations, and initiated a separate proceeding to consider additional measures. In short, we have taken into consideration the potential impact of the repacking process on LPTV stations in this proceeding, and are not required to conduct additional analysis. For the same reasons, we reject ATBA's suggestion that we must consider the potential impact of LPTV displacement on the diversity of broadcast voices before carrying out the incentive auction. LPTV and TV translator stations have always been at risk of displacement by primary services, yet Congress provided specifically that the Spectrum Act does not alter that risk.

46. We also disagree with Mako that our decision not to protect LPTV and TV translator stations in the repacking process ''altered'' LPTV and TV translator stations' spectrum usage rights in contravention of section 1452(b)(5). As explained in the *Vacant Channel NPRM*, we interpret section 1452(b)(5) as a rule of statutory construction, not a limit on the Commission's authority. In any event, LPTV and TV translator stations have always operated on a secondary basis with respect to primary licensees, which may be authorized and operated without regard to existing or proposed LPTV and TV translators. Any LPTV displacement as a result of the incentive auction, therefore, does not ''alter the spectrum usage rights of low power television stations.'' Mako counters that this is the first time that the LPTV industry ''will be subject to losing their station licenses.'' However, LPTV stations have always operated in an environment where they could be displaced from their operating channel by a primary user and, if no new channel assignment is available, forced to go silent. The potential impact of the repacking process is no different.

47. We also disagree with Mako that displacement of an LPTV or TV translator station is a ''revocation'' requiring an order to show cause and a hearing. Displacement does not ''revoke'' LPTV or TV translator licenses for purposes of section 312 of the Act because it does not require termination of operations or relinquishment of spectrum usage rights; displacement requires only that LPTV and TV translator stations vacate the channel on which they are operating. Indeed, displacement is not even a license modification, as LPTV and TV translator stations may be displaced by primary services at any time.

48. We also disagree with Mako's argument that the Commission's conclusion that the CBPA does not protect LPTV and TV translator stations vis-à-vis Class A stations during the repacking process cannot be justified based on the CBPA's ''fail[ure] to 'anticipate' a broadcast television incentive auction would be held at some future point.'' This argument is based on a misreading of the *Incentive Auction R&O.* Our statutory interpretation in the *Incentive Auction R&O* was based on the fact section 336(f)(7)(B) ''grants LPTV and TV translator stations protection against changes to facilities *proposed by Class A licenses,*'' whereas channel reassignments in the repacking process will be carried out by the Commission; Class A licensees will neither initiate such reassignments nor have the right to protest the resulting license modifications. Our interpretation of the statutory language was not based on the fact that Congress could not have anticipated the incentive auction and the repacking process when it enacted the CBPA in 1999. Nevertheless, we note that our interpretation harmonizes the two statutes in a way that Mako's fails to do: reading section 336(f)(7)(B) to require the Commission to protect LPTV and TV translator stations vis-à-vis Class A stations would create tension with the statutory preservation mandate of section 1452(b)(2), which directs the Commission to make all reasonable efforts to preserve the coverage area and population served of Class A stations, not LPTV or TV translator stations.

49. Finally, we also disagree with USTV that ''the FCC clearly erred when it failed to protect stations that Congress identified in the Digital Data Services Act (DDSA) for its LPTV data pilot project.'' In the DDSA, Congress created a project to allow 13 LPTV stations to begin operating with digital facilities prior to the adoption of digital rules for the low power television services. USTV maintains that Congress ''clearly expressed its intention that the 13 stations identified in the DDSA should be permitted to operate so that they can introduce digital data services on low-power TV spectrum.'' USTV further argues that ''the Spectrum Act did not repeal the DDSA or give the FCC authority to abrogate or ignore its provisions.'' Contrary to USTV's argument, stations authorized to operate under the terms of the DDSA remain secondary in nature under the Commission's rules, and nothing in the DDSA, the Commission's order implementing the DDSA, the Commission's rules, or the Spectrum Act mandates that DDSA stations be protected in the repacking process. Furthermore, as USTV points out, the pilot program never materialized, and there are no stations that are currently operating under the program to qualify even if we were to decide to extend discretionary protection to them.

(ii) Measures To Assist LPTV and TV Translators

50. We decline to grant ATBA's request that we reconsider our decision not to allow displaced LPTV stations to operate with alternative technical standards and non-broadcast type facilities. Although we are sympathetic to the objectives and concerns cited by ATBA and WatchTV, grant of ATBA's request would require the creation of new technical standards that, in turn, would require in-depth analysis and complete overhaul of the existing LPTV rules and policies. We conclude that such a supplementary project is infeasible in the incentive auction proceeding. We believe that ATBA's request is appropriately addressed in the rulemaking in MB Docket No. 03–185 that we initiated to address the potential impact of the incentive auction and the repacking process on the LPTV service. Indeed, we invited parties to raise such matters in that proceeding and many commenters have raised this issue there.

51. We affirm our decision to grant a processing priority to displacement applications for DRTs. As we found in the *Incentive Auction R&O*, replacement translators are still an important tool for full power stations to replace service lost in the digital transition. Contrary to WatchTV's assertion, DTS may not work in all cases and digital TV boosters are not authorized by the rules. For these reasons, to ensure that television stations are able to restore service from DRT facilities that are displaced in the repacking process, we affirm our decision to give displacement applications for DRTs a displacement priority.

52. In addition, we reject USTV's contention that we should have provided a displacement priority for the 13 LPTV stations. As indicated above, nothing in the DDSA or the Spectrum Act mandates priority treatment of DDSA stations in the repacking process, and the same applies to the post-auction transition. Moreover, there are no stations operating in the pilot program to qualify for such a priority even if we were to provide one.

e. Other Issues

53. We dismiss and, on alternative and independent grounds, deny the ALF and Beach TV Petitions. As an initial matter, we dismiss the Petitions on procedural grounds. The *Incentive Auction NPRM* squarely raised the question of which facilities to protect in the repacking process and which stations would be eligible to participate in the reverse auction. On reconsideration, petitioners for the first time attempt to explain why they should be protected in the repacking process or allowed to participate in the reverse auction. They have not shown, however, why they were unable to raise these facts and arguments before adoption of the *Incentive Auction R&O*. Indeed, the evidence put forth by petitioners precedes the adoption of the *Incentive Auction R&O*. Accordingly, we dismiss the Petitions because they rely on facts and arguments not presented to the Commission before the *Incentive Auction R&O* was issued and petitioners have not attempted to demonstrate compliance with the exceptions for such filings found in section 1.429(b) of our rules.

54. As an alternative and independent ground, we deny the Petitions because neither petitioner is a ''broadcast television licensee'' entitled to mandatory protection in the repacking process or eligible to participate in the reverse auction. Beach TV is the licensee of an LPTV station that has never filed an application for a Class A license. ALF is a mere applicant for a new full power television construction permit. While we determined that full power or Class A licensees that are the subject of non-final license validity proceedings or downgrade orders will be protected in the repacking process, and may participate in the reverse auction until the proceeding or order becomes final and non-reviewable, this treatment applies to stations that previously held full power or Class A licenses. Beach TV and ALF have never held such licenses. We reject ALF's claim that excluding it from the reverse auction denies it due process. To the extent that ALF believed there was unreasonable delay at any stage in the processing of its application, it had the opportunity to file a petition for writ of mandamus to compel agency action.

55. We also dismiss Beach TV's request that we protect it in the repacking process as a matter of discretion. We explained in the *Incentive Auction R&O* the reasons for declining to extend discretionary protection to LPTV stations, such as Beach TV. As discussed above, we affirm that decision. In addition, as we stated above, we extended discretionary protection only to otherwise eligible ''broadcast television licensees,'' *i.e.,* full power and licensed Class A stations. Moreover, despite its claim, Beach TV is unlike KHTV–CD, a formerly out-of-core Class A-eligible LPTV station that we elected to protect in the repacking process. Unlike Beach TV, KHTV–CD's eligibility for Class A status has never been in doubt and it holds a Class A license. Moreover, unlike Beach TV, KHTV–CD documented repeated efforts over the course of a decade to locate an in-core channel and convert to Class A status.

3. International Coordination

56. We deny the requests for reconsideration by Affiliates Associations, Gannett, ATBA, Block, and CDE as they relate to international coordination. We must, of course, take Canadian and Mexican stations into account in determining the assignment of channels particularly in U.S. markets along the borders, but completion of border coordination is not a precondition to repacking as either a legal or practical matter. International coordination is an ongoing process which by its nature involves negotiation with sovereign nations whose actions the FCC does not control. The Commission is familiar with matters of international coordination, having dealt with similar issues every time it auctions new spectrum licenses. The Spectrum Act affords the FCC discretion regarding how to implement the coordination process, including the timing of that process. As CTIA points out, therefore, we reasonably interpreted the Spectrum Act as not imposing a temporal requirement on international coordination. Because we fully considered and rejected in the *Incentive Auction R&O* the arguments of Affiliates Associations and ATBA that the language of the Spectrum Act should be interpreted as requiring the Commission to complete international coordination prior to the auction or the repacking process, we dismiss these arguments on procedural grounds. Block Stations' request that we reconsider our statutory interpretation because the Spectrum Act does not require that the incentive auction be conducted right away lacks merit: delay in our schedule for conducting the incentive auction is not necessary and would disserve the public interest.

57. We disagree with NAB that, if international coordination is not completed in advance of the auction, stations in border areas risk being forced to go dark. As discussed below, we expect to reach timely arrangements with Canada and Mexico that will enable us to carry out the repacking process in an efficient manner that is fully consistent with the requirements of the statute and our goals for the auction. As we explained in the *Incentive Auction R&O,* however, all that is required as a practical matter in order to carry out the repacking process in the border areas is a mutual understanding with Canada and Mexico

as to how the repacking process in the U.S. will be conducted to protect border stations in all countries from interference, and the requisite information about the location and operating parameters of Canadian and Mexican stations that affect the assignment of television channels in the U.S. The mutual understanding that we anticipate reaching with Canada and Mexico regarding the technical criteria to be used in repacking will enable us to secure timely approval of individual channel assignments for U.S. stations after the auction. Accordingly, we are not persuaded that stations in border areas are at risk of going dark if coordination is not complete. In the unlikely event that a border station has not been able to complete construction on its new channel assignment by the end of the 36-month construction period, that station may request authorization to operate on temporary facilities as provided in the *Incentive Auction R&O.* We will make every reasonable effort to accommodate such requests.

58. We also reject the other arguments of Affiliates Associations, CDE, and NAB regarding border stations. We are not persuaded that border stations face an unfair risk of being deprived of the opportunity for reimbursement in the event that the FCC cannot complete coordination prior to the incentive auction and the repacking process. In the event that international coordination is not completed prior to the commencement of the incentive auction, the reimbursement process we adopted in the *Incentive Auction R&O* will facilitate a smooth transition for border stations that provides a fair opportunity to obtain reimbursement. We fully intend to make initial allocations quickly to help broadcasters initiate the relocation process. If cases occur in which a broadcaster's move to a new channel is delayed because of international coordination, the delay need not jeopardize reimbursement. We expressly provided broadcasters the opportunity to receive initial allocations based on estimated reimbursement costs. We also afforded stations the flexibility to update their cost estimates if they experience a change in circumstances during the reimbursement period. Moreover, our process recognizes that construction for certain stations may run up against the end of the 36-month reimbursement period and therefore includes a final allocation, to be made based on actual costs incurred by a date prior to the end of the three-year period, in addition to a station's estimated expenses through the end of construction. For any relocating station, this final allocation will occur during the statutory reimbursement period, even if construction is not complete until after the end of the three-year reimbursement period. We believe this process will provide sufficient flexibility for any stations that encounter difficulties constructing new facilities located along the borders with Mexico and Canada. We explain in Section IV.C *infra* how the reimbursement process is designed to address problems or delays that may arise for stations in the post-auction transition process.

59. While we regard the confidentiality of the ongoing government-to-government incentive auction coordination discussions as critical to their ultimate success, there are indications that our ongoing coordination efforts are advancing our goal to reach mutual spectrum reconfiguration arrangements with Canada in a manner that is fully consistent with our statutory mandate and our goals for the auction. We note that on December 18, 2014, Industry Canada initiated a consultation (similar to a Notice of Proposed Rulemaking) that proposes a joint reconfiguration of the 600 MHz Band for mobile use. The Industry Canada consultation proposed to adopt the U.S. 600 MHz Band Plan framework and to commit to repurposing the same amount of spectrum as the U.S., as determined in the FCC's incentive auction. Moreover, Industry Canada's consultation also expressly states that Canada would have to make a decision on the harmonized band plan *before* the incentive auction in the U.S. The Industry Canada consultation also proposes harmonizing Canada's approach for developing a TV allotment plan with that of the U.S. It also recognizes the mutual benefits of a joint repacking that takes into consideration broadcasters on both sides of the border and ensures maximum benefits with minimum disruption of broadcast services, resulting in a more efficient reassignment of broadcasting channels and more spectrum being made available for mobile services in both countries. In light of the consultation, we anticipate that our coordination efforts will culminate in an arrangement that captures the mutual benefits to Canada and the U.S. of a harmonized 600 MHz Band Plan approach that will repurpose the spectrum for mobile broadband services and optimize television channel placement on both sides of the border.

60. FCC staff also continues to collaborate closely with Mexico's Instituto Federal de Telecomunicaciones (IFT) on attaining a spectrum reconfiguration arrangement that would incorporate unified objectives regarding spectrum allocation and accommodate television broadcast and wireless services along the common border. As part of Mexico's constitutional reforms adopted in 2012, IFT is committed to completion of Mexico's DTV transition by the end of 2015. The FCC and IFT, through the established coordination process, are assigning Mexican DTV channels below channel 37 to the extent possible while also providing channels for the FCC to use in repacking. Considering the efforts and progress made by both Administrations towards developing a comprehensive solution that involves the best and future use of current television spectrum, we anticipate the eventual completion of an arrangement with Mexico that will enable us to carry out the repacking process in a manner fully consistent with the requirements of the statute and our goals for the auction. In any event, prior to the start of the incentive auction, we will release information regarding the Mexican stations and allotments that will need to be protected in the repacking.

61. Finally, we reject ATBA's requests for reconsideration with regard to LPTV stations in the border areas. Contrary to ATBA's argument, the Spectrum Act places no special limits on displacement of LPTV licensees in border areas. ATBA notes that section 1452(b)(1)(B)(i) provides that the Commission may, subject to international coordination, make ''reassignments'' of ''television channels,'' and argues that ''television channels'' should be read broadly to include LPTV stations. We reject this argument. As an initial matter, nothing in section 1452(b) ''shall be construed to alter the spectrum usage rights of [LPTV] stations,'' which as we have explained have never included protection from displacement by primary services. Moreover, while section 1452(b)(1)(B)(i) refers to the Commission's ''reassignment'' of ''television channels,'' the Commission will not be ''reassign[ing]'' the television channels of LPTV stations. Rather, LPTV stations may be displaced when broadcasters begin operations on their new channels post-repacking and required to locate new channels, but they will not be ''reassigned'' as that term is used in the Spectrum Act. Further, ATBA's concern regarding the risk of LPTV stations being subject to ''double-displacement and double-builds'' is ill-founded. Our post-auction coordination process for relocating stations will require Canada's or

Mexico's concurrence before the Media Bureau issues a construction permit. Once a channel assignment has been coordinated with Canada or Mexico, it is unlikely that the relocating station will be subjected to another coordination.

B. Unlicensed Operations

1. Television Bands

62. We dismiss Free Access' request. In the *Incentive Auction R&O,* the Commission indicated that it intended, following notice and comment, to designate one unused television channel following the repacking process for shared use by unlicensed devices and wireless microphones. The Commission stated that it sought to strike a balance between the interests of all users of the television bands, including the secondary broadcast stations and white space device operators, for access to the UHF TV spectrum. As indicated in the *Incentive Auction R&O,* the final decision on preserving one such television channel, and precisely how to do so, would follow additional notice and comment. Accordingly, we dismiss Free Access' challenge of the Commission's action on this issue in the *Incentive Auction R&O* given the absence of a final decision. On June 11, 2015, the Commission adopted the *Vacant Channel NPRM* proposing to take action to preserve a vacant television channel, following the repacking process, for use by both unlicensed white space devices and wireless microphones. This proceeding provides Free Access with an opportunity to express its concerns to the Commission on the proposal to preserve a television channel for use by unlicensed white space devices as well as wireless microphones.

2. Guard Bands and Duplex Gap

63. We deny Qualcomm's request to reconsider the Commission's decision in the *Incentive Auction R&O* to permit unlicensed white space devices to operate in the guard bands and duplex gap. The Commission determined in the *Incentive Auction R&O* that the part 15 rules provide an ''appropriate and reliable framework for permitting low power uses on an unlicensed basis,'' while also recognizing that a further record would be necessary to establish the technical standards to govern such use in the guard bands and duplex gap. The Commission also emphasized that, ''consistent with the Spectrum Act, unlicensed use of the guard bands will be subject to the Commission's ultimate determination that such use will not cause harmful interference to licensed services.'' Subsequent to the *Incentive Auction R&O,* the Commission initiated a rulemaking proceeding to develop technical and operational rules to enable unlicensed devices to operate in the guard bands and duplex gap without causing harmful interference to licensed services. Specifically, on September 30, 2014, the Commission adopted the *Part 15 NPRM* that proposed rules for unlicensed white space device operation in the TV bands, repurposed 600 MHz Band, guard bands (including the duplex gap), and on channel 37.

64. We disagree with Qualcomm that the Commission's decision is arbitrary, capricious, or otherwise violates the APA. The procedure the Commission is following in this proceeding (first deciding to allow unlicensed use of certain frequency bands, and then proposing specific technical rules) is similar to the procedure the Commission followed in the TV white spaces proceeding (ET Docket No. 04–186). In that proceeding, the Commission decided to allow fixed unlicensed use of certain vacant channels in the TV bands, but did not have a sufficient record to adopt technical rules for such operation. It adopted the *TV White Spaces First R&O and FNRPM* that made the decision but did not adopt any technical rules. Along with this decision, the Commission included a further notice of proposed rulemaking portion proposing specific technical rules, which it followed subsequently with the *TV White Spaces Second Incentive Auction R&O* in which it adopted technical rules. Thus, there is precedent for the Commission's decision to decide first to permit unlicensed operations in a frequency band—in this case in the guard bands and duplex gap—subject to the subsequent proceedings to develop technical rules to allow such operation. Moreover, the Commission has broad authority to decide how best to manage its decision-making process. Also, we disagree that the Commission disregarded Qualcomm's filings alleging that unlicensed use of the guard bands and duplex gap would result in harmful interference to licensed services. The Commission considered them when making its decision, specifically recognizing that parties disagreed on certain assumptions in Qualcomm's technical analysis, and decided that these disagreements would be more appropriately addressed in the rulemaking proceeding that it initiated subsequent to the *Incentive Auction R&O.*

65. We also disagree with Qualcomm's contention that unlicensed operations in the 600 MHz Band would destroy the fungibility of the licensed spectrum blocks and reduce their value. This argument is based on the premise that unlicensed operations in the guard bands and duplex gap will definitely cause harmful interference to licensed services in adjacent bands. As discussed above, we will not permit any unlicensed operations in the guard bands and duplex gap that will cause harmful interference to licensed services.

3. Channel 37

66. *Background.* The current part 15 rules generally prohibit operation of unlicensed devices on channel 37. The Commission ceased certifying new unlicensed medical telemetry transmitters for operation on channel 37 when it established the WMTS as a licensed service under part 95, but it permits previously authorized medical telemetry equipment to continue operating on channel 37. The rules do not allow the operation of white space devices on channel 37. The Commission excluded white space devices from operating on channel 37 to protect the WMTS and the Radio Astronomy Service (''RAS'') since channel 37 is not used for TV service and therefore has different interference considerations than those at issue in the white spaces proceeding.

67. In the *Incentive Auction R&O,* the Commission decided that unlicensed devices will be permitted to operate on channel 37, subject to the development of the appropriate technical parameters for such operations, including the use of the white space databases to protect WMTS operations at their fixed locations. It stated that unlicensed operations on channel 37 will be authorized in locations that are sufficiently removed from WMTS users and RAS sites to protect those incumbent users from harmful interference. In making this decision, the Commission recognized the concerns of WMTS equipment manufacturers and users about the potential for unlicensed operations on channel 37 to cause harmful interference to the WMTS. It also recognized that parties disagreed on the appropriate interference analysis methodology and the ability of the TV bands databases to provide adequate protection to the WMTS. The Commission decided that it would ''permit unlicensed operations on channel 37 at locations where it is not in use by incumbents, subject to the development of the appropriate technical parameters to protect incumbents from harmful interference,'' and that it would consider these issues

as part of a separate rulemaking proceeding ''with the objective of developing reliable technical requirements that will permit unlicensed operations while protecting the WMTS and RAS from harmful interference.''

68. GE Healthcare (''GEHC'') and the WMTS Coalition seek reconsideration of the Commission's decision to allow unlicensed devices to operate on channel 37. The petitioners argue that the Commission should consider whether to permit sharing only after it has completed a full and balanced inquiry into whether operating and technical rules can be developed that assure that harmful interference will not occur to the WMTS. GEHC claims that the Commission's decision to permit unlicensed operations on channel 37 is a policy change and a rule change because the Commission revised section 15.707(a) to permit unlicensed operations in the 600 MHz Band, including on channel 37, and thus its request for reconsideration is appropriate and ripe for review. GEHC and the WMTS Coalition also claim that the Commission's decision is inconsistent with past precedents that WMTS and unlicensed devices could not share the band. The WMTS Coalition states that the Commission has given careful consideration to the advisability of band sharing on channel 37 between unlicensed devices and the WMTS several times over the last twelve years, and that each time it has done so, it determined that channel 37 should not be subject to sharing with unlicensed devices. GEHC argues that the Commission's failure to explain its departure from precedent or how harmful interference to WMTS operations from unlicensed devices will be avoided violates the APA. The WMTS Coalition also argues that the decision to allow sharing is premised upon the unrealistic assumption that current and future WMTS sites can be accurately identified. It states that the geographic coordinates in the WMTS database are not sufficiently accurate for frequency coordination, and that some hospitals have either not kept their data updated or have not registered at all with the database. The WMTS Coalition argues that by determining in advance that sharing of channel 37 will occur, the Commission has tipped the scales away from a balanced analysis of the risks and benefits of allowing sharing. We received oppositions to the GEHC and WMTS Coalition petitions from Google/Microsoft, WISPA, OTI/PK and Sennheiser.

69. *Discussion.* We deny the requests of GEHC and the WMTS Coalition to reverse the Commission's decision to permit unlicensed white space devices to operate on channel 37. The Commission made this decision subject to the development of appropriate technical parameters for such operations, so unlicensed devices cannot operate on channel 37 unless such rules are promulgated. Subsequent to the *Incentive Auction R&O,* the Commission initiated a rulemaking proceeding to develop technical and operational rules to enable unlicensed white space devices to access and operate on channel 37, through use of a database, in a manner that would not cause harmful interference to the WMTS and RAS. Specifically, on September 30, 2014, the Commission adopted a *Notice of Proposed Rulemaking* that proposes rules for unlicensed operation in the TV bands, repurposed 600 MHz Band, guard bands (including the duplex gap), and on channel 37.

70. We disagree with GEHC that the Commission's action to allow unlicensed white space device operation on channel 37 is arbitrary, capricious, or violates the APA. As discussed above, the Commission followed a similar course in the TV white spaces proceeding in which it decided to allow unlicensed white space device operation in particular frequency bands (the TV bands in that case), followed by a proposal to develop the appropriate technical requirements to prevent interference to authorized services in those bands. As with the guard bands, the decision in the *Incentive Auction R&O* was based on the record, recognizing that the parties had different analyses based on different assumptions. The decision is conditioned on developing technical rules to protect incumbent services from harmful interference. As noted above, the Commission has broad authority to decide how best to manage its decision-making process and to order its docket ''as will best conduce to the proper dispatch of business and to the ends of justice.'' Contrary to GEHC's assertion, the changes that the Commission made to section 15.707(a) in the *Incentive Auction R&O* do not allow operation of unlicensed white space devices on channel 37 prior to the development of technical requirements. The purpose of the changes to section 15.707(a) is to allow the continued operation of white space devices in the 600 MHz Band after the incentive auction at locations where licensees have not yet commenced service. The 600 MHz Band as defined in part 27 does not encompass channel 37, so the Commission's changes to section 15.707(a) in the *Incentive Auction R&O* do not allow unlicensed device operation on channel 37.

71. The Commission adequately explained its policy change to allow unlicensed white space devices to operate on channel 37. As discussed above, when the Commission decided in 2006 to exclude white space devices from operating on channel 37 to protect the WMTS and RAS, it noted that channel 37 has different interference considerations than those at issue in the white spaces proceeding. In particular, the white space proceeding focused on unlicensed devices operating on channels used for the broadcast television service, so the Commission developed technical requirements to protect television and other operations in the TV bands, such as wireless microphones. The Commission did not conclude that sharing with the WMTS and RAS was not possible; it simply chose not to address the issue of such sharing in the TV white spaces proceeding. The Commission explained in the *Incentive Auction R&O* that since the time it made the decision to prohibit unlicensed use of channel 37, it has designated multiple TV bands database administrators, has had extensive experience working with their databases, and has a high degree of confidence that they can reliably protect fixed operations. The Commission further explained that the fixed locations where the WMTS is used are already registered in the American Society for Health Care Engineering (''ASHE'') database, and these data could be added to the TV bands databases. The Commission recognized concerns that WMTS location information in the ASHE database may be imprecise or missing, and stated that these could be addressed by establishing conservative separation distances from unlicensed devices and by reminding hospitals and other medical facilities of their obligation under the rules to register and maintain current information in the database. The Commission is currently considering these issues in the *Part 15 NPRM.*

C. Other Services

1. Channel 37 Services

72. *Background.* The WMTS, which operates licensed stations on channel 37 in the UHF Band, is used for remote monitoring of patients' vital signs and other important health parameters (*e.g.,* pulse and respiration rates) inside medical facilities. WMTS includes devices that transport the data via a radio link to a remote location, such as a nurse's station, for monitoring. After the incentive auction, the services that

will operate in the frequency bands adjacent to the WMTS will depend on the amount of spectrum recovered in the incentive auction. If more than 84 megahertz is recovered, there will be three megahertz guard bands on each side of channel 37, with wireless downlink spectrum above and below these guard bands. If exactly 84 megahertz is recovered, there will be a three megahertz guardband above channel 37 to separate this channel from wireless downlink spectrum, while channel 36 will continue to be used for television. If less than 84 megahertz is recovered, channels 36 and 38 will both continue to be used for television.

73. The decision to provide for a three megahertz guard band between WMTS and 600 MHz downlink operations balanced the need to protect WMTS facilities from interference with the need for new 600 MHz licensees to have flexibility to deploy base stations where needed to provide coverage over their service areas. The decision not to require coordination was supported by the Commission's technical analysis, based on protection criteria GEHC provided in its comments. This analysis showed that three megahertz guard bands adjacent to channel 37 requires only reasonably short separation distances to protect WMTS from new 600 MHz operations. The Commission decided not to provide for enhanced protection of WMTS if additional TV stations are placed in channels 36 or 38 as a result of the repacking process. Instead, we chose to rely on the existing DTV out-of-band emission (OOBE) limits, and noted that the extent of potential interference to WMTS would depend in large part on the locations of any TV stations repacked to channels 36 or 38 in relationship to health care facilities.

74. In its Petition, GEHC claims the Commission erred when it relied solely on the three megahertz guard band to protect WMTS from 600 MHz Band operations in adjacent bands, and that GEHC's revised analysis shows that greater separation distances or more stringent limits on power and out-of-band emissions from 600 MHz Band base stations are needed. GEHC makes three main claims to support its position: (1) The FCC's technical analysis inappropriately applied the protection criteria GEHC provided; (2) the FCC failed to consider interference aggregation from multiple WMTS antennas; and (3) the FCC incorrectly converted field strength to received power. GEHC further claims that the Commission ignored key concerns that allowing additional TV stations to be repacked into channels 36 and 38 will reduce WMTS spectrum capacity, increase the number of WMTS facilities that could experience interference from TV operations, cause hospitals to incur additional costs to protect their WMTS operations from harmful interference, and require hospitals to create de facto guard bands to protect their WMTS operations from harmful interference, effectively reducing the amount of usable spectrum on channel 37 for the WMTS. CTIA disagrees with GEHC, noting that their positions would threaten to limit the amount of licensed spectrum made available in the incentive auction and increase the number of new wireless licenses that are encumbered.

75. *Discussion—WMTS and 600 MHz Band services.* While we revise our technical analysis in light of GEHC's Petition, we affirm our conclusion that a three megahertz guard band between 600 MHz operations and channel 37, along with the 600 MHz Band service out-of-band emission limits we adopted, will adequately protect WMTS facilities. GEHC states that the FCC's technical analysis inappropriately applied the protection criteria GEHC provided. More specifically, it states that instead of applying the field strength protection values it provided ''at the perimeter of a registered WMTS facility,'' we applied them at the receiver. GEHC argues that this resulted in the double-counting of building penetration losses and filter rejection in the overload interference analyses and double-counting of building penetration loss in the out-of-band analysis. GEHC's maximum recommended field strength levels at the perimeter of a WMTS facility that were provided in its comments to the *Incentive Auction NPRM* were based on several tables showing a link budget analysis for overload and out-of-band interference. These tables included a term described as ''excess loss (building attenuation, etc.),'' which we included in our analysis. It was unclear from GEHC's comments that these losses had been already considered in developing their recommended field strength limits. However, based on the clarification in its petition, we now agree that these losses should not have been considered in our analysis. Accordingly, we eliminate this factor from our revised analysis shown in Appendix A.

76. While we agree that we incorrectly double-counted building losses in our original analysis, we disagree that we double-counted any WMTS receive filter attenuation outside of channel 37. GEHC developed its recommended field strength limits using the assumption that new 600 MHz licensees would be operating directly adjacent to channel 37. The 600 MHz Band Plan, however, includes three megahertz guard bands adjacent to channel 37. Based on the filter characteristics provided by GEHC, this frequency separation provides an additional 10 dB of signal attenuation. Thus, it was appropriate to include this additional 10 dB of signal loss for filter attenuation in our analysis. This is so even though the receiver which includes the filter is not located at the perimeter of the building, because the goal is to protect the receiver and the filter provides some of that protection. Such excess loss occurs after the point at which GEHC specifies the protection values must be met. But, because that loss is a real phenomenon, GEHC takes it into account when developing its protection criteria. We treat the filter attenuation in a similar manner in our analysis.

77. We also agree with GEHC that we erred by failing to consider interference aggregation from multiple WMTS antennas in our technical analysis. Because most WMTS facilities employ distributed antenna systems (''DAS'') which include many antenna elements, more than a single antenna element may receive an interfering signal. In its comments, GEHC asserted that the analysis therefore should include a 10 dB penalty for aggregating signals from ten WMTS antennas. In its Petition, GEHC states that this scenario is unlikely, and instead recommends an aggregation adjustment of three dB based on signal aggregation from two antennas. Using the revised three dB value provides an additional seven dB of margin, which would allow less stringent field strength protection values than those GEHC proposed. We take this three dB antenna aggregation factor into account in our new analysis shown in Appendix A.

78. Regarding GEHC's claim that we incorrectly converted field strength to received power, we disagree. There are many methods for converting between these units and the choice of which method to use depends on many factors, such as whether the conversion is being used to verify a measurement or to estimate an electric field at some distance from a transmitter. GEHC asserts that the formula we used, which is commonly used in measurement laboratories, unfairly biases our results by three meters (the assumed measurement distance). It states that such bias creates a 37.6 dB disparity, which is equivalent to the free space loss over the first three meters from an antenna at 611 MHz. GEHC's claim fails to recognize that the received power is being generated from a transmitter at a much greater distance than three meters.

Because signal strength attenuates exponentially over distance, the loss in that last three meters is much less than the loss over the first three meters or any other three-meter segment along the signal path. The exact difference will depend on the actual distance of the transmitter from the WMTS facility.

79. We reject GEHC's alternative formula for calculating radiated power and field strength for conducted power measurements. It cites an equation that relates power in the load (*i.e.* power received by the antenna) to the field strength. GEHC then argues an equivalency between that field strength and the transmitter equivalent isotropically radiated power (''EIRP''). GEHC fails to acknowledge that the EIRP is a function of the transmitter power and transmit antenna gain, which is at some distance from the receiving antenna. Thus, the power received by the receive antenna is not the EIRP, but the EIRP less the path loss (*e.g.,* free space loss plus any additional loss that the signal may incur as it propagates from the transmitter to the antenna).

80. We also disagree with GEHC's claims that there are several other, less serious errors in our analysis. For the overload analysis, it states that while we assumed five megahertz channels for the 600 MHz transmitter, we incorrectly considered only that portion of the 600 MHz Band power that falls in the first adjacent six megahertz channels above and below channel 37, effectively ignoring any power in the second adjacent channels. GEHC argues that such a methodology is unrealistic as it inherently assumes that power in the second adjacent channel does not exist or that the receiver's filter perfectly rejects this portion of the power. Based on the surface acoustic wave (''SAW'') filter characteristics GEHC provided, which show attenuation between approximately 40 and 60 dB beyond four to five megahertz of the channel 37 band edges (*i.e.,* into the second adjacent channel), our assumption to only consider the power in the first adjacent channel is reasonable. If we were to consider the power across additional channels, we would also need to consider the full filter attenuation across the channel; instead, we simplify our analysis and assume only 10 dB of attenuation at three megahertz from the band edge. Thus, our power assumptions are conservative. GEHC also states that we should not have integrated the partial power over the entire six megahertz adjacent channel. However, GEHC fails to offer an alternative method. Again, we believe this to be a valid simplifying assumption for the purposes of our analysis.

81. In advocating for specific field strength protection values, GEHC fails to provide information on the relationship between the results of its analysis and those field strength protection values. GEHC does, however, state that those field strength protection values are based on meeting a -37.8 dBm/MHz threshold in its overload (or blocking) analysis and on meeting an I/N ratio of -6 in its OOBE analysis. GEHC's methodology for calculating protection distance based on these protection values is straightforward. Using that same methodology, we show in Appendix A that the separation distance necessary to protect WMTS from 600 MHz operations is reasonably small. The results of our analysis show shorter separation distances than those calculated by GEHC to meet the same protection criteria for overload and OOBE interference. We acknowledge that these distances are larger than those we calculated in our analysis supporting the *Incentive Auction R&O,* but not of such a magnitude that persuades us to alter our conclusion that the vast majority of WMTS stations will not suffer any detrimental effects from the installation of new 600 MHz base stations. It is important to note that this is a worst case analysis and in most installations one or more of the parameters we assumed here will provide additional protection. Thus, we continue to believe that the three megahertz guard band along with the adopted 600 MHz service OOBE limits we adopted will adequately protect WMTS facilities while providing flexibility for new 600 MHz licensees to deploy their systems. Nevertheless, we encourage new 600 MHz licensees to be cognizant of the presence of WMTS facilities when designing their networks and when possible to take measures to minimize the energy directed towards them.

82. *WMTS and Television Services.* We decline to reconsider our decision not to limit the number of television stations that could be repacked in channels 36 and 38. Restricting repacking on channels 36 and 38 would significantly impede repacking flexibility and limit our ability to repurpose spectrum through the incentive auction. Even if channels 36 and 38 continue to be used for broadcast television after the auction, an increase in the number of stations on these channels does not correspond to an increase in the number of WMTS users that would be affected by adjacent channel TV stations. We expect that there will be many locations where TV stations can operate on channels 36 and 38 with minimal or no effect on WMTS users. Any interference that does occur to the WMTS from adjacent channel TV operations can be addressed on an as-needed basis. The potential for an adjacent channel TV station to affect a WMTS installation depends on many factors, including the TV station power and antenna height, separation distance, intervening obstacles (such as terrain, trees or buildings), and the WMTS receive antenna characteristics (such as height, gain, directionality, and location inside or outside a building). While we recognize GEHC's concern that ''hardening'' a WMTS facility against adjacent channel TV emissions involves costs, we note that many WMTS licensees have already taken such action by adding filters to their systems. Thus, we believe that the need for some facilities to take this action does not pose an insurmountable problem, or require a blanket restriction on repacking TV stations into channels 36 and 38. As CTIA points out, WMTS has never been able to rely on those channels being vacant.

83. Finally, we note that the Commission allocated three spectrum bands for the WMTS, including two bands at 1.4 GHz in addition to channel 37. In allocating this spectrum, the Commission recognized that WMTS operations on channel 37 could be affected in some instances by nearby stations on channels 36 and 38, and it stated that WMTS providers could use one of the other allocated bands in these situations. The Commission also stated that manufacturers could design their equipment to provide sufficient protection from adjacent channel interference.

2. LPAS and Unlicensed Wireless Microphones

84. We deny Sennheiser's and RTDNA's petitions requesting that additional spectrum be reserved exclusively for wireless microphone operations. We instead affirm the balanced approach we adopted in the *Incentive Auction R&O* to accommodate wireless microphone operations while also taking into account the interests of other users of the more limited spectrum in the repacked TV bands and the repurposed 600 MHz Band spectrum, including the 600 MHz Band guard bands. Considering the several actions the Commission took in the *Incentive Auction R&O,* as well as the additional actions it now is actively exploring, to accommodate wireless microphone operators' needs following the incentive auction, including the high-end professional-type needs about

which Sennheiser and RDTNA are concerned, we are not persuaded that we should provide any more spectrum exclusively for use by wireless microphone users for these types of operations.

85. The Commission took several steps in the *Incentive Auction R&O* to accommodate wireless microphone operations—including licensed wireless microphone operations—in the spectrum that would remain available for use following the incentive auction. Specifically, it provided for more opportunities for co-channel operations with television stations. It also sought to ensure that at least one channel in the TV bands would continue to be available for wireless microphone operations, stating its intent, following notice and comment, to designate one unused TV channel in each area of the country for use by wireless microphones and white space devices. As discussed above, we recently adopted the *Vacant Channel NPRM* proposing to do this. Licensed wireless microphone operators needing interference-free operations from white space devices will be able to reserve this channel for use at specified locations and times through the TV bands databases. Further, the Commission stated that it would seek comment on ways to update its rules for TV bands databases to provide for more immediate reservation of unused and available channels for use by wireless microphone operators in order to better enable them to obtain needed interference protection from white space device operations at specified locations and times. Shortly following adoption of the *Incentive Auction R&O,* in September 2014, the Commission issued the *Part 15 NPRM* proposing such revisions.

86. The Commission also indicated in the *Incentive Auction R&O* that it planned to take additional steps to ensure that spectrum for wireless microphone users—again including licensed wireless microphone users—would be available following the incentive auction. It provided that wireless microphones would be permitted to operate in the 600 MHz Band guard bands, including the duplex gap, subject to technical standards to be developed in a later proceeding. In the *Part 15 NPRM,* we are following through on that decision, including seeking comment on our proposal to provide licensed wireless microphone operators with exclusive access to four megahertz of spectrum in the duplex gap. Because wireless microphone operators today rely heavily on the current UHF Band, we provided for a transition period that would permit them to continue to operate in the repurposed 600 MHz Band spectrum for up to 39 months following issuance of the Channel Reassignment PN, subject to specified conditions, both to address their near-term needs and to help facilitate the transition of users that currently operate in this portion of the UHF Band to spectrum that is or will be available for their use. In order to accommodate wireless microphone users' long-term needs, the Commission committed to initiating a proceeding to explore additional steps it can take, including use of additional frequency bands. We followed through on this commitment by adopting the *Wireless Microphones NPRM* in September 2014. In light of the above-stated actions, and the need to balance the interests of multiple different UHF Band spectrum users, as well as the goals of the incentive auction, we decline to take action on reconsideration to provide any more spectrum exclusively for use by wireless microphone users.

87. We also deny Qualcomm's petition challenging the Commission's decision to permit wireless microphone operations in the guard bands and duplex gap. The crux of Qualcomm's challenge is that there was insufficient record to decide how wireless microphones could operate successfully in these bands, along with white space devices, in a manner that also ensures that such operations do not cause interference to licensed wireless services in the adjacent bands. For the reasons discussed above with respect to Qualcomm's challenge of the decision to permit unlicensed white space devices to operate in the guard bands and duplex gap (along with wireless microphones), we reject Qualcomm's request. In the *Part 15 NPRM,* we are seeking comment on technical rules that comply with the Spectrum Act and address the potential interference concerns raised in Qualcomm's petition. Qualcomm has the opportunity to present its concerns in that proceeding.

88. Finally, we reject Sennheiser's renewed request that we require forward auction winners to reimburse licensed and unlicensed wireless microphone users for costs associated with replacing equipment as a result of the incentive auction and repurposing of spectrum for wireless services. Sennheiser does not challenge the Commission's conclusion that reimbursement was not contemplated or required by the Spectrum Act. Instead, Sennheiser argues that the Commission has independent authority under the Communications Act to require reimbursement, and challenges the Commission's reasoning that wireless microphone users are not entitled to reimbursement because they operate on a secondary or unlicensed basis. While we agree that the Commission does have independent authority for requiring reimbursements for relocation costs under certain circumstances, we affirm our decision not to require it here. Contrary to Sennheiser's arguments, our rules and policies are clear that licensed wireless microphone operations are secondary, and not primary, in those portions of the current TV bands that will be reallocated for wireless services following the incentive auction. The Commission has never required that primary licensees (here, the 600 MHz Band wireless licensees) moving into a band reimburse users that have been operating on a secondary basis in that band. We also decline to require reimbursement of unlicensed wireless microphone users that currently are operating pursuant to a limited waiver under certain part 15 rules; unlicensed users as a general matter do not have vested or cognizable rights to their continued operations in the reallocated TV bands.

II. The Incentive Auction Process

A. Integration of the Reverse and Forward Auctions

89. We deny the petitions for reconsideration of the average price component of the final stage rule. The final stage rule is an aggregate reserve price based on bids in the forward auction. If the final stage rule is satisfied, the forward auction bidding will continue until there is no excess demand, and then the incentive auction will close. If the final stage rule is not satisfied, additional stages will be run, with progressively lower spectrum targets in the reverse auction and less spectrum for licenses available in the forward auction, until the rule is satisfied.

90. Contrary to petitioners' claims, the Commission clearly stated the reason for the adoption of the average price component in the *Incentive Auction R&O.* The Commission concluded that its reserve price approach would help assure that auction prices reflect competitive market values and serve the public interest. In particular, the Commission stated, ''the first component of the final stage rule's reserve price [the average price component] ensures that the forward auction recovers 'a portion of the value of the public spectrum resource,' as required by the Communications Act.'' The petitioners, T-Mobile and the Competitive Carriers Association (''CCA''), do not demonstrate that this

objective is not a satisfactory explanation for adopting this component.

91. CCA argues that the average price component is unnecessary because forward auction bids that satisfy the costs component (including payments to reverse auction bidders) would represent a price for goods agreed to by willing sellers and buyers of those goods, but this argument is based on an incorrect premise. The forward auction bidders will not be ''buying'' what the reverse auction bidders are ''selling.'' Rather, the Commission will offer new flexible use licenses—unlike existing broadcast licenses—utilizing spectrum from various sources, including the aggregate spectrum relinquished by reverse auction bidders as well as spectrum freed by relocating broadcasters that will continue broadcasting on different frequencies. Consequently, bids to relinquish spectrum in the reverse auction do not intrinsically determine the value of the licenses offered in the forward auction. As a result, CCA has not demonstrated that it was unreasonable for the Commission to establish the average price component to serve public interest objectives of spectrum auctions as required by the Communications Act.

92. T-Mobile contends that the Commission failed to adequately address the inherent risk that forward auction bids may not satisfy the average price component or the risks that an unsuccessful auction pose to wireless competition and the availability of sufficient low band spectrum to meet demand for broadband services. The degree of these risks, however, depends in large part on the final benchmarks used, which the Commission stated that it would decide later based on additional public input. To the extent T-Mobile's argument rests upon the degree of risk posed by a specific average price, therefore, it is premature. Moreover, assessing the reasonableness of any risk to the incentive auction's success requires a proper metric for that success. The incentive auction will succeed if its results serve the public interest, as identified by the Commission and consistent with Congress's statutory mandates. As discussed, Congress mandated the particular objective of recovering a portion of the value of the public spectrum resource in the Communications Act. Neither petitioner takes into account this metric of success when complaining that the average price component risks auction ''failure.''

93. We do not find the petitioners' additional arguments any more persuasive. T-Mobile complains that the use of an ''average'' price benchmark leaves many issues undecided and adds further complexity to an already complex proceeding. As noted in the *Incentive Auction R&O,* however, ''the *Procedures PN* will determine the specific parameters of the final stage rule after further notice and comment in the pre-auction process.'' In its Reply, T-Mobile strains to read the *Incentive Auction R&O* as providing that ''all that remains to be done . . . is for the Commission to announce a price figure[.]'' T-Mobile's list of questions regarding implementation, however, demonstrates that more is required in the pre-auction process than simply announcing a price figure. The *Incentive Auction Comment PN* makes proposals and seeks comment with respect to several such points. Accordingly, T-Mobile's argument does not offer a basis for reconsidering the decision to adopt the average price component of the final stage rule.

94. Finally, CCA contends that the Commission did not articulate a reason for addressing the possibility in the average price component that the spectrum clearing target exceeds the spectrum clearing benchmark, but not the possibility that the actual target falls below the spectrum clearing benchmark. The Commission need not address why the decision it made ''is a better means [to achieving its purpose] than any conceivable alternative.'' Given that the Commission's mandate is to recover ''a portion of the value of the public spectrum resource,'' the average price component need not be designed to take into account MHz-pop prices that might be higher than expected (which would be the effect, if any, of the auction clearing less spectrum than the spectrum clearing benchmark). Put differently, the Commission is not charged with recovering a particular percentage of the spectrum value, so there is no need for the average price component to respond to increasing prices.

B. Reverse Auction

1. Eligibility

95. We reject the arguments of Free Access, LPTV Coalition, and Signal Above that LPTV stations should be allowed to participate in the incentive auction and that we violated the RFA by failing to conduct an independent analysis of the potential economic impact on LPTV stations of either granting or denying them eligibility to participate. Two months after the deadline for filing reconsideration petitions, Free Access filed a Motion for Leave to File Supplement to Petition for Reconsideration (filed Dec. 15, 2014) (''Free Access Motion''), arguing that it discovered additional information after the deadline for filing for reconsideration, that it raised such matters in a letter to the Chairman and to the Chief Counsel of the Small Business Administration (''SBA Letter''), and asking that the SBA Letter be included in the record of this proceeding. We dismiss this filing as a late-filed petition for reconsideration. The Commission may not waive the deadline for seeking reconsideration absent extraordinary circumstances, which Free Access has failed to demonstrate. Accordingly, we deny Free Access' Motion. We will, however, consider the matters raised in Free Access' Motion as informal comments.

96. We affirm our determination that eligibility to participate in the reverse auction is limited to licensees of full power and Class A television stations. This determination is consistent with the Spectrum Act's mandate to conduct a reverse auction specifically for each ''broadcast television licensee,'' which is defined to exclude LPTV stations. Even assuming we have discretion to grant eligibility to the licensees of LPTV stations despite the statutory mandate, granting such eligibility would be inappropriate for the reasons we explained in the *Incentive Auction R&O.* For instance, LPTV stations are not entitled to repacking protection, and we reasonably declined to exercise our limited discretion to protect them. As LPTV stations are not eligible for protection in the repacking process and are subject to displacement by primary services, relinquishment of their spectrum usage rights is not necessary ''in order to make spectrum available for assignment'' in the forward auction. Accordingly, sharing the proceeds of the forward auction with the licensees of LPTV stations would not further the goals of the Spectrum Act; instead, it would undercut Congress's funding priorities, including public-safety related priorities and deficit reduction.

97. Contrary to the petitioners' arguments, nothing in the RFA or any other statute requires the Commission to conduct an independent analysis of the economic impact on LPTV stations of making them ineligible to participate in the incentive auction. The RFA requires a '''statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule.' Nowhere does it require . . . cost-benefit analysis or economic modeling.'' We disagree with Free Access' claim that the Final Regulatory Flexibility Analysis included with the *Incentive Auction R&O* incorrectly stated that ''no comments were received in response to the IRFA

[Initial Regulatory Flexibility Analysis] in this proceeding.'' The IRFA included with the *Incentive Auction NPRM* at Appendix B stated that ''[w]ritten public comments are requested on this IRFA'' and that ''[c]omments must be identified as responses to the IRFA and must be filed by the deadlines for comments indicated on the first page of the Notice.'' Although some parties may have raised IRFA-related matters in *ex parte* presentations to staff, these presentations did not constitute formal comments filed in response to the IRFA, were not identified as such, and were not filed by the comment deadline. Nevertheless, the matters that were raised in these *ex parte* presentations (namely that the FCC should undertake a full economic and financial analysis as to whether LPTV participation could result in a more successful incentive auction) were considered by the Commission in this proceeding. Furthermore, many of the filings Free Access mentions simply cite a sentence in the IRFA included with the *Incentive Auction NPRM* as support for the position that LPTV may participate in the auction. Those filings have nothing to do with the analysis in the IRFA of the impact on small entities.

98. Likewise, the APA requires that a rule be ''reasonable and reasonably explained.'' Here, Congress has already determined that LPTV stations are not eligible for the auction, rendering an economic analysis superfluous at best. We fully explained our reasons for declining to protect LPTV stations in the repacking process or to include them in the reverse auction, adopted various measures to mitigate the potential impact of the incentive auction and the repacking process on LPTV stations, and initiated a separate proceeding to consider additional remedial measures. Having demonstrated a ''reasonable, good-faith effort to carry out [the RFA's] mandate,'' no independent analysis of the potential economic impact on LPTV stations of excluding them from reverse auction participation was required of us, nor would such an analysis have been useful or helpful.

2. Bid Options

99. For the reasons set out in more detail below, we affirm our decision to allow NCE stations to participate fully in the reverse auction and find that it is consistent with the Public Broadcasting Act and our NCE reservation policy, taking into account the unique circumstances and Congressional directives with respect to the auction. At the same time, the Commission remains fully committed to the mission of noncommercial broadcasting. The Commission has continuously found that NCEs provide an important service in the public interest, and it has promoted the growth of public television accordingly. In the context of the incentive auction, we emphasize that there will be multiple ways for NCE stations to participate in the auction and continue in their broadcasting missions. The bid options to channel share and to move to a VHF channel will enable NCE stations to continue service after the auction while still realizing significant proceeds. In the channel sharing context, we continue to disfavor dereservation of NCE channels. For those stations that are interested in moving to VHF, we have proposed opening prices that represent significant percentages of the prices for going off the air, and we will afford favorable consideration to post-auction requests for waiver of the VHF power and height limitations. NCEs that participate in the auction under any bid option but are not selected will remain broadcasters in their home band, and we will make all reasonable efforts to preserve their service.

100. Our auction design preserves for each NCE licensee the decision of whether to participate, giving stations that want to participate but remain on the air choices for doing so, without unnecessarily constraining our ability to repurpose spectrum. Our approach gives NCE licensees the flexibility to participate fully in the incentive auction, and we will be able to address any service losses after the auction is complete in a manner consistent with the goals of section 307(b) of the Communications Act and our longstanding NCE reservation policy. On balance, we find that the approach we adopted in the *Incentive Auction R&O* is the best way to uphold the NCE reservation policy while also carrying out Congress's goals for the incentive auction.

101. We agree with PTV that the Commission has a longstanding policy of reserving spectrum in the television band for NCE stations and against dereserving channel allotments. As PTV notes, the Commission's policy originated more than 60 years ago, when the Commission concluded that ''there is a need for non commercial educational stations.'' Indeed, the Commission has historically denied requests for dereservation both where the licensee was in severe financial distress and where the channel was vacant after a number of attempts to provide noncommercial service failed.

102. However, we disagree that our decision reverses the NCE reservation policy. The incentive auction presents unique circumstances that we must take into account in implementing this policy. Congress directed that the Commission conduct a broadcast television spectrum incentive auction to repurpose UHF spectrum for new, flexible uses, but directed that participation in the reverse auction by broadcasters must be voluntary. Thus, the Commission cannot compel participation, but neither should it preclude a willing broadcast licensee, including an NCE station, from bidding. PTV also claims that our analysis that restrictions on participation would be contrary to the statute is flawed. On this, we agree and update our analysis. Section 1452(a)(1) provides that the Commission ''shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television usage rights . . . .'' After further analysis, we agree that the language in section 1452(a) is ambiguous and that nothing in section 1452(a) expressly prohibits the FCC from imposing conditions on its acceptance of reverse auction bids in order to serve policy goals, and the Commission did in fact impose certain conditions on acceptance of reverse auction bids in the *Incentive Auction R&O.* Nevertheless, while we agree that we are not statutorily precluded from adopting the PTV proposal, we decline to adopt it for all the policy reasons described above.

103. Most closely analogous to the incentive auction in terms of application of the reservation policy was the digital television transition. There, the Commission preserved vacant reserved allotments where possible, but where it was impossible, the Commission allowed for the future allotment of reserved NCE channels after the transition to fill in those areas that lost a reserved allotment, finding that ''if vacant allotments were retained, it would not be possible to accommodate all existing broadcasters in all areas . . . and could result in increased interference to existing . . . stations.'' In the auction context, we similarly determined that we could not apply the reservation policy during the repacking process itself because there is no feasible way of doing so without creating additional constraints on repacking that would compromise the auction.

104. PTV proposes ''to allow a noncommercial educational station to relinquish its spectrum so long as at least one such station remains on-air in the community or at least one reserved channel is preserved in the repacking to

enable a new entrant to offer noncommercial educational television service in the community.'' While PTV regards its proposal as balanced because it would allow the last NCE to relinquish its spectrum, the two options it puts forward would impose essentially equivalent constraints on our ability to repurpose spectrum. Under PTV's proposal, the auction mechanism would either have to reject the bids of the last NCE station in a market, or it would have to put an additional constraint in the new television band. Rejecting the bid of the last NCE in a market would prevent at least some NCEs from engaging in the auction. And while conditioning the relinquishment of the last NCE's spectrum on the preservation of at least one reserved channel may allow full participation by NCE licensees, it would impose the same constraint on the auction system's ability to repack commercial and NCE stations that remain on the air. The effect would be the same as PTV's first option, reducing the amount of spectrum that can be cleared and the revenue that can be realized in the forward auction. This extra analysis would also compromise the speed at which the auction runs.

105. We conclude that the most effective means of balancing our commitment to noncommercial educational broadcasting and the mandates of the Spectrum Act is to address any actual service losses on a case-by-case basis in a manner that is tailored to the post-auction television landscape. We are considering a number of such measures. For example, we could waive the freeze on the filing of applications for new LPTV or TV translator stations to allow NCE licensees to promptly restore NCE service to a loss area with these stations. Or, if the last NCE station in a given community goes off the air as a result of the incentive auction, the Commission could consider a minor modification application by a neighboring public station to expand its contour to cover that community, possibly by waiving our rules on power and height restrictions, if the licensee can demonstrate that it would not introduce new interference to other broadcasters. In addition, interested parties could file petitions for rulemaking to propose the allotment of new reserved channels to replace the lost service once the Commission lifts the current freeze on the filing of petitions for rulemaking for new station allotments, or the Commission could do so on its own motion.

106. Finally, we disagree with PTV's claim that ''nothing in the *NPRM* or the extensive record in this proceeding 'fairly apprised the public of the Commission's new approach' to reserved channels,'' contrary to the requirements of the APA. The petition states that the ''*Notice's* discussion of the impact of the incentive auction on noncommercial educational service was limited to channel sharing restrictions aimed at 'preserv[ing] NCE stations and reserved channels.' '' This is incorrect. The *Incentive Auction NPRM* specifically analyzed whether NCEs would be eligible to participate in the reverse auction. It proposed an approach that did not restrict the participation of NCEs operating on reserved or non-reserved channels, noting that the Spectrum Act did not limit eligibility based on commercial status. The *Incentive Auction NPRM* indicated further that NCE participation in the auction would be beneficial, both because it would promote the overall goals of the auction and it would ''serve the public interest by providing NCE licensees with opportunities to strengthen their financial positions and improve their service to the public.'' Adequacy of the notice is demonstrated by comments that PTV submitted in response to the *Incentive Auction NPRM,* which cited section 307(b) and the FCC's historical policies pertaining to loss of service and asked the Commission not to accept license relinquishment bids that would result in DMAs not served by certain NCE stations.

III. The Post-Incentive Auction Transition

A. Construction Schedule and Deadlines

107. We decline to consider at this time the Affiliates Associations, ATBA's, and Gannett's requests regarding the transition period for full power and Class A stations because the arguments the petitioners raise are the subject of a recent decision by the United States Court of Appeals for the D.C. Circuit. We will take appropriate action regarding these arguments in a subsequent Order.

108. We will, however, address ATBA's petition to the extent that it challenges the decision not to ''protect'' LPTV and TV translator stations from displacement during and after the post-auction transition process. We decline ATBA's request that we ''protect all LPTV licenses and construction permits'' during the post-incentive auction transition period and ''for at least two years thereafter,'' which would presumably allow LPTV and TV translators to avoid being displaced during the post-incentive auction transition and two years beyond while repacked stations continue to make modifications to their facilities. The Spectrum Act does not mandate protection of LPTV or TV translator stations in the repacking process, and we declined to grant such protection as a matter of discretion for the reasons explained in the *Incentive Auction R&O.* For the same reasons, we decline to grant LPTV and TV translator stations protection during and after the post-auction transition period. Any such protection would be inconsistent with the secondary status of LPTV stations under the Commission's rules and policies and would seriously impede the transition process, a critical element to the incentive auction's success. Recognizing the potential impact of the incentive auction and the repacking process on LPTV stations, we adopted in the *Incentive Auction R&O* an expedited post-auction displacement window to allow stations that are displaced to file an application for a new channel without having to wait until they are actually displaced by a primary user. In addition, we have initiated a proceeding to consider measures to help LPTV and TV translators that are displaced, including delaying the digital transition deadline, allowing stations to channel share, and other measures. These actions will mitigate the impact of the repacking process on LPTV stations without impeding the post-incentive auction transition process.

B. Consumer Education

109. We grant, in part, Affiliates Associations' petition for reconsideration and modify our consumer education requirements with respect to certain ''transitioning stations.'' We continue to believe that ''[c]onsumer education will be an important element of an orderly post-auction band transition. Consumers will need to be informed if stations they view will be changing channels, encouraged to rescan their receivers for new channel assignments, and educated on steps to resolve potential reception issues.'' At the same time, we agree with Affiliates Association that transitioning stations, except for license relinquishment stations, will be motivated to inform their viewers of their upcoming channel change to prevent disruptions in service. Therefore, we revise our consumer education requirements to provide these stations with additional flexibility.

110. In the *Incentive Auction R&O,* we required that all commercial full power and Class A television transitioning stations air a mix of Public Service

Announcements (''PSAs'') and crawls at specific times of the day. We allowed NCE full power stations to comply with consumer education requirements through an alternate plan. Specifically, we allowed NCE full power stations to either comply with the framework established for commercial full power and Class A television stations or by only airing 60 seconds per day of on-air consumer education PSAs for 30 days prior to termination of operations on their pre-auction channel. Thus, NCE full power stations were given additional flexibility to choose the timeslots for their consumer education PSAs and to not have to air crawls. We conclude that all transitioning stations, except for license relinquishment stations, should have the same flexibility. Therefore, we will allow all transitioning stations, except for license relinquishment stations, to meet the consumer education objectives by airing, at a minimum, either 60 seconds of on-air consumer education PSAs or 60 seconds of crawls per day for 30 days prior to termination of operations on their pre-auction channel. Stations will have the discretion to choose the timeslots for these PSAs or crawls. We will continue to require that transition PSAs and crawls conform to the requirements set forth in the rules.

111. We decline, however, to revise our consumer education requirements for license relinquishment stations. Given that these stations will be going off the air, their incentives are necessarily different from stations that will remain on the air. Specifically, relinquishing stations may be less motivated to inform their viewers of their upcoming plan to terminate operations. Nevertheless, it is critical that viewers of these stations be informed of the potential loss of service so they can take the necessary steps to view programming from another source. As we did with consumer education during the DTV transition, we continue to believe a '''baseline requirement' is necessary and appropriate for license relinquishment stations to ensure the public awareness necessary for a smooth and orderly transition.'' For these reasons, we affirm our decision with respect to consumer education requirements for license relinquishment stations.

C. Reimbursement of Relocation Costs

1. Sufficiency of Reimbursement Fund

112. For the reasons set out below, we deny the requests of Affiliates Associations, Block Stations and NAB that the Commission limit the number of stations that can be repacked based on the availability of $1.75 billion for relocation expenses. We agree with CTIA that the statute merely limits the budget of the Fund to $1.75 billion but does not require that actual costs fall below this level. We affirm the repacking approach adopted in the *Incentive Auction R&O,* which will incorporate an optimization process to determine the amount of spectrum that can be cleared or repurposed based on the feasibility of assigning channels to stations that remain following the reverse auction. We deny NAB's request that the Commission impose additional constraints on provisional channel assignments, which will be made throughout the reverse auction, beyond those mandated by the statute. Imposing the cost-based constraints sought by petitioners is not mandated by the Spectrum Act and would be unworkable because the total cost of any repacking scenario remains unknown. Moreover, by increasing the number of constraints on the repacking process, granting the petitioners' request would limit our ability to recover spectrum through the incentive auction and undermine the goals of the Spectrum Act.

113. We agree that reducing the overall costs associated with the repacking process would be beneficial, not only to broadcasters and MVPDs that will rely on reimbursement from the Fund, but also because any excess in funding would be applied to deficit reduction, consistent with another goal of the Spectrum Act. Accordingly, the Commission has proposed an optimization process that seeks to minimize relocation costs associated with the repacking process by adopting a plan for final channel assignments that maximizes the number of stations assigned to their pre-auction channel and avoids reassignments of stations with high anticipated relocation costs. The proposed optimization process would accomplish the same goals as the proposals made by NAB, without compromising the speed and certainty provided by the repacking process adopted in the *Incentive Auction R&O.* In this regard, we note that Affiliates Associations' and NAB's reliance on estimates that up to 1,300 stations could be reassigned to new channels is misplaced. These estimates do not include any optimization to minimize channel moves and reduce relocation costs in the final TV channel assignment plan. Therefore, these results are not representative of the final number of stations that will be required to move, which we expect to be significantly lower as a result of optimization. Likewise, Affiliates Associations' concern that optimization may not reduce the number of stations repacked enough to bring the total costs below $1.75 billion does not account for the ability of the optimization process to avoid reassignments of stations with high anticipated relocation costs, thereby reducing the total cost of repacking. In light of these initiatives, we have no reason, at this time, to believe the Fund will be insufficient to cover all eligible relocation costs.

114. Contrary to Block Stations' contention, the ''all reasonable efforts'' mandate in section 1452(b)(2) does not require us to limit the number of repacked stations based on concerns about the sufficiency of the Fund. Section 1452(b)(2) applies ''[i]n making any reassignments or reallocations'' under section 1452(b)(1)(B). ''Reassignments and reallocations'' are ''ma[de]'' during the repacking process, and become ''effective'' after ''the completion of the reverse auction . . . and the forward auction,'' specifically upon release of the Channel Reassignment PN. Although the Commission's efforts to fulfill the statutory mandate include post-auction measures available to remedy losses in coverage area or population served that individual stations may experience, the mandate itself does not extend to the reimbursement process, which will occur after the Commission has made the reassignments and reallocations for which the statute provides.

115. We are not persuaded by Affiliates Associations' argument that participation in the reverse auction might become involuntary for broadcasters if there is a risk that they could potentially incur out-of-pocket expenses. As discussed in the *Incentive Auction R&O,* Congress allocated $1.75 billion of the auction proceeds to cover repacking costs. The Spectrum Act expressly provides that broadcasters' participation in the reverse auction is voluntary, but the repacking process is not voluntary. Other than suggesting that the Commission could be ''putting its thumb on the scale'' in favor of auction participation as broadcasters weigh their options, Affiliates Associations offers no evidence that, notwithstanding the $1.75 billion set aside to compensate broadcasters for reasonable relocation costs, broadcasters who would otherwise remain on the air will be motivated to participate in the reverse auction out of concern they will not be fully compensated for their relocation expenses. For the reasons stated above, we believe that the optimization process will enhance the sufficiency of the $1.75 billion Fund by reducing both the overall number of

stations repacked and the number of particularly expensive channel moves.

116. We decline Affiliates Associations' request to reconsider the conclusion that providing additional funding from auction proceeds beyond the $1.75 billion would be contrary to the express language of the Spectrum Act. Our decision is consistent with the Commission's conclusion in previous auctions that it lacks authority to use auction proceeds to pay incumbents' relocation costs. In this case, section 309 of the Communications Act, as revised, requires $1.75 billion of ''the proceeds'' of the auction to be deposited in the Reimbursement Fund, and ''all other proceeds'' to be deposited in the Public Safety Trust Fund and the general fund of the Treasury. While section 1452(i) of the Act provides that ''[n]othing in [section 1452(b)] shall be construed to'' expand or contract the FCC's authority except as expressly provided, that provision does not qualify the specific direction in section 309 as to funding priorities and the amount of proceeds to be dedicated to relocation costs.

117. We also deny requests that we mandate that winning forward auction bidders pay for post-auction expenses. First, we find no merit in the argument of ATBA that wireless carriers should reimburse LPTV stations. We agree with CTIA that the Commission is not obligated to provide reimbursement for displaced LPTV stations given Congress' unambiguous definition of ''broadcast television licensee,'' which includes only full-power television stations and Class A licensees. Because LPTV licensees do not meet the definition of ''broadcast station licensee'' they are not eligible for reimbursement from any source. Second, we disagree with the Affiliates Associations and NAB that there is relevant precedent for requiring winning forward auction bidders to reimburse relocation expenses of repacked broadcasters. Although in previous auctions the Commission has required winning bidders to cover incumbents' relocation costs pursuant to its broad spectrum management authority, in this case the Spectrum Act contains an explicit provision for the Reimbursement Fund. Congress's adoption of a precise amount for such costs indicates its intention to limit the FCC's authority to order additional reimbursements. In any event, it distinguishes the incentive auction from previous auctions in which the Commission has adopted other measures to address incumbent relocation costs.

118. The blanket waiver approach advocated by ATBA is inconsistent with the Commission's obligation to analyze waiver petitions to ensure they comply with the statutory requirements. The Spectrum Act's flexible use waiver provision provides a means of reducing demand on the Fund by conditioning petition grant on an agreement to forgo reimbursement, as well as offering broadcasters flexibility in the use of their licensed broadcast spectrum. In the *Incentive Auction R&O,* we declined to automatically grant service rule waiver requests because we found that, in evaluating a waiver petition, the Media Bureau must determine whether the petition meets the Commission's general waiver standard and complies with the statutory requirements pertaining to interference protection and the provision of one broadcast television program stream at no cost to the public. Similarly, this analysis must be performed for each station seeking a waiver of the Commission's service rules. Therefore, we deny the request of ATBA. We note that a station group may still obtain a waiver for all of its stations if the Media Bureau determines they demonstrate compliance with the relevant statutory provisions.

2. Stations That Are Not Repacked and Translator Facilities

119. We decline to exercise our discretionary authority to allow secondary services such as translator stations to claim reimbursement from the Fund, consistent with our decision not to protect these entities in the repacking process. This decision is consistent with Commission precedent to reimburse only primary services that are relocated, not secondary services that are not entitled to protection. Providing reimbursement for translators or other secondary services out of the $1.75 billion Fund would also reduce the amount available to reimburse repacked Class A and full-power stations for their eligible relocation costs. Therefore, we deny this portion of ATBA's petition.

120. Further, we are not persuaded by Affiliates Associations' argument that we acted inconsistently in declining to reimburse non-reassigned stations directly but allowing MVPDs to be reimbursed from the Fund for expenses related to a particular type of station move (successful high-VHF-to-low-VHF bidders). Although the Spectrum Act does not require reimbursement for either type of expense, they are distinguishable. The MVPD expenses in question arise from our decision to allow high-VHF-to-low-VHF bids, a decision that Congress could not have specifically anticipated. Our exercise of discretion makes MVPDs eligible for reimbursement for the reasonable costs they incur in order to continue to carry broadcast stations that are reassigned as a result of the auction, regardless of the type of bid option exercised by the broadcaster. In contrast, Congress clearly anticipated a distinction between reassigned and non-reassigned broadcasters, expressly providing for reimbursement of the former but not the latter. Moreover, non-repacked broadcasters might nevertheless indirectly benefit from a reimbursement to a reassigned station. We find that our decision was reasonable and will help to preserve limited reimbursement funds.

3. Reimbursement Timing

121. We dismiss on procedural grounds Affiliates Associations' request that we delay the completion of the auction until after forward licenses have been issued. The *Incentive Auction R&O* fully considered the argument by broadcasters that the Commission should delay the close of the forward auction until wireless licenses are assigned. Specifically, we found that this approach would produce uncertainty in the UHF Band transition because the Spectrum Act directs that no reassignments or reallocations may become effective until the completion of the reverse auction and the forward auction. We therefore dismiss the assertion of Affiliates Associations that close of the auction should be contingent on assigning licenses to winning forward auction bidders.

122. We deny the requests of Affiliates Associations and Gannett for reconsideration of certain aspects of the reimbursement process. In adopting a reimbursement process providing that eligible entities receive an initial allocation of up to 80 percent of their estimated expenses, the Commission concluded that this approach should help ensure that broadcasters and MVPDs do not face an undue financial burden while also reducing the possibility that we allocate more funds than necessary to cover actual relocation expenses. Moreover, this approach takes into consideration the practical limitation that the Commission will have only $1 billion (borrowed from Treasury) to allocate at the beginning of the reimbursement process. Nevertheless, we fully intend to make initial allocations quickly to help broadcasters begin the relocation process.

123. We also deny requests that we extend the initial three-month deadline for repacked stations to file construction permits and cost estimates. We find that doing so would postpone the award of initial funding allocations, thus making

it more difficult for broadcasters to meet construction deadlines. The purpose behind these deadlines is to permit broadcasters to begin construction as quickly as possible. Moreover, the statute requires that reimbursements from the Fund be completed no later than three years after the completion of the forward auction, and extending the filing deadline would compress the period within which disbursements could be made. We disagree with Affiliates Associations that the Media Bureau will be unable to approve the cost estimates and construction permit applications of a large number of stations quickly. With respect to construction permit applications, the Media Bureau has the experience and expertise to process these applications quickly and has adopted expedited processing guidelines for certain applications to further accelerate the approval process. We also plan to hire a reimbursement contractor to assist with processing the cost estimates and actual cost submissions throughout the reimbursement period. In order to make initial allocations, we require all eligible entities to file cost estimates at the three-month deadline because allocations will be calculated based on total cost estimates in relation to the amount available to the Commission at the time. To the extent a broadcaster or MVPD is unable to obtain price quotes by the filing deadline, it can use the predetermined cost estimates published in the Catalog of Eligible Expenses as cost estimate proxies. For these reasons, we retain the three-month deadline for eligible entities to file construction permit applications and reimbursement cost estimates.

IV. Other Matters

124. Mako argues that the *Incentive Auction R&O* violates the National Environmental Policy Act of 1969 (''NEPA'') because it did not include an ''Environmental Assessment'' (''EA'') with a ''No Significant Impact'' finding or a full ''Environmental Impact Statement'' (''EIS''). In addition, International Broadcasting Network (''IBN'') argues without any support that Chairman Wheeler should be recused from this proceeding. We find no evidence whatsoever to support IBN's claim that the Chairman should have recused himself from this proceeding and we therefore we reject this request. We reject this argument. The environmental effects attributable to the rules adopted in the *Incentive Auction R&O,* including the potential modification of broadcast facilities resulting from channel reassignments and the build-out of facilities in the 600 MHz Band, are already subject to environmental review under our NEPA procedures. Under those procedures, potentially significant environmental effects of proposed facilities will be evaluated on a site-specific basis prior to construction. Adoption of rules in the *Incentive Auction R&O* has no potentially significant environmental effects—beyond those already subject to site-specific reviews—that the Commission must evaluate in an EA or EIS under NEPA or the Commission's NEPA procedures.

V. Procedural Matters

125. *Final Regulatory Flexibility Act Analysis.* The Commission has prepared a Final Regulatory Flexibility Certification in Appendix C. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA).

126. In 2012, Congress mandated that the Commission conduct an incentive auction of broadcast television spectrum as set forth in the Middle Class Tax Relief and Job Creation Act of 2012 (''Spectrum Act''). The incentive auction will have three major pieces: (1) A ''reverse auction'' in which full power and Class A broadcast television licensees submit bids to voluntarily relinquish certain broadcast rights in exchange for payments; (2) a reorganization or ''repacking'' of the broadcast television bands in order to free up a portion of the ultra-high frequency (''UHF'') band for other uses; and (3) a ''forward auction'' of licenses for flexible use of the newly available spectrum. In the *Incentive Auction R&O,* the Commission adopted rules to implement the broadcast television spectrum incentive auction. Among other things, the Commission adopted the use of *TVStudy* software and certain modified inputs in applying the methodology described in OET–69 to evaluate the coverage area and population served by television stations in the repacking process. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (''FRFA'') was incorporated into the *Incentive Auction R&O.*

127. The *Second Order on Reconsideration* for the most part affirms the decisions made in the *Incentive Auction R&O.* To the extent the *Second Order on Reconsideration* revises the *Incentive Auction R&O,* it does so in a way that benefits both large and small entities, but without imposing any burdens or costs of compliance on such entities. First, the *Second Order on Reconsideration* modifies two of the input values that the Commission uses when applying the OET–69 methodology. Specifically, the *Second Order on Reconsideration* revises the vertical antenna pattern inputs for Class A stations in the *TVStudy* software, which will result in more accurate modeling of the service and interference potential of those stations during the repacking process. It also reduces the minimum effective radiated power (''ERP'') values, or power floors, that the *TVStudy* software uses to replicate a television station's signal contours when conducting pairwise interference analysis in the repacking process, which will result in greater accuracy. Second, the *Second Order on Reconsideration* provides that the Commission will make all reasonable efforts to preserve the coverage areas of stations operating pursuant to waivers of the antenna height above average terrain (''HAAT'') or ERP limits set forth in the Commission's rules, provided such facilities are otherwise entitled to protection under the *Incentive Auction R&O.* Third, in the *Incentive Auction R&O,* the Commission extended discretionary protection to five stations affected by the destruction of the World Trade Center. In the *Second Order on Reconsideration,* the Commission extends this protection to an additional station, WNJU, Linden, New Jersey. Fourth, we exercise discretion to protect stations that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012. Fifth, we revise our consumer education requirements to provide stations changing channels as a result of the incentive auction and repacking additional flexibility to determine the timeslots to air their consumer education public service announcements.

128. None of these changes to the *Incentive Auction R&O* adopted in the *Second Order on Reconsideration* will impose additional costs or impose

additional record keeping requirements on either small or large entities. Therefore, we certify that the changes adopted in this *Second Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities.

129. The Commission will send a copy of the *Second Order on Reconsideration,* including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the *Second Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. See 5 U.S.C. 605(b).

130. *Congressional Review Act.* The Commission will send a copy of this Second Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

VII. Ordering Clauses

131. *It is ordered,* pursuant to the authority found in sections 1, 4, 301, 303, 307, 308, 309, 310, 316, 319, 325(b), 332, 336(f), 338, 339, 340, 399b, 403, 534, and 535 of the Communications Act of 1934, as amended, and sections 6004, 6402, 6403, 6404, and 6407 of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, 126 Stat. 156, 47 U.S.C. 151, 154, 301, 303, 307, 308, 309, 310, 316, 319, 325(b), 332, 336(f), 338, 339, 340, 399b, 403, 534, 535, 1404, 1452, and 1454, this Second Order on Reconsideration in GN Docket No. 12–268 *is adopted.*

132. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, *is granted in part and denied in part* to the extent described herein

133. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by NBC Telemundo License, LLC, as clarified on April 7, 2015, *is granted* to the extent described herein.

134. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by the Walt Disney Company *is granted* to the extent described herein.

135. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by Dispatch Printing Company *is granted* to the extent described herein.

136. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by Cohen, Dippell, and Everist, P.C *is granted in part and denied in part* to the extent described herein.

137. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petitions for Reconsideration filed by Advanced Television Broadcasting Alliance; and Gannett Co., Inc., Graham Media Group, and ICA Broadcasting *are denied in part* to the extent described herein.

138. *It is further ordered* that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. and 405, and section 1.429 of the Commission's rules, 47 CFR 1.429, the Petitions for Reconsideration filed by Abacus Television; American Legacy Foundation; Artemis Networks LLC; Association of Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Service; Beach TV Properties, Inc.; Block Communications, Inc.; Bonten Media Group, Inc. and Raycom Media, Inc.; Competitive Carriers Association; Free Access & Broadcast Telemedia, LLC; GE Healthcare; International Broadcasting Network; the LPTV Spectrum Rights Coalition; Mako Communications, LLC; Media General, Inc.; Radio Television Digital News Association; Sennheiser Electronic Corporation; Signal Above, LLC; Qualcomm Inc.; T-Mobile USA, Inc.; U.S. Television, LLC; The Videohouse, Inc.; and the WMTS Coalition *are dismissed and/or denied* to the extent described herein.

139. *It is further ordered* that the Petition for Leave to File Supplemental Reconsideration filed by Abacus Television on November 12, 2014 and the Petition for Leave to Amend filed by the LPTV Coalition on November 12, 2014 *are denied.*

140. *It is further ordered* that the Motion for Leave to File Supplement to Petition for Reconsideration filed by Free Access and Broadcast Telemedia, LLC on December 15, 2014 *is denied.*

141. *It is further ordered* that the Commission's rules *are hereby amended* as set forth in the Final Rules and *will become effective* September 8, 2015 except for § 73.3700(c)(6) which contains new or modified information collection requirements that have not be approved by OMB. The Federal Communications Commission will publish a document announcing the effective date.

142. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Second Order on Reconsideration in GN Docket No. 12–268, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

143. *It is further ordered* that the Commission *shall send* a copy of this Second Order on Reconsideration in GN Docket No. 12–268 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Administrative practice and procedure, Communications common carriers, Radio, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final rules

For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as set forth below:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336 and 339

■ 2. Section 73.3700 paragraph (c) is revised to read as follows:

§ 73.3700 Post-incentive auction licensing and operation.

* * * * *

(c) *Consumer education for transitioning stations.* (1) License relinquishment stations that operate on a commercial basis will be required to

air at least one Public Service Announcement (PSA) and run at least one crawl in every quarter of every day for 30 days prior to the date that the station terminates operations on its pre-auction channel. One of the required PSAs and one of the required crawls must be run during prime time hours (for purposes of this section, between 8:00 p.m. and 11:00 p.m. in the Eastern and Pacific time zones, and between 7:00 p.m. and 10:00 p.m. in the Mountain and Central time zones) each day.

(2) Noncommercial educational full power television license relinquishment stations may choose to comply with these requirements in paragraph (c)(1) of this section or may air 60 seconds per day of on-air consumer education PSAs for 30 days prior to the station's termination of operations on its pre-auction channel.

(3) Transitioning stations, except for license relinquishment stations, must air 60 seconds per day of on-air consumer education PSAs or crawls for 30 days prior to the station's termination of operations on its pre-auction channel.

(4) *Transition crawls.* (i) Each crawl must run during programming for no less than 60 consecutive seconds across the bottom or top of the viewing area and be provided in the same language as a majority of the programming carried by the transitioning station.

(ii) Each crawl must include the date that the station will terminate operations on its pre-auction channel; inform viewers of the need to rescan if the station has received a new post-auction channel assignment; and explain how viewers may obtain more information by telephone or online.

(5) *Transition PSAs.* (i) Each PSA must have a duration of at least 15 seconds.

(ii) Each PSA must be provided in the same language as a majority of the programming carried by the transitioning station; include the date that the station will terminate operations on its pre-auction channel; inform viewers of the need to rescan if the station has received a new post-auction channel assignment; explain how viewers may obtain more information by telephone or online; and for stations with new post-auction channel assignments, provide instructions to both over-the-air and MVPD viewers regarding how to continue watching the television station; and be closed-captioned.

(6) Licensees of transitioning stations, except for license relinquishment stations, must place a certification of compliance with the requirements in paragraph (c) of this section in their online public file within 30 days after beginning operations on their post-auction channels. Licensees of license relinquishment stations must include the certification in their notification of discontinuation of service pursuant to § 73.1750 of this chapter.

* * * * *

[FR Doc. 2015–19281 Filed 8–5–15; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 192, 193, and 195

[Docket No. PHMSA–2011–0337; Amdt. Nos. 192–119; 193–25; 195–99]

RIN 2137–AE85

Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments; Corrections

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Correcting amendments.

SUMMARY: PHMSA published in the **Federal Register** of January 5, 2015 (80 FR 168), a document containing revisions to the Pipeline Safety Regulations. That document inadvertently removed paragraphs (b)(1) through (b)(4) in 49 CFR 192.153. This document removes that amendment and makes several editorial changes.

DATES: This amendment is effective August 6, 2015.

FOR FURTHER INFORMATION CONTACT:

Technical Information: Mike Israni by phone at 202–366–4571 or by email at *mike.israni@dot.gov*.

Regulatory Information: Cheryl Whetsel by phone at 202–366–4431 or by email at *cheryl.whetsel@dot.gov*.

SUPPLEMENTARY INFORMATION: PHMSA published in the **Federal Register** of January 5, 2015 (80 FR 168), a document containing revisions to the Pipeline Safety Regulations. That document inadvertently removed paragraphs (b)(1) through (b)(4) in 49 CFR 192.153; incorrectly listed a cross-reference in § 193.2321(b)(1); incorrectly formatted the word ''see'' in various sections in parts 192, 193, and 195; and specified an incorrect authority citation in part 193. This document corrects the final regulations to address these issues.

List of Subjects

49 CFR Part 192

Incorporation by reference, Natural gas, Pipeline safety.

49 CFR Part 193

Incorporation by reference, Liquefied natural gas, Pipeline safety.

49 CFR Part 195

Anhydrous ammonia, Carbon dioxide, Incorporation by reference, Petroleum pipeline safety.

In consideration of the foregoing, PHMSA amends 49 CFR parts 192, 193, and 195 as follows:

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 1. The authority citation for part 192 is revised to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, 60116, 60118 and 60137; and 49 CFR 1.53.

§ 192.55, 192.191, 192.735, 192.923, 192.933, and Appendix B to Part 192 [Amended]

■ 2. In 49 CFR part 192, remove ''(incorporated by reference, see § 192.7)'' and add in its place ''(incorporated by reference, *see* § 192.7)'' everywhere it appears in the following sections:

■ a. Section 192.55(e);
■ b. Section 192.735(b);
■ c. Section 192.923(b)(1);
■ d. Section 192.933(d)(1)(i); and
■ e. Appendix B to part 192.

§ 192.11 [Amended]

■ 3. In § 192.11:

■ a. Amend paragraph (a) by removing ''NFPA 58 and 59'' and adding in its place ''NFPA 58 and NFPA 59''.

■ b. Amend paragraph (c) by removing ''NFPA 58 and 59'' and ''ANSI/NFPA 58 and 59'' and adding in their place the terms ''NFPA 58 and NFPA 59''.

■ 4. In § 192.153, paragraphs (b)(1), (2), (3), and (4) are added to read as follows:

§ 192.153 Components fabricated by welding.

* * * * *

(b) * * *

(1) Regularly manufactured butt-welding fittings.

(2) Pipe that has been produced and tested under a specification listed in appendix B to this part.

(3) Partial assemblies such as split rings or collars.

(4) Prefabricated units that the manufacturer certifies have been tested

to at least twice the maximum pressure to which they will be subjected under the anticipated operating conditions.

* * * * *

PART 193—LIQUEFIED NATURAL GAS FACILITIES: FEDERAL SAFETY STANDARDS

■ 5. The authority citation for part 193 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60103, 60104, 60108, 60109, 60110, 60113, 60118; and 49 CFR 1.53.

§ 193.2321 [Amended]

■ 6. In § 193.2321, amend paragraph (b)(1) by removing ''(incorporated by reference, *see* § 193. 2012)'' and adding in its place ''(incorporated by reference, *see* § 193.2013).''

PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

■ 7. The authority citation for part 195 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60116, 60118 and 60137; and 49 CFR 1.53.

§§ 195.132, 195.205, 195.264, 195.405, and 195.432 [Amended]

■ 8. In 49 CFR part 195, remove ''(incorporated by reference, see § 195.3)'' and add in its place ''(incorporated by reference, *see* § 195.3)'' everywhere it appears in the following sections:

■ a. Section 195.132(b)(1);
■ b. Section 195.205(b)(1) and (2);
■ c. Section 195.264(b)(2) and (e)(1) and (3);
■ d. Section 195.405(b); and
■ e. Section 195.432(c).

Issued in Washington, DC, on July 24, 2015, under authority delegated in 49 CFR Part 1.97.

Stacy Cummings,

Interim Executive Director.

[FR Doc. 2015–18565 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 140117052–4402–02]

RIN 0648–XE077

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2015 commercial Atlantic bluefish quota to the Commonwealth of Massachusetts. These quota adjustments are necessary to comply with the Bluefish Fishery Management Plan quota transfer provision. This announcement informs the public of the revised commercial quota for each state involved.

DATES: Effective August 5, 2015, through December 31, 2015.

FOR FURTHER INFORMATION CONTACT: Reid Lichwell, Fishery Management Specialist, (978) 281–9112.

SUPPLEMENTARY INFORMATION: Regulations governing the bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.162.

The final rule implementing Amendment 1 to the Bluefish Fishery Management Plan published in the **Federal Register** on July 26, 2000 (65 FR 45844), provided a mechanism for transferring bluefish quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Greater Atlantic Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.162(e). The Regional Administrator is required to consider the criteria in § 648.162(e)(1) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 200,000 lb (90,719 kg) of its 2015 commercial quota to Massachusetts. This transfer was prompted by state officials in Massachusetts to ensure their commercial bluefish quota is not exceeded. The Regional Administrator has determined that the criteria set forth in § 648.162(e)(1) are met. The revised bluefish quotas for calendar year 2015 are: North Carolina, 1,480,371 lb (671,485 kg); and Massachusetts, 552,036 lb (250,399 kg), based on the final 2015 Atlantic Bluefish Specifications.

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 3, 2015.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2015–19486 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 150126074–5655–02]

RIN 0648–XD742

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; 2015 Atlantic Bluefish Specifications

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

ACTION: Final rule.

SUMMARY: NMFS is implementing final specifications for the 2015 Atlantic bluefish fishery, including catch restrictions for commercial and recreational fisheries. This action is necessary to establish the 2015 harvest limits and management measures to prevent overfishing. The intent of the action is to inform the public of the 2015 catch limits and state-to-state commercial quota transfers consistent with the Atlantic Bluefish Fishery Management Plan and the recommendations of the Mid-Atlantic Fishery Management Council. NMFS is also approving transfers of commercial bluefish quota from the Commonwealth of Virginia and the State of Florida to the State of New York to ensure New York quota would not be exceeded.

DATES: The final specifications and state-to-state commercial quota transfers for the 2015 bluefish fishery are effective August 5, 2015, through December 31, 2015.

ADDRESSES: Copies of the specifications document, including the Environmental Assessment and Initial Regulatory Flexibility Analysis (EA/IRFA) and other supporting documents for the specifications, are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The specifications document is also accessible via the Internet at: *http://www.greateratlantic.fisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Reid Lichwell, Fishery Management Specialist, (978) 281–9112.

SUPPLEMENTARY INFORMATION:

Background

The Atlantic bluefish fishery is jointly managed by the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission. The management unit for bluefish specified in the Atlantic Bluefish Fishery Management Plan is U.S. waters of the western Atlantic Ocean. Regulations implementing the FMP appear at 50 CFR part 648, subparts A and J. The regulations requiring annual specifications are found at § 648.162, and are described in the proposed rule. The proposed rule for this action published in the **Federal Register** on April 27, 2015 (80 FR 23249), and comments were accepted through May 12, 2015.

Final Specifications

A description of the process used to estimate bluefish stock status and fishing mortality, as well as the process for deriving the annual catch limit (ACL) and associated quotas and harvest limits, is provided in the proposed rule and in the bluefish regulations at §§ 648.160 through 648.162. The stock is not overfished or experiencing overfishing, and the catch limits described below reflect the best available scientific information for bluefish. The final 2015 bluefish acceptable biological catch (ABC), ACL, and Annual Catch Target (ACT) are specified at 21.544 million lb (9,772 mt).

The ACT is initially allocated between the recreational fishery (83 percent) and the commercial fishery (17 percent). After deducting 3.351 million lb (1,520 mt) to adjust for recreational discards (commercial discards are considered negligible), the recreational Total Allowable Landings (TAL) is 14.530 million lb (6,591 mt) and the commercial TAL is 3.662 million lb (1,661 mt).

A transfer of quota from the recreational to the commercial sector is permitted under the FMP because the initial commercial fishery ACT is less than 10.50 million lb (4,763 mt) and the recreational fishery is not projected to land its harvest limit in 2015.

The recreational landings for 2015 are projected to be 12.951 million lb (5,875 mt). This projection was based on the average recreational landings from 2012 through 2014, including final 2014 Marine Recreational Information Program data that became available after the publication of the proposed rule. With the addition of updated and final recreational landings data, the projected 2015 recreational landings (12.951 million lb; 5,875 mt) are lower than what was published in the proposed rule (13.073 million lb; 5,930 mt). We are implementing a revised transfer of 1.579 million lb (716 mt) from the recreational to the commercial sector in the final rule. This updated final transfer results in an adjusted 2015 commercial quota of 5.241 million lb (2,377 mt), a 35-percent decrease from 2014 (7.458 million lb; 3,383 mt), and an adjusted 2015 RHL of 12.951 million lb (5,875 mt), a 4.3-percent decrease from the 2014 RHL (13.523 million lb; 6,133 mt). Consistent with Council recommendations, these final specifications do not allocate research set-aside quota for 2015; therefore, no additional adjustments to commercial or recreational allocations are needed.

The final rule implementing Amendment 1 to the Bluefish Fishery Management Plan, which was published in the **Federal Register** on July 26, 2000 (65 FR 45844), provided a mechanism for bluefish quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Greater Atlantic Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.162(e). The Regional Administrator is required to consider the criteria in § 648.162(e)(1) in the evaluation of requests for quota transfers or combinations.

During the processing of this final rule, the Commonwealth of Virginia and the State of Florida each requested we transfer 150,000 lb (68,039 kg) to the State of New York to help ensure the NY state quota would not be exceeded. The state commercial transfers will not preclude the overall annual quota from being fully harvested, and will also address contingencies in the fishery. In addition, the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act. These transfers have been approved and are incorporated within this final rule and the individual state quota allocations have been adjusted to reflect the transfers. The final bluefish quotas are shown in Table 1.

Final Recreational Possession Limit

Consistent with the recommendation by the Council, this final rule maintains the status quo daily recreational possession limit of up to 15 fish per person for 2015.

Final State Commercial Allocations

The final state commercial allocations, including the previously outlined transfers, for the recommended 2015 commercial quota are shown in Table 1. The initial quotas are based on the percentages specified in the FMP. There were no states that exceeded their quota in 2014; therefore, no accountability measures are being implemented for the 2015 fishing year.

TABLE 1—FINAL BLUEFISH COMMERCIAL STATE-BY-STATE ALLOCATIONS FOR 2015

State	Percent share	2015 Commercial quota (lb) before transfer	2015 Transfer of commercial quota (lb) as of 7/10/2015	Final 2015 commercial quota (lb)	Final 2015 commercial quota (kg)
ME	0.6685	35,037		35,037	15,893
NH	0.4145	21,725		21,725	9,854
MA	6.7167	352,036		352,036	159,682
RI	6.8081	356,826		356,826	161,855
CT	1.2663	66,369		66,369	30,105
NY	10.3851	544,304	+300,000	844,304	382,970
NJ	14.8162	776,547		776,547	352,239
DE	1.8782	98,440		98,440	44,652
MD	3.0018	157,330		157,330	71,365
VA	11.8795	622,629	−150,000	472,629	214,380
NC	32.0608	1,680,371		1,680,371	762,211
SC	0.0352	1845		1,845	837
GA	0.0095	498		498	226
FL	10.0597	527,249	−150,000	377,249	171,117

TABLE 1—FINAL BLUEFISH COMMERCIAL STATE-BY-STATE ALLOCATIONS FOR 2015—Continued

State	Percent share	2015 Commercial quota (lb) before transfer	2015 Transfer of commercial quota (lb) as of 7/10/2015	Final 2015 commercial quota (lb)	Final 2015 commercial quota (kg)
Total	100.0001	5,241,202	.....	5,241,202	2,377,394

Comments and Responses

The public comment period for the proposed rule ended on May 12, 2015. There were 19 comments that resulted in 9 groups of substantive comments received from the public, including recreational and commercial fishermen, in regards to the proposed rule. Three comments were non-substantive and did not address this rule or the subject matter related to the rule.

Comment 1: One commenter generally criticized NMFS and the data used to set catch limits. The commenter did not suggest other data or approaches that might be better suited for establishing specifications.

Response: Consistent with National Standard 2 of the MSA, NMFS used the best scientific information available and is approving specifications for the bluefish fishery. The most up-to-date stock assessment and recreational and commercial catch data were used. The final specifications in this rule are consistent with the FMP and recommendations of the Council.

Comment 2: One commenter expressed concern regarding the economic effects that this rule would have on the recreational sector, specifically party and charter/head boat businesses. The commenter suggested there should be an increase in quota specifically for charter/head boats.

Response: NMFS disagrees that a quota increase for charter and party vessels is needed. The 2015 specifications have been established following the procedures set forth in the FMP, which does not allocate bluefish harvest between sectors of the recreational fishery. Marine Recreational Information Program (MRIP) catch data by mode for 2013 indicate that approximately 59 percent of bluefish were caught from shore, 34 percent of bluefish were caught from private and rental boats, and 7 percent from party and charter boats. The 2015 RHL represents approximately 71 percent of the coastwide total allowable landings for bluefish when accounting for transfers, which are expected to be equivalent to recent observed recreational harvest across all sectors (shore, private, charter, etc.). As such, the 2015 RHL is not likely to constrain party or charter fishing opportunity or catch. According to the analyses in the EA supporting this action (see **ADDRESSES**), the economic impacts of these specifications have neutral to slightly negative impacts that are not expected to be significant to any component of the recreational fishery.

Comment 3: One commenter suggested that with the decrease in private angler and for-hire effort, there should be no reduction in the bluefish recreational quota.

Response: NMFS disagrees. The RHL is set to equal the expected recreational catch for 2015. NMFS calculates the expected catch by averaging the yearly recreational landing over a three-year period (2012–2014) using MRIP data. Although the 2014 RHL is less than the 2015 RHL, the fishery is projected to catch less bluefish recreationally during 2015. Therefore, the RHL is not likely to constrain or limit recreational fishing opportunity in 2015.

Comment 4: Three commenters requested clarification for the decision to reduce the ACL, given that the bluefish stock is not currently being overfished.

Response: Although the bluefish stock is not currently overfished or experiencing overfishing, estimated biomass has declined slightly in recent years. Based upon the results of the 2014 assessment update for bluefish, the Council's Scientific and Statistical Committee (SSC) recommended a reduction in the ABC for 2015. This reduction is necessary to reduce the risk of overfishing the stock.

Comment 5: Three commenters, including an operator of a party boat that targets bluefish, agreed with NMFS that the current recreational bag limit of 15 bluefish per person per day should remain unchanged for the 2015 fishing year.

Response: NMFS agrees and has retained the Council's recommendation that the status quo recreational bag limit of 15 bluefish per person, per day remain in place for the 2015 fishing year.

Comment 6: Five commenters stated that the bluefish specifications should remain unchanged from the 2014 fishing year. The comments offered no suggestions on why specifications should remain unchanged.

Response: NMFS disagrees that the status quo bluefish specifications would be appropriate for 2015. As outlined in the response to comment number 3, the bluefish biomass has declined. The specifications in place for 2014 would be expected to result in negative biological impacts to the bluefish stock. If the 2014 catch limits remain in place for 2015 and were fully achieved, it would result in catches above the ABC recommended by the SSC, and could result in overfishing. Under National Standard 1 guidelines, the Council cannot recommend catch limits higher than the ABC recommended by its SSC.

Comment 7: Two commenters expressed concern that the 2015 specifications imposed regulations that were too severe and would have an adverse effect on small businesses in the commercial sector.

Response: According to the economic analyses in the EA (see **ADDRESSES**), the impacts of the 2015 specifications are not expected to be significant. Although there are 1,009 affiliate firms that caught bluefish from 2011 to 2013, of those, 1,001 were considered small business entities and bluefish comprised a very small amount of their annual gross revenues, averaging 0.63 percent.

The 2015 commercial bluefish quota is lower than the commercial quota implemented in 2014. However, the 2015 quota is higher than the realized commercial landings for 2014. Under the 2015 commercial quota, it is expected that commercial bluefish fishermen would likely land bluefish similarly to 2014 landings. Furthermore, the Bluefish FMP permits states to transfer bluefish quota to each other as a tool to mitigate the potential adverse economic impacts of a fishery closure in a particular state.

Comment 8: One commenter expressed concern that offshore fleets outside of the Exclusive Economic Zone (EEZ) are having an adverse impact on bluefish abundance. The commenter suggested that the EEZ border be expanded to improve U.S. fish stocks.

Response: NMFS recognizes that a small amount of bluefish are caught outside the U.S. EEZ. Bluefish stock assessments are based on data collected from within EEZ and changes in stock biomass from a variety of sources,

including international fishing pressures, are part of the assessment. Changes to the EEZ boundaries would be beyond the scope of this rule.

Comment 9: One commenter inquired about the reduction in the commercial quota compared to a smaller reduction in the recreational TAL. The commenter asked if there could be a more equitable split in quota reduction to accomplish the same conservation goals.

Response: Bluefish catch is allocated between the recreational and commercial fisheries according to specific requirements in the Bluefish FMP, as described in the EA (see **ADDRESSES**). Allocation changes can be addressed by the Council through an FMP amendment. Apart from the previously described transfer, NMFS has no authority to alter allocations between the commercial and recreational sector. How the 2015 specifications were derived is explained in detail in the preamble of this rule and the proposed rule (80 FR 23249).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Bluefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule is exempt from review under Executive Order 12866.

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

The Assistant Administrator for Fisheries finds there is a need to implement these measures in an timely manner in order to help achieve conservation objectives for the bluefish fishery which constitutes good cause, under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness and to make the 2015 Atlantic bluefish specifications effective immediately upon filing with the Office of the Federal Register.

The bluefish fishing year began on January 1, 2015, and has been operating without an established bluefish quota. Until this final rule becomes effective, there will be no established bluefish quota for 2015 and therefore no authority to close a fishery approaching a quota limit. A 30-day delay in implementing this final rule would delay the setting of quota used to properly manage and monitor bluefish stocks at the state and federal level. Development of this final rule was undertaken as quickly as possible; however, incorporating the most up-to-date MRIP data necessarily created a delay while analysis occurred.

This final rule also implements two quota transfers of commercial bluefish quota from the Commonwealth of Virginia and the State of Florida to the State of New York to ensure New York does not exceed its 2015 commercial quota.

The FRFA included in this final rule was prepared pursuant to 5 U.S.C. 604(a), and incorporates the IRFA and a summary of analyses completed to support the action. A public copy of the EA/IRFA is available from the Council (see **ADDRESSES**).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

Final Regulatory Flexibility Analysis

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

The comments NMFS received did not raise specific issues, but commented generally on the economic analyses summarized in the IRFA. Refer to the ''Comments and Responses'' section of this preamble for more detail. No changes to the proposed rule were required to be made as a result of public comment.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

The Small Business Administration (SBA) defines a small business in the commercial harvesting sector as a firm with receipts (gross revenues) of up to $5.5 million for shellfish and $20.5 million for finfish businesses. A small business in the recreational fishery is a firm with receipts of up to $7.5 million.

According to the 2011–2013 Northeast affiliate ownership database, 1,009 fishing businesses or affiliated firms (vessels grouped together by a common owner) landed bluefish during the 2011–2013 period, with 1,001 of those businesses categorized as small businesses and 8 categorized as large businesses. South Atlantic Trip Ticket reports identified 790 vessels that landed bluefish in North Carolina and 1,338 vessels that landed bluefish on Florida's east coast in 2013.[1] Bluefish landings in South Carolina and Georgia were near zero in 2013, representing a negligible proportion of the total bluefish landings along the Atlantic Coast. In recent years, approximately 2,000 party/charter vessels have been active in the bluefish fishery and/or have caught bluefish.

[1] Some of these vessels were also identified in the Northeast dealer data; therefore, double counting is possible.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

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

Specification of commercial quota, recreational harvest levels, and possession limits is constrained by the conservation objectives set forth in the FMP and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Act. With the specification options considered, the measures in this final rule are the only measures that both satisfy these overarching regulatory and statutory requirements while minimizing, to the extent possible, impacts on small entities. The 2015 commercial quota implemented by this final rule is 35 percent lower than the 2014 quota, but higher than actual 2014 bluefish landings. All affected states will receive decreases in their individual commercial quota allocations. The magnitude of the decrease varies depending on the state's relative percent share in the total commercial quota, as specified in the FMP. The states have the ability to transfer commercial quota from one state to another; although the use of this management measure cannot be predicted, it is often used to prevent quota overages in the commercial sector and can minimize the economic impacts associated with a quota allocation.

The 2015 RHL contained in this final rule is approximately 4.3 percent lower than the RHL in 2014. The 2015 RHL is greater than the total recreational bluefish harvested in 2014, and therefore it does not constrain recreational bluefish harvest below a level that the fishery is anticipated to achieve. The possession limit for bluefish will remain at 15 fish per person, so there should be no impact on demand for party/charter vessel fishing and, therefore, no impact on revenues earned by party/charter vessels. No negative economic impacts on the recreational fishery are anticipated.

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 agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the Atlantic bluefish fishery.

In addition, copies of this final rule and guide (*i.e.,* permit holder letter) are available from NMFS (see **ADDRESSES**) and at the following Web site: *www.greateratlantic.fisheries.noaa.gov.*

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 31, 2015.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2015–19269 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 150316270–5662–02]

RIN 0648–XD843

Fisheries Off West Coast States; West Coast Salmon Fisheries; 2015 Management Measures; Correction

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

ACTION: Final rule; correcting amendment.

SUMMARY: On May 5, 2015, NMFS published a final rule to implement fishery management measures for the 2015 ocean salmon fisheries off the coast of the states of Washington, Oregon, and California under the jurisdiction of the Pacific Fisheries Management Council (Council). This correcting amendment changes the date of an area closure in the recreational salmon fishery that was incorrect in the original rule; this will make the Federal rule consistent with State regulations.

DATES: This correction is effective August 10, 2015, until the effective date of the 2016 management measures, as published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323.

SUPPLEMENTARY INFORMATION:

Need for Correction

On May 5, 2015, NMFS published a final rule (80 FR 25611) that implemented the fishery management measures for the 2015 ocean salmon fisheries off the coasts of the states of Washington, Oregon, and California under the jurisdiction of the (Council). On page 25620, in the first column, under the subheading ''—Queets River to Leadbetter Point (Westpoint Subarea),'' in the second paragraph, fifth sentence, an incorrect date was provided for the closure of the Grays Harbor Control Zone. Under Washington State regulations, the Grays Harbor Control Zone is closed beginning the second Monday in August. The Federal fishery management measures for the 2015 ocean salmon fisheries were intended to be consistent with the Washington State regulations and to include the same closing date. In 2015, the second Monday in August is August 10. However, the date for the second Monday in August in 2014 (August 11) was inadvertently left in the management measures for 2015, as originally published. To be consistent with the state regulations, as was intended, the correct date of the Grays Harbor Control Zone closure in 2015 is August 10, 2015. This rule corrects the closure date for the Grays Harbor Control Zone in 2015, from ''August 11'' to ''August 10.'' This correction was discussed during an inseason consultation among NMFS, the Council, Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, Salmon Advisory Subpanel, and Salmon Technical Team on July 21, 2015. Also, the date is correct in state regulations. Therefore, this correction is anticipated by the public and the regulatory agencies and its implementation will cause no harm.

Correction

In the **Federal Register** of May 5, 2015 (80 FR 25611), on page 25620, under the subheading ''—Queets River to Leadbetter Point (Westport Subarea)'', the second paragraph, fifth sentence is corrected to read as follows:

''Grays Harbor Control Zone closed beginning August 10 (C.4.b).''

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries (AA) finds there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be unnecessary and contrary to public interest. Notice and comment are unnecessary and contrary to the public interest because this action corrects an inadvertent error in regulations for a fishery that opened on July 1, and immediate notice of the error and correction is necessary to prevent confusion among participants in the fishery that could result from the existing conflict between state regulations and the final rule. This error was called to NMFS' attention on July 21, 2015. To effectively correct the error, this correction must be done as soon as possible prior to August 10, the date when the Grays Harbor Control Zone should be closed. There is not sufficient time for a notice and comment rulemaking prior to August 10. In addition, this action makes only a minor change to the dates of the fishery.

This correction will not affect the results of analyses conducted to support management decisions in the salmon fishery nor change the total catch of salmon. No change in operating practices in the fishery is required. For the same reasons, the AA has determined that good cause exists to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d). Because prior notice and an opportunity for public comment are not required to be provided for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are not applicable. Accordingly, no Regulatory Flexibility Analysis is required for this rule and none has been prepared.

This final rule is not significant under Executive Order 12866.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: July 31, 2015.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2015–19268 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 80, No. 151

Thursday, August 6, 2015

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3560

RIN 0575–AC98

Multi-Family Housing Program Requirements To Reduce Financial Reporting Requirements

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Housing Service (RHS) is proposing to amend regulations to change program requirements regarding financial reporting to align RHS requirements with those of the Department of Housing and Urban Development (HUD) which will reduce the burden on the borrower to produce multiple financial reports.

DATES: Written comments must be received on or before October 5, 2015 to be assured for consideration.

ADDRESSES: You may submit comments to this rule by any of the following methods:

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

FOR FURTHER INFORMATION CONTACT: Stephanie White, Director, Multi-Family Housing Portfolio Management Division, Rural Housing Service, Room 1263S—STOP 0782, 1400 Independence Avenue SW., Washington, DC 20250–0782, Telephone: (202) 720–1615.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, Classification

This proposed rule has been determined to be non-significant and, therefore was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

Authority

The Multi-Family Housing program is administered, subject to appropriations, by the U.S. Department of Agriculture (USDA) as authorized under Sections 514, 515 and 516 of the Housing Act of 1949, as amended (42 U.S.C. 1484, 1485, and 1486).

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' RHS has determined that this action does not constitute a major Federal action significantly affecting the quality of the environment. In accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Regulatory Flexibility Act

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The undersigned has determined and certified by signature on this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded program nor does it require any more action on the part of a small business than required of a large entity.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This rule does not impose substantial direct compliance costs on State and local Governments; therefore, consultation with the States is not required.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

Unfunded Mandate Reform Act (UMRA)

Title II of the UMRA, Public Law 104–4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal Agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal Governments, in the aggregate, or to the private sector, of $100 million or more in any one-year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal Governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Paperwork Reduction Act of 1995

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number 0575–0189. This proposed rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

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

Programs Affected

The programs affected by this regulation are listed in the Catalog of Federal Domestic Assistance under number 10.405—Farm Labor Housing Loans and Grants; 10.415—Rural Rental Housing Loans; and 10.427—Rural Rental Assistance Payments.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on RHS in the development of regulatory policies that have tribal implications or preempt tribal laws. RHS has determined that the proposed rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RHS on this proposed rule, they are encouraged to contact USDA's Office of Tribal Relations or Rural Development's Native American Coordinator at (720) 544–2911 or *AIAN@usda.gov* to request such consultation.

Executive Order 12372, Intergovernmental Consultation

These loans are subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. RHS conducts intergovernmental consultations for each loan in accordance with 2 CFR part 415, subpart C.

Non-Discrimination Policy

The U.S. Department of Agriculture (USDA) prohibits discrimination against its customers, employees, and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal, and where applicable, political beliefs, marital status, familial or parental status, sexual orientation, or all or part of an individual's income is derived from any public assistance program, or protected genetic information in employment or in any program or activity conducted or funded by the Department. (Not all prohibited bases will apply to all programs and/or employment activities.)

If you wish to file a Civil Rights program complaint of discrimination, complete the *USDA Program Discrimination Complaint Form* (PDF), found online at *http://www.ascr.usda.gov/complaint_filing_cust.html,* or at any USDA office, or call (866) 632–9992 to request the form. You may also write a letter containing all of the information requested in the form. Send your completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410, by fax (202) 690–7442 or email at *program.intake@usda.gov.*

Individuals who are deaf, hard of hearing or have speech disabilities and you wish to file either an EEO or program complaint please contact USDA through the Federal Relay Service at (800) 877–8339 or (800) 845–6136 (in Spanish).

Persons with disabilities who wish to file a program complaint, please see information above on how to contact us by mail directly or by email. If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Background

Section 515(z)(1) of the Housing Act of 1949, as amended states that the Secretary shall require that borrowers in programs authorized by this section maintain accounting records in accordance with generally accepted accounting principles for all projects that receive funds from loans made or guaranteed by the Secretary. Since RHS considers 514 loans to have similar risks as 515 loans, the regulatory accounting requirements apply to both types of loans. See 7 CFR 3560.578.

RHS published an interim rule on November 26, 2004, (69 FR 69032–69176) to implement the consolidation of MFH's previous 14 separate regulations, with an effective date of February 24, 2005. As part of the interim rule, RHS required that engagement reports be submitted with the annual financial reports for borrowers with 16 or more units. Borrowers with less than 16 units in their housing project are required to submit annual financial reports using a limited scope engagement. Engagement is currently defined at 7 CFR 3560.11.

RHS proposes to remove engagement requirements as well as unit-based requirements from 7 CFR 3560.11, 3560.301, 3560.302, 3560.303 and 3560.308 and replace it with risk-based requirements for audits utilizing a modified version of the HUD Office of Inspector General's (OIG's) Consolidated Audit Guide standard.

This proposed change is a result of RHS's participation in the White House's Domestic Policy Council's Rental Policy Working Group (RPWG) on an initiative to reduce duplications of requirements on customers, eliminate conflicting administrative requirements, and align program requirements in the affordable rental housing industry. The RPWG believes high-risk properties, which consists of properties that have combined federal financial assistance of $500,000 or greater, should receive more stringent evaluation of financial performance. RHS agrees, and plans to implement a risk-based threshold to set the standard for audit guidelines. This will reduce the burden on project budgets, as multiple reports become unnecessary. Instead it will require financial reporting to include audits based on a modified version of the HUD OIG Consolidated Audit Guide, which are also acceptable to HUD.

Combined Federal financial assistance is defined as a combination of any or all of the sources identified below:

- The outstanding principal balance of a USDA Mortgage, a mortgage insured by the Federal Housing Administration (FHA) or HUD-held mortgages or loans (including flexible subsidy loans);
- Any USDA Rental Assistance or Project-based Section 8 assistance received during the fiscal year;
- Interest reduction payments received during the year (interest subsidy) and/or;
- Federal grant funds received during the year.

The Agency believes standardizing audit requirements is an important first step in aligning the financial reporting standards among various Federal and State agencies. The new policy eliminates a financial reporting burden by allowing owners who receive less than $500,000 in combined Federal assistance to submit owner certified financial statements instead of audited financial statements.

Although the Agency is removing engagement requirements as it relates to the borrower's annual financial reporting requirements, Section 514 and 515 proposals for new construction are still subject to the agreed upon cost certification procedures set forth in 7 CFR 3560.72(b).

In addition to the changes in the annual reporting requirements outlined herein, the Agency is proposing two

additional certifications to the Performance Standards required under 7 CFR 3560.308(c). The borrower will be asked to certify there have been no changes in project ownership other than those approved by the Agency and identified in the certification; and that, real estate taxes are paid in accordance with state and/or local requirements and are current.

List of Subjects in 7 CFR Part 3560

Aged loan programs—Agriculture, Loan programs—Housing and Community Development, Low- and moderate-income housing, Public housing, Rent subsidies.

For the reasons set forth in the preamble, chapter XXXV, Title 7 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3560—DIRECT MULTI-FAMILY HOUSING LOANS AND GRANTS

■ 1. The authority citation for Part 3560 continues to read as follows:

Authority: 42 U.S.C. 1480.

Subpart A—General Provisions and Definitions

■ 2. Amend § 3560.11 by removing the definition of ''Engagement''.

Subpart G—Financial Management

■ 3. Section 3560.301 is revised to read as follows:

§ 3560.301 General.

This subpart contains requirements for the financial management of Agency-financed multi-family housing (MFH) projects, including accounts, budgets, and reports. Financial management systems and procedures must cover all housing operations and provide adequate documentation to ensure that program objectives are met.

■ 4. Amend § 3560.302 by revising paragraphs (a), (b)(1) and (2), and (e)(1) to read as follows:

§ 3560.302 Accounting, bookkeeping, budgeting, and financial management systems.

(a) *General.* Borrowers must establish the accounting, bookkeeping, budgeting and financial management procedures necessary to conduct housing project operations in a financially safe and sound manner. Borrowers must maintain records in a manner suitable for an audit, and must be able to report accurate operational results to the Agency from these accounts and records.

(b) * * *

(1) Borrowers may use a cash, accrual, or modified accrual method of accounting, bookkeeping, and budget preparations as long as they are prepared in accordance with the standards identified in § 3560.308.

(2) Borrowers must describe their accounting, bookkeeping, budget preparation, and financial reporting procedures in their management plan.

* * * * *

(e) * * *

(1) Borrowers must retain all housing project financial records, books, and supporting material for at least three years after the issuance of their financial reports. Upon request, these materials will immediately be made available to the Agency, its representatives, the USDA Office of the Inspector General (OIG), or the General Accountability Office (GAO).

* * * * *

■ 5. Amend § 3560.303 by revising paragraph (b)(1)(vi)(Q) to read as follows:

§ 3560.303 Housing project budgets.

* * * * *

(b) * * *

(1) * * *

(vi) * * *

(Q) Professional service contracts (audits, owner-certified submissions in accordance with § 3560.302(a)(2), tax returns, energy audits, utility allowances, architectural, construction, rehabilitation and inspection contracts, etc.)

* * * * *

■ 6. Amend § 3560.308 by:

■ a. Revising paragraphs (a)(1) and (2).

■ b. Removing paragraph (b).

■ c. Redesignating paragraphs (c) and (d) as (b) and (c) respectively.

■ d. Revising the newly designated (b) introductory text.

■ e. Adding paragraphs (b)(8) and (b)(9).

■ f. Revising the newly designated (c)(1).

The revisions and additions read as follows:

§ 3560.308 Annual financial reports.

(a) *General.* (1) Borrowers that receive $500,000 or more in combined Federal financial assistance must include an independent auditor's report, financial statements and notes to the financial statements, supplemental information containing Agency approved forms for project budgets and borrower balance sheets, report on internal controls and compliance, and a schedule of current and prior year finding and corrective actions (if applicable). Borrowers must include the audit with their annual financial reports submitted to the Agency. Federal Financial Assistance is defined in accordance with 2 CFR 200.40.

(2) Borrowers that receive less than $500,000 in combined Federal financial assistance must submit annual owner certified financial statements presented in accordance with Generally Accepted Accounting Principles (GAAP). Owner-certified submissions will not include an auditor's opinion or auditor's report on compliance or internal controls. Borrowers may use a CPA to prepare this report.

* * * * *

(b) *Performance standards.* All Borrowers must certify that the housing meets the performance standards below:

* * * * *

(8) There have been no changes in project ownership other than those approved by the Agency and Identified in the certification.

(9) Real estate taxes are paid in accordance with state and/or local requirements and are current.

(c) * * *

(1) Non-profit and public borrower entities subject to OMB Circular A–133 requirements must submit audits in accordance with 2 CFR part 200.

* * * * *

Dated: July 9, 2015.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2015–19342 Filed 8–5–15; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2014–BT–TP–0044]

RIN 1904–AD45

Energy Conservation Program: Test Procedures for Battery Chargers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) is proposing to revise its test procedure for battery chargers established under the Energy Policy and Conservation Act of 1975, as amended (EPCA). These proposed revisions, if adopted, would harmonize the instrumentation resolution and uncertainty requirements with the second edition of the International Electrotechnical Commission (IEC) 62301 standard and other international standards for measuring standby power. Additionally, the proposed amendments would update and propose new battery selection criteria for multi-voltage, multi-capacity battery chargers, and

provide specific steps on how to select a battery for those chargers when more than one battery meets the selection criteria, such as with a multi-chemistry battery charger. The proposal also outlines new provisions for conditioning and discharging lead acid batteries.

DATES: *Comments:* DOE will accept comments, data, and information regarding this notice of proposed rulemaking before and after the public meeting, but no later than October 20, 2015. See section V, ''Public Participation,'' for details.

Meeting: DOE will hold a public meeting on Tuesday, September 15, 2015 from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a webinar. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585.

Any comments submitted must identify the NOPR for Test Procedures for battery chargers and provide docket number EERE–2014–BT–TP–0044 and/or regulatory information number (RIN) number 1904–AD45. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: BatteryChargers2014TP0044@EE.Doe.Gov* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC, 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC, 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page can be found at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx?productid=84.*

This Web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through regulations.gov.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information may be sent to Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9870.

Email: *battery_chargers_and_external_power_supplies@EE.Doe.Gov*

In the office of the General Counsel, contact Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background
II. Summary of the Notice of Proposed Rulemaking
III. Discussion
A. Battery Selection and Testing of Multi-Voltage, Multi-Capacity Battery Chargers
B. Back-Up Battery Chargers
C. Measurement Accuracy and Precision
D. Conditioning and Discharge Rate for Lead Acid Battery Chargers
E. Sampling and Certification Requirements
F. Enforcement Testing Sampling Plan
G. Other Proposed Updates
H. Effective Date and Compliance Date of Test Procedure
I. Impact from the Test Procedure
J. Wireless Power
IV. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
M. Description of Material Incorporated by Reference
V. Public Participation
A. Attendance at Public Meeting
B. Procedure for Submitting Prepared General Statements for Distribution
C. Conduct of Public Meeting
D. Submission of Comments
E. Issues on Which DOE Seeks Comment
VI. Approval of the Office of the Secretary

I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291 *et seq.;* ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015). Part B of Title III, which for editorial reasons was re-designated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309, as codified), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' Battery chargers are among the products affected by these provisions.

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) making representations about the efficiency of those products. Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA.

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE follows when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results that measure the energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, when DOE determines that a test procedure requires amending, it publishes a notice with the proposed changes and offers the public an opportunity to comment on the proposal. (42 U.S.C. 6293(b)(2)) As part of this process, DOE determines the extent to which, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1))

Section 135 of the Energy Policy Act of 2005 (''EPACT 2005''), Public Law 109–58 (Aug. 8, 2005), amended sections 321 and 325 of EPCA by adding certain provisions related to battery chargers. Among these provisions were new definitions defining what constitutes a battery charger and a requirement that DOE prescribe ''definitions and test procedures for the power use of battery chargers and external power supplies.'' (42 U.S.C. 6295(u)(1)(A)) DOE complied with this requirement by publishing a test procedure final rule on December 8, 2006, that established a new Appendix Y to address the testing of battery chargers to measure their energy consumption and adopted several definitions related to the testing of battery chargers. See 71 FR 71340 (codified at 10 CFR part 430, subpart B, appendix Y ''Uniform Test Method for Measuring the Energy Consumption of Battery Chargers''). Lastly, DOE incorporated by reference specific sections of the EPA's ''Test Methodology for Determining the Energy Performance of Battery Charging Systems'' when measuring inactive mode energy consumption.

Section 310 of the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140 (Dec. 19, 2007) then amended section 325 of EPCA by defining active mode, standby mode, and off mode. (42 U.S.C. 6295(gg)(1)(A)) This section also directed DOE to amend its existing test procedures by December 31, 2008, to measure the energy consumed in standby mode and off mode for battery chargers. (42 U.S.C. 6295(gg)(2)(B)(i)) Further, it authorized DOE to amend, by rule, any of the definitions for active, standby, and off modes (42 U.S.C. 6295(gg)(1)(B)) Accordingly, the Department issued a notice of proposed rulemaking (NOPR) in 2008, 73 FR 48054 (Aug. 15, 2008), and a final rule in early 2009 to establish definitions for these terms. (74 FR 13318, March 27, 2009)

Subsequently, in response to numerous testing issues raised by commenters in the context of DOE's energy conservation standards rulemaking efforts for battery chargers,[1] DOE issued another NOPR on April 2, 2010 (75 FR 16958). The NOPR proposed adding a new active mode energy consumption test procedure for battery chargers that would assist in developing potential energy conservation standards for these products. DOE also proposed amending portions of its standby and off mode battery charger test procedure to shorten the overall measurement time. DOE held a public meeting to discuss its test procedure NOPR on May 7, 2010, where it also received comments on the proposals set forth in the NOPR.

After receiving comments at the public meeting, DOE published a final rule that codified a new active-mode test procedure and amended the standby and off-mode test procedures then-present in appendix Y to subpart B of part 430 in the CFR. 76 FR 31750 (June 1, 2011). That rule became effective 30 days after publication in the **Federal Register**, but manufacturers were allotted 180 days from the rule's publication to use the new test procedure when making written representations of the energy efficiency of their chargers. As federal standards for battery chargers have yet to be finalized, DOE has not required manufacturers to submit energy efficiency data for their products tested under the battery charger test procedure.

Following the publication of the most recent final rule, DOE continued to receive additional questions and requests for clarification regarding the testing, rating, and classification of battery chargers. As part of the continuing effort to establish federal efficiency standards for battery chargers and to develop a clear and widely applicable test procedure, DOE published a Notice of Data Availability (NODA) on May 15, 2014 (79 FR 27774). This NODA sought comment from stakeholders concerning the repeatability of the test procedure when testing battery chargers with several consumer configurations, and on the anticipated market penetration of new battery charging technologies that may require further revisions to DOE's regulations. DOE also sought comment on the reporting methodologies for manufacturers attempting to comply with the California Energy Commission's (CEC's) efficiency standards for battery chargers in order to understand certain data discrepancies in the CEC database. DOE indicated its interest in soliciting feedback to determine whether the current procedure contained any ambiguities requiring clarification. These issues were discussed during DOE's NODA public meeting on June 3, 2014.

To ensure the test procedure's clarity, DOE's proposal, which is based on commenter feedback to the NODA, would make certain clarifications to appendix Y to subpart B of 10 CFR part 430 and include a sampling plan for battery chargers in 10 CFR part 429. These proposed changes would include updated references to the latest version of IEC 62301 and clarify DOE's test methods for specific types of battery chargers to better reflect evolving technologies.

II. Summary of the Notice of Proposed Rulemaking

This proposal seeks to make several changes to the current test procedure for measuring the energy use of battery chargers.

First, DOE is proposing to amend the existing battery selection criteria to limit the number of batteries selected for testing to a single battery. DOE is proposing that only the battery with the highest rated voltage and/or highest rated charge capacity, from those among which the battery charger is capable of charging, would be tested for each basic model. Additionally, DOE is proposing that if at least two distinct batteries meet the criteria of having the highest rated voltage and highest rated charge capacity, the battery charger and battery combination with the highest maintenance mode power would be selected for testing. (''Maintenance mode'' is defined as ''the mode of operation when the battery charger is connected to the main electricity supply

[1] U.S. Department of Energy—Office of Energy Efficiency and Renewable Energy. Energy Conservation Program for Consumer Products *Energy Conservation Standards Rulemaking for Battery Chargers and External Power Supplies.* May 2009. Washington, DC. Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/bceps_frameworkdocument.pdf.*

and the battery is fully charged, but is still connected to the charger.'' See 10 CFR part 430, subpart B, appendix Y, Sec. 2.8.)

Second, the proposed changes would exclude back-up battery chargers embedded in continuous use devices from being required to be tested under the DOE procedure. This proposed exclusion would harmonize with DOE's approach currently under consideration regarding the potential regulation of battery back-up systems (including uninterruptible power supplies (UPSs)) as part of the Computer and Back-up Battery Systems rulemaking.

Third, the proposed changes would harmonize DOE's test procedure with the latest version of IEC 62301 by providing specific resolution and measurement tolerances. These specifications would assist in ensuring that testing is performed with equipment that is capable of reaching these tolerances and that the resulting measurements are repeatable and reproducible.

Fourth, DOE is proposing to change how lead acid batteries are conditioned and discharged by applying the protocol currently used for all other battery chemistries (excluding lithium-ion) to lead acid batteries. DOE has become aware that a lead acid battery's condition may vary upon purchase and this variation can impact lead acid battery performance. In an effort to minimize these effects, DOE is proposing to require that the batteries be conditioned prior to testing. Additionally, DOE has been informed that discharge rate can significantly impact the nominal battery energy of lead acid batteries, especially in the case of flooded lead acid batteries. Stakeholders have claimed that the discharge rate as determined by the current DOE test procedure is higher than that during typical use, and therefore does not give an accurate representation of the battery energy in lead acid batteries. (NMMA, No. 12, p. 4) Accordingly, DOE is proposing to lengthen the discharge time for lead acid batteries to mitigate these effects.

Fifth, DOE is proposing to add product-specific certification reporting requirements into 10 CFR 429.39(b), which is currently reserved. DOE is also proposing to add a sampling methodology to be used for determining representations of efficiency, energy and power consumption, and other key battery charger characteristics. These proposals would specify the required data elements to certify compliance with any energy conservation standards for battery chargers that DOE may adopt, and also would provide a method for DOE to enforce compliance with any energy conservation standards for battery chargers that DOE may promulgate.

Sixth, DOE is proposing to correct an internal cross-reference in the current version of Table 3.1 contained in 10 CFR part 430, subpart B, appendix Y and to add units to the measured and calculated values in the table. The updates would also remove the empty value column currently found in Table 3.1. DOE is also proposing to specify in section 430.23(aa) that battery discharge energy should be measured according to section 3.8 of appendix Y.

The table below summarizes the changes and the affected sections of 10 CFR parts 429 and 430.

TABLE II.1—SUMMARY OF PROPOSED CHANGES AND AFFECTED SECTIONS OF 10 CFR PARTS 429 AND 430

Sections to modify	Summary of proposed modifications
Subpart B of Part 429—Certification	
429.39(b) Certification Reports	• Create new paragraph (b), specifying requirements for certifications of compliance with energy conservation standards for battery chargers.
Subpart C of Part 429—Enforcement	
Appendix D	• Create new appendix to include sampling plan for enforcement testing.
Subpart A of Part 430—General Provisions	
§ 430.2. Definitions	• Amend definitions of ''direct operation external power supply.'' • Add definition of ''back-up battery charger.''
Appendix Y to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Battery Chargers	
1. Scope	• Insert exceptions for back-up battery chargers embedded in continuous use devices and wireless charging systems that do not fix the position of the device during charging.
3. Standard Test Conditions	• Incorporate by reference the uncertainty requirements of IEC 62301 (2nd Ed.) in 3.2(a). • Correct the internal cross-reference in Table 3.1 for item 4 and modify the table by removing the current ''value'' column and adding units to the table as appropriate.
4. Unit Under Test (UUT) Setup Requirements	• Clarify in section 4.3.b that a single battery should be selected as a result of applying the battery selection criteria in Table 4.1. • Insert section 4.3.b.1 to require selecting the single battery resulting in the highest maintenance mode power when following Table 4.1 results in two or more distinct batteries. • Update Table 4.1 to remove instances of multiple batteries for test and to instruct that, where applicable, the highest voltage or highest charge capacity battery, or combination for multi-port battery chargers, must be tested. Remove column ''number of tests.''
5. Test Measurement	• Remove reference to lead acid batteries from section 5.3(a). • Insert provision for lead acid batteries to be discharged to 50% of rated voltage in section 5.3(c)(2)(i).

TABLE II.1—SUMMARY OF PROPOSED CHANGES AND AFFECTED SECTIONS OF 10 CFR PARTS 429 AND 430—Continued

Sections to modify	Summary of proposed modifications
	• Remove reference to lead acid from section 5.3(d). • Removed discharge current value ".2C" from section 5.8(c)(2). • Updated discharge rate and termination voltage for VRLA and Flooded Lead Acid in Table 5.2.

III. Discussion

In response to the May 2014 NODA, DOE received written comments from 15 interested parties, including manufacturers, trade associations, standards development organizations, and energy efficiency advocacy groups. Table III.1 lists the entities that commented on that NODA and their affiliation. These comments are discussed in more detail below, and the full set of comments can be found at: *http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=EERE-2014-BT-NOA-0012;dct=PS.*

TABLE III–1—INTERESTED PARTIES THAT COMMENTED ON THE MAY 2014 NODA

Commenter	Acronym	Organization type/ affiliation	Comment No. (Docket reference)
Alliance for Wireless Power	A4WP	Trade Association	17
Arris Group, Inc.	ARRIS	Manufacturer	12
Association of Home Appliance Manufacturers	AHAM	Standard Development Organization	18
California Investor-Owned Utilities	CA IOUs	Utilities	15
Consumer Electronics Association	CEA	Trade Association	21
Energizer Holdings, Inc.	Energizer	Manufacturer	8
Information Technology Industry Council	ITI	Trade Association	19
Johnson Outdoors Marine Electronics	JOME	Manufacturer	9
National Electrical Manufacturers Association	NEMA	Trade Association	7
National Marine Manufacturers Association	NMMA	Trade Association	11
Natural Resources Canada/ECOVA	NRCan (ECOVA)	Efficiency Advocacy Group	16
National Resources Defense Council	NRDC	Efficiency Advocacy Group	20
Power Tool Institute	PTI	Trade Association	13
Proctor & Gamble	P&G	Manufacturer	10
Telecommunications Industry Association	TIA	Standard Development Organization	14

A. Battery Selection and Testing of Multi-Voltage, Multi-Capacity Battery Chargers

DOE sought comments on the existing battery selection methodology included in section 4.3 ''Selection of Batteries To Use for Testing'' of the test procedure in its recent NODA as it relates to multi-voltage, multi-voltage and multi-capacity, and multi-chemistry battery chargers. See 79 FR 27774, 27776–27777 (May 15, 2014).The submitted comments suggested that errors may be introduced when testing these types of battery chargers and raised questions about the repeatability of the test procedure when testing battery chargers capable of charging batteries of different chemistries (*i.e.,* chargers capable of handling multiple battery chemistries such as lithium and nickel metal hydride). PTI urged DOE to state explicitly how each battery charger and battery combination should be rated. (PTI, Pub. Mtg. Transcript, No. 6 at p. 77) ITI commented that the current test procedure leaves significant room for error and does not employ effective, reasonable and repeatable test conditions for these types of battery chargers. (ITI, No. 19, pp. 2–3) The CA IOUs and NRDC both offered solutions to eliminate ambiguity in battery selection for these battery chargers by suggesting that the least expensive battery or the battery which represents the most common intended use be selected. (California IOUs, No. 15, p. 2, NRDC, No. 20, p. 2) DOE took all of these comments into account when developing its proposal.

Under the current provisions for battery selection, a multi-voltage, multi-capacity battery charger must be tested with as many as three distinct battery types. The battery selection procedure under Appendix Y, Section 4, Table 4.1, lays out three sets of testing scenarios:

(a) Test unit with the lowest voltage, lowest capacity battery utilizing only one port.

(b) Test unit with the highest voltage, lowest capacity battery utilizing only one port.

(c) Use all ports and use the battery or configuration of batteries with the highest total rated energy capacity.

Per section 4.3.a(2), if no batteries are packaged with the charger, but the instructions specify or recommend batteries for use with the charger, batteries for testing must be those recommended or specified in the instructions and must be selected according to the procedure in section 4.3.b, which generally requires that a tester use Table 4.1 to determine which batteries to use when testing the efficiency of a given battery charger. In the case of multi-chemistry battery chargers, multiple batteries of differing chemistries may meet the criteria outlined in 4.3.b for a single battery selection and test. Specifically, the current test procedure is not clear which battery chemistry, or chemistries, should be selected for testing—it indicates only that the battery with the highest voltage or highest rated charge capacity be selected. In this case, the test results for each battery of differing chemistries may be inconsistent even though they have the same voltage and charge capacity. Finally, DOE realizes that the current battery selection criteria can result in the selection of up to three separate batteries for testing, which increases testing burden and may create ambiguity as to which test result to use when making a representation about the energy efficiency of a battery charger.

DOE is proposing an approach that would reduce ambiguity and testing burden, while yielding repeatable measurements of a tested unit's energy use.

Specifically, to eliminate potential ambiguity and reduce testing burden, DOE is proposing to modify Table 4.1 to eliminate the multiple tests currently required for multi-voltage and multi-capacity battery chargers and instead require that only the battery with the highest voltage and/or highest charge capacity be selected. In doing so, DOE's goal is to test the charger in the mode for which the battery charger is designed to operate optimally. Based on feedback from industry representatives and consultation with subject matter experts, DOE understands that, if required to operate over a range of outputs, power electronics, including battery chargers, are typically designed to optimize components at the high output range of the device. Therefore, DOE believes these test results will be representative of the typical energy consumption of the battery charger and reduce the possibility of placing undue burden on manufacturers of chargers that are able to charge lower voltage, lower capacity batteries.

To address these same issues, DOE is also proposing that if a battery charger is multi-voltage and multi-capacity and capable of charging batteries of multiple chemistries (such that two or more batteries, each with a unique chemistry, meet the proposed selection criteria) the battery and battery charger combination resulting in the highest maintenance mode power would be chosen for testing.

DOE anticipates that, with these proposed changes, there will be only one set of test results, and a single rating, for each basic model of battery charger. The resulting energy consumption calculation would be repeatable and representative of each basic model's energy use for which it has been optimized, while eliminating the ambiguity that appears to be present in the current version of the procedure. Additionally, by reducing the number of tests required, DOE believes that the overall test burden would be reduced. DOE seeks comment on the proposed methodology for selecting batteries for multi-voltage, multi-capacity battery chargers, and for those cases when the battery selection criteria results in two or more unique batteries (*e.g.,* multi-chemistry battery chargers).

DOE notes that it also considered several other options to modify the test procedure to clarify how to measure the energy use of, and obtain a single set of energy consumption ratings for, multi-voltage and multi-capacity battery chargers. First, DOE considered requiring the existing battery selection criteria to be applied and then averaging the test results to produce one set of test results. Second, DOE considered modifying the battery selection criteria to require that only the battery with the lowest voltage and/or lowest rated charge capacity be selected for testing. Lastly, in the case of multi-chemistry battery chargers, DOE considered requiring the battery charger be considered a basic model for each base chemistry it was capable of charging and apply the battery selection criteria separately for each chemistry, or basic model.

Each one of these proposed solutions, however, resulted in solutions that did not fully accomplish DOE's goals. The first option, while producing a single set of test results, could result in an unrepresentative measurement of the true energy consumption consistent with any configuration of batteries the battery charger is capable of charging. The second option, while similar to DOE's proposal, would not produce results representative of the higher range for which battery chargers are, typically, optimally designed when capable of charging multiple voltages and capacities. Finally, in addressing battery chemistry, treating each chemistry mode as a unique basic model, with either of the previous options discussed above, did not produce a single metric and could increase the testing burden on some manufacturers. In DOE's view, this approach would produce test results that are repeatable and representative of the typical energy consumption of the battery charger under test and at the same time reduce testing burden on manufacturers. While DOE's preliminary determination is that these options conflict with those intentions, DOE is seeking comment on these other options as well.

B. Back-Up Battery Chargers

DOE sought comments on applying the current test procedure to battery chargers embedded in continuous use products, or back-up battery chargers, in the recent NODA. See 79 FR 27774. Based on comments received from interested parties and DOE's own analysis, DOE is proposing to define back-up battery chargers and exclude them from the scope of this test procedure. DOE is proposing to define back-up battery chargers in 10 CFR 430.2 as a battery charger that: (1) Is embedded in a separate end-use product that is designed to continuously operate using main power (AC or DC) and (2) has as its sole purpose to recharge a battery used to maintain continuity of load power in case of input power failure. DOE previously referred to these battery chargers in the context of continuous use devices in the May 2014 NODA. Examples of such devices that integrate back-up battery chargers include UPSs and some cable modems. Interested parties noted to DOE that continuous use devices are becoming increasingly integrated with a variety of products that do not perform back-up battery charging as a primary function of the device. As a result of this integrated approach, the battery charging function in these products often cannot be isolated during testing (ARRIS, No. 22, p. 2). While the test procedure is designed to measure the energy consumption and efficiency of the battery charging functionality, the method is limited when applied to a battery charger that is embedded among other functions that cannot be isolated during testing. Citing this reason, ARRIS suggested that these types of devices be excluded from the scope of the test procedure. (ARRIS, No. 22, p. 2).

ARRIS also noted that, in the event that DOE does not exclude these types of back-up battery chargers embedded in continuous use devices from the scope of this procedure, DOE should add provisions specifically to address the testing of these units. ARRIS suggested amending the test procedure to provide for measurement of only the battery charging functionality of continuous use devices that lack an on/off switch and for which the battery cannot be removed. The suggested alternative includes measuring 24-hour energy consumption (''E24'') with a fully charged battery, then again measuring E24 with a discharged battery. ARRIS's approach would use the absolute difference between these two values to represent the 24-hour energy consumption of the unit under test (UUT). (ARRIS, No. 12, p. 4–6)

Additionally, the CA IOUs and NRDC both suggested that if DOE plans to require back-up battery chargers embedded in continuous use devices to be tested under the current test procedure, manufacturers should add an on-off switch to turn off all additional functionality. (CA IOUs, No. 15, p. 3, NRDC, No. 20, p. 3) ARRIS argued, however, that adding switches to disable non-charging functionality in a device where multiple functions, including battery charging, have been integrated at the system or chipset level—which helps achieve lower manufacturing costs and increased reliability and energy efficiency—is not feasible. (ARRIS, No. 22, p. 3).

Based on its own testing data and the feedback received from commenters, at this time, DOE is proposing to exclude back-up battery chargers that are embedded in continuous devices from the testing requirements of the DOE battery charger test procedure. DOE may revisit this decision in the future as circumstances permit.

Consistent with this proposed approach, DOE is also proposing to define the term ''back-up battery charger'' in § 430.2 and add to Section 1 of Appendix Y language specifying that back-up battery chargers would be excluded from the scope of the test procedure. DOE recognizes that its previously proposed standards for battery chargers considered products that would now be excluded from the scope of the test procedure. If back-up battery chargers were removed from the scope of test procedure, DOE would no longer consider establishing conservation standards for these types of products as part of a standards rulemaking for battery chargers. However, DOE is considering energy conservation standards for some battery back-up systems (including UPSs) as part of the Computer and Back-up Battery Systems rulemaking. DOE seeks comments on this approach.

C. Measurement Accuracy and Precision

On June 13, 2005, the IEC published its first edition of testing standard IEC 62301, which provided a method for measuring standby power of household appliances. The standard quantified minimum resolution requirements for energy measurement instruments and outlined the necessary procedures to ensure stable energy readings for any UUT. The standard also set limits on the uncertainties associated with any measurement taken that is meant to represent the energy consumption of a household device. It has since become recognized by many regulatory bodies as the default guideline for any power or energy measurement required for formal certification. DOE subsequently adopted instrumentation resolution and measurement uncertainty requirements for testing battery chargers identical to those in the IEC 62301 standard and codified these requirements at 10 CFR part 430, subpart B, appendix Y on June 1, 2011. 76 FR 31750.

The IEC published Edition 2.0 of IEC 62301 in January 2011. This revised version of the testing standard refined the test equipment specifications, measuring techniques, and uncertainty determination to improve the method for measuring loads with high crest factors and/or low power factors, such as the low power modes typical of battery chargers operating in standby mode. These provisions were contained in Section 4 of IEC 62301, with informative guidance provided in Annex B and Annex D on measuring low power modes and determining measurement uncertainty.

To continue to ensure test methods are harmonized, DOE is proposing to incorporate by reference the resolution parameters for power measurements and uncertainty methodologies found in Section 4 of the second edition of the IEC 62301 standard. DOE seeks comment on the merits of incorporating these revisions into the current battery chargers test procedure in Appendix Y. DOE also seeks comment regarding whether the use of Annex B and Annex D should be mandatory to ensure the most accurate test results.

D. Conditioning and Discharge Rate for Lead Acid Battery Chargers

DOE received several comments from stakeholders suggesting changes to both the conditioning of lead acid batteries and the discharge rate for lead acid batteries. In some cases, DOE's own research also points to a potential need to modify the current procedure to better account for the specific characteristics of lead acid batteries. Currently, no conditioning is performed for lead acid batteries. See 10 CFR part 430, appendix Y, sec. 5.3.a.

First, Johnson Outdoor Marine Electronics (JOME) provided test results with its comments indicating that the discharge energy of lead acid batteries varies over several cycles. These results are contrary to certain lead acid battery manufacturers' claims that conditioning is not required. JOME stated that typical lead acid batteries are only at 75 to 80 percent capacity when they are delivered in new condition, and JOME's test results show that lead acid battery discharge energy could increase after just two cycles, the current value for all other battery chemistries. (JOME, No. 9, p. 4–5) These data suggest that applying the conditioning protocol outlined in the current appendix Y, section 5.3.c (for batteries of other chemistries) as a prerequisite, prior to testing lead acid batteries, will produce a more accurate representation of battery discharge energy.

Providing the option of various discharge rates during battery conditioning would also allow manufacturers to increase conditioning if needed. JOME's data suggest that additional conditioning may be needed to maximize discharge energy—in some cases up to 4 cycles or more. Furthermore, JOME added that its conversations with battery manufacturers indicate that a 50%-80% depth of discharge would produce more accurate and representative results for lead acid batteries. (JOME, No. 9, p. 4) To account for these issues, DOE is proposing to apply the same battery conditioning provisions found in appendix Y, Section 5.3.c, to lead acid batteries and use a 50% depth of discharge during conditioning. DOE is seeking comment on applying the conditioning protocol (two charges and two discharges, followed by a charge, as a minimum) outlined in section 5.3.c of the test procedure to lead acid batteries. DOE also seeks comment on amending the depth of discharge requirement, during conditioning only, to 50% of the rated voltage of the battery and what alternative depth of discharge requirements (if any) should apply to lead acid batteries.

Second, JOME, the National Marine Manufacturers Association (NMMA), and DOE's own research, indicate that the amount of usable energy extracted from a lead acid battery is inversely proportional to its discharge rate.[2] (NMMA, No. 12, p. 3) Thus, a lead acid battery discharged over a span of 10 hours produces a higher amount of overall measured energy than one discharged over a period of 5 hours. To address this issue, NMMA suggested that DOE allow for a longer discharge cycle than the current 5 hours required in the battery charger test procedure. (NMMA, No. 12, p. 4) Given that a longer discharge rate may be more representative for certain lead acid batteries, particularly those used in marine applications, DOE is proposing to amend its procedure by providing manufacturers with the option to choose between a 5-hour (C/5 or .2C), 10-hour (C/10 OR .1C), or 20-hour (C/20 OR .05C) discharge rate when testing with batteries that are rated above 1,000 watt-hours (Wh). DOE is limiting this option to those batteries that are above 1,000 Wh because a longer discharge cycle would do little to maximize discharge energy for batteries under 1,000 Wh, but would have a more significant impact on maximizing discharge energy for batteries greater than 1,000 Wh. DOE seeks comment on its proposed approach for lead acid batteries and whether the approach as described above would require any adjustments. Should adjustments be needed, DOE seeks feedback on what those adjustments should be.

[2] Perez, Richard. ''Lead-Acid Battery State of Charge vs. Voltage.'' Home Power #36 (August/September 1993). Web 2014. *http://www.zetatalk4.com/docs/Batteries/FAQ/State_Of_Charge_Ver_Voltage_2004+.pdf.*

E. Sampling and Certification Requirements

DOE is proposing to update 10 CFR 429.39, section (a), ''Determination of represented value,'' and reserved section (b), ''Certification Reports,'' to detail how to apply the sampling plan to calculate a represented value for each measure of energy consumption, time, and power recorded as part of the battery charger test procedure, and subsequently report those ratings during certification. For each basic model, these ratings would be determined by applying the statistical requirements outlined in 10 CFR 429.39 to a sample of battery charger units that are tested according to the test procedure in appendix Y. Specifically, a represented value would be calculated in watts (W) for the measured maintenance mode power, the measured standby mode power, and the measured off mode power; the Wh rating would be calculated for the measured battery discharge energy and the measured 24-hour energy consumption. Additionally, the proposal would require the certification report for each basic model of battery charger to include each of the aforementioned represented values, along with the manufacturer and model of the test battery used; the nameplate battery voltage of the test battery in volts (V); the nameplate charge capacity of the test battery in ampere-hours (Ah); the nameplate charge energy, if available, of the battery in watt hours (Wh); the brand and model, when applicable, of the external power supply (EPS) used for testing; [3] and the average duration of the charge and maintenance mode test in hours (hr).

In 2012, DOE proposed to regulate battery charger energy use with a single metric—Unit Energy Consumption (UEC)—derived from a calculation of the amount of energy consumed by the battery charger over the course of year. 77 FR 18478 (March 27, 2012). The inputs into this calculation would include the represented values that DOE is proposing to include as part of the certification requirements, along with constants used to represent the estimated number of charges per day and the number of hours each day that the battery charger spends in each mode of operation. These usage profile assumptions were originally proposed as part of the March 2012 NOPR. Therefore, should DOE finalize energy conservation standards using the same UEC approach proposed in the NOPR, the represented values included on the certification report would allow DOE to calculate the UEC of each certified basic model of battery charger and ensure compliance with energy conservation standards.

DOE seeks comment on its proposal to update the sampling requirements and reporting requirements for battery chargers to include the data required to identify the battery charger and battery, as well as measured ratings recorded in the test procedure. DOE is particularly interested in whether the inclusion of these proposed categories of information would present a significant burden on manufacturers to produce as part of a submitted certification report—and if so, why.

F. Enforcement Testing Sampling Plan

To ensure that manufacturers of consumer products comply with the applicable energy conservation standards, DOE conducts enforcement testing by randomly selecting a sample of units and testing them according to the test procedure. DOE then compares the results obtained through this enforcement testing to the applicable energy conservation standard to determine whether the basic model meets that standard. DOE is proposing a sampling and calculation method for DOE to assess the compliance of battery charger basic models.

When conducting enforcement testing for battery chargers, DOE is proposing to test a sample of at least 4 units of a battery charger basic model according to the provisions of the test procedure. DOE would then determine the sample mean for each of the output metrics of the test procedure, and then use those sample means to calculate the basic model's UEC according to the UEC equation that would be set forth as part of an energy conservation standard for battery chargers. DOE would then determine compliance by comparing the UEC calculated as part of enforcement testing to the applicable energy conservation standard. DOE is proposing to add Appendix D to Subpart C of Part 429 of the CFR to describe the methodology that DOE would use when conducting enforcement testing of battery chargers. DOE seeks comments on this proposal.

G. Other Proposed Updates

DOE is also proposing to update Table 3.1 of Appendix Y to correct a cross-reference error and eliminate a redundant column. The Active and Maintenance Mode Energy Consumption item on the fourth line in this table currently references section 5.8, when it should reference section 5.6, ''Testing Charge Mode and Battery Maintenance Mode.'' Additionally, DOE is proposing to remove the current ''Value'' column because the information from that column can be inserted in the column labeled ''Name of measured or calculated value'' column to reduce the table's complexity. DOE seeks comment on these proposed simplification changes.

H. Effective Date and Compliance Date of Test Procedure

If adopted, the effective date for the battery charger test procedure would be 30 days after publication of the test procedure final rule in the **Federal Register**. At that time, any measure of energy consumption relying on these metrics may be represented pursuant to the final rule. Consistent with 42 U.S.C. 6293(c), representations of the energy consumption or energy efficiency of battery chargers must be based on the new test procedure and sampling plans as of 180 days after the date of publication of the test procedure final rule. Starting on that date, any such representations, including those made on marketing materials, Web sites (including qualification with a voluntary or State program), and product labels would be required to be based on results generated using the proposed procedure as well as the sampling plan in 10 CFR part 429.

I. Impact From the Test Procedure

When proposing to amend a test procedure, DOE typically determines the extent to which, if any, the proposed test procedure would alter the measured energy efficiency of any covered product when compared to the existing test procedure. (42 U.S.C. 6293(e)(1)). Because DOE does not currently have energy conservation standards for battery chargers, this proposal would not affect this provision.

J. Wireless Power

In a March 2012 standards NOPR for battery chargers and EPSs, DOE noted that there are a number of different products under the broad umbrella of ''wireless power,'' including both battery chargers and EPSs. See 77 FR 18478 (March 27, 2012) (notice of proposed rulemaking to set standards for battery chargers and external power

[3] The test procedure states in section 4.1.a that ''[t]he battery charger system shall be prepared and set up in accordance with the manufacturer's instructions.'' See 10 CFR 430 appendix Y to subpart B. Battery charger systems that include an EPS should be tested with the EPS that is sold with the battery charger system in accordance with the manufacturer's instructions. For battery chargers that use an EPS but are not sold with an EPS, the system should be tested according to the manufacturer's instructions on how to supply power to the battery charger. Providing the manufacturer and model for the EPS in the certification report would help ensure test result repeatability in cases where the EPS necessary to supply power to the charger is not included.

supplies). In the May 2014 battery charger NODA, DOE sought input on wireless charging stations that are specifically designed to operate in dry environments, although DOE did not explicitly consider these products when first developing the battery charger test procedure. (79 FR at 27776–27777) DOE plans to address this issue in a separate rulemaking.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel.*

For manufacturers of battery chargers, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (September 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/content/summary-size-standards-industry.* Battery charger manufacturers are classified under NAICS 335999, ''All Other Miscellaneous Electrical Equipment and Component Manufacturing.'' The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for this category.

As discussed in the March 2012 NOPR, DOE identified one battery charger original device manufacturer with domestic manufacturing. Based on manufacturer interviews and DOE's research, DOE believes that almost all battery charger manufacturing takes place abroad. Also, in the NOPR and at the NOPR public meeting DOE asked for comment regarding the impacts on small battery charger manufacturers and it received no comments. Therefore, based on the information DOE currently has at hand, DOE certifies that this proposed rule is unlikely to have a significant impact on a substantial number of small entities.

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule prescribes certain limited clarifying amendments to an already-existing test procedure that will help manufacturers and testing laboratories to consistently conduct that procedure when measuring the energy efficiency of a battery charger, including in those instances where compliance with the applicable Federal energy conservation standard is being assessed. DOE has tentatively concluded that the proposed rule would not have a significant impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

If DOE adopts energy conservation standards for battery chargers, manufacturers of battery chargers will be required to certify that their products comply with those standards. In certifying compliance, manufacturers must test their products according to the applicable DOE test procedure, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment and is proposing specific requirements for battery chargers in this rule. See 10 CFR part 429, subpart B. The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. This information collection was renewed in January 2015 to include certification requirements for battery chargers. 80 FR 5099 (January 30, 2015). Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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.

D. Review Under the National Environmental Policy Act of 1969

The proposed test procedure amendments will likely be used to develop and implement future energy conservation standards for battery chargers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The

Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause 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), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel*. DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this proposed regulation, if adopted, would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action to amend the test procedure for measuring the energy efficiency of battery chargers is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

Certain of the proposed amendments would incorporate testing methods contained in the following commercial standards: IEC Standard 62301 ''Household electrical appliances—Measurement of standby power.'' DOE has evaluated these testing standards and believes that the IEC standard complies with the requirements of section 32(b) of the Federal Energy Administration Act, (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). DOE is, however, consulting with the Attorney General and the Chairwoman of the FTC concerning the effect on competition of requiring manufacturers to use the test method in this standard.

M. Description of Material Incorporated by Reference

DOE previously adopted instrumentation resolution and measurement uncertainty requirements for testing battery chargers identical to those in the IEC 62301 standard and codified these requirements at 10 CFR part 430, subpart B, Appendix Y on June 1, 2011. 76 FR 31750. The IEC published Edition 2.0 of IEC 62301 in January 2011, which is available from the American National Standards Institute, 25 W. 43rd Street, 4th Floor, New York, NY 10036 or at *http://webstore.ansi.org/.* This revised version of the testing standard refined the test equipment specifications, measuring techniques, and uncertainty determination to improve the method for measuring loads with high crest factors and/or low power factors, such as the low power modes typical of battery chargers operating in standby mode. These provisions were contained in Section 4 of IEC 62301, with informative guidance provided in Annex B and Annex D on measuring low power modes and determining measurement uncertainty. DOE has already incorporated by reference Edition 2.0 of IEC 62301in 10 CFR part 430 for use with other test procedures, and is now proposing to also incorporate by reference Edition 2.0 in appendix Y as well.

V. Public Participation

A. Attendance at Public Meeting

The time, date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.*

Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Regina Washington at (202) 586–1214 or by email: *Regina.Washington@ee.doe.gov* so that the necessary procedures can be completed.

DOE requires visitors to have laptops and other devices, such as tablets, checked upon entry into the building. Any person wishing to bring these devices into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing these devices, or allow an extra 45 minutes to check in. Please report to the visitor's desk to have devices checked before proceeding through security.

Due to the REAL ID Act implemented by the Department of Homeland Security (DHS), there have been recent changes regarding ID requirements for individuals wishing to enter Federal buildings from specific states and U.S. territories. Driver's licenses from the following states or territory will not be accepted for building entry and one of the alternate forms of ID listed below will be required. DHS has determined that regular driver's licenses (and ID cards) from the following jurisdictions are not acceptable for entry into DOE facilities: Alaska, American Samoa, Arizona, Louisiana, Maine, Massachusetts, Minnesota, New York, Oklahoma, and Washington. Acceptable alternate forms of Photo-ID include: U.S. Passport or Passport Card; an Enhanced Driver's License or Enhanced ID-Card issued by the states of Minnesota, New York or Washington (Enhanced licenses issued by these states are clearly marked Enhanced or Enhanced Driver's License); a military ID or other Federal government issued Photo-ID card.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx?productid=84.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this NOPR. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement

(within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this NOPR. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this NOPR.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE seeks comments on the methodology for selecting a battery for multi-capacity, multi-voltage, multi-chemistry battery chargers. (See section III.A.1)

2. DOE seeks comments on the methodology for selecting a single battery based on the battery and battery charger combination that results in the highest maintenance mode power when Table 4.1 results in two or more unique batteries. (See section III.A.1)

3. DOE seeks comment on the other options considered for addressing multi-voltage, multi-capacity battery chargers. (See section III.A.1)

4. DOE seeks comments on the exclusion of back-up battery chargers from the scope of the test procedure. (See section III.A.2)

5. DOE seeks comments on the merits of incorporating IEC 62301 V.2 updates into the current battery chargers test procedure in Appendix Y. (See section III.A.3)

6. DOE seeks comments on amending the depth of discharge to 50% of the rated voltage of the battery for lead acid batteries during conditioning. (See section III.DA.4)

7. DOE seeks comment on adding optional discharge rates at 10 hrs. (or C/10) and 20 hrs. (or C/20) in the Battery Discharge Energy Test for lead acid batteries. (See section III.A.4)

8. DOE seeks comment on its proposal to amend the sampling and certification requirements for battery chargers. (See section III.A.5)

9. DOE seeks comment on the updates to Table 3.1 to correct for a reference error and update units for the required values identified in the table. (See section III.A.7)

10. DOE seeks comment on the burden estimates outlined in the review of the Paperwork Reduction Act. (See section IV.C)

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on July 27, 2015.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 430 of chapter II of title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Revise § 429.39 to read as follows:

§ 429.39 Battery chargers.

(a) *Determination of represented value.* Manufacturers must determine represented values, which includes certified ratings, for each basic model of battery charger in accordance with following sampling provisions.

(1) *Represented values include:* Battery discharge energy in watt hours (Wh), 24-hour energy consumption in watt hours (Wh), maintenance mode power in watts (W), standby mode power in watts (W), and off mode power in watts (W).

(2) *Units to be tested.* The requirements of § 429.11 are applicable to battery chargers; and, for each basic model of battery charger, a sample of sufficient size must be randomly selected and tested to ensure that—

(i) Any represented value of energy consumption or power for which consumers would favor lower values must be greater than or equal to the higher of:

(A) The mean of the sample, where:

$$\bar{x} = \frac{1}{\eta}\sum_{i=1}^{n} x_i$$

And, $\bar{x}$ is the sample mean; η is the number of samples; and x_i is the i_{th} sample; or,

(B) The upper 97.5 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{.975}\left(\frac{s}{\sqrt{\eta}}\right)$$

And $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.975}$ is the t statistic for a 97.5% one-tailed confidence interval with n-1 degrees of freedom (from appendix A to subpart B of part 429); and

(ii) Any represented value energy consumption or power of a basic model for which consumers would favor higher values must be less than or equal to the lower of:

(A) The mean of the sample, where:

$$\bar{x} = \frac{1}{\eta}\sum_{i=1}^{n} x_i$$

And, $\bar{x}$ is the sample mean; η is the number of samples; and x_i is the i_{th} sample; or,

(B) The lower 97.5 percent confidence limit (LCL) of the true mean divided by 1.05, where:

$$LCL = \bar{x} - t_{.975}\left(\frac{s}{\sqrt{\eta}}\right)$$

And $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.975}$ is the t statistic for a 97.5% one-tailed confidence interval with n-1 degrees of freedom (from appendix A to subpart B of part 429).

(b) *Certification reports.* (1) The requirements of § 429.12 are applicable to battery chargers;

(2) Pursuant to § 429.12(b)(13), a certification report must include the following public product-specific information: The manufacturer and model of the test battery; the nameplate battery voltage of the test battery in volts (V); the nameplate charge capacity of the test battery in ampere-hours (Ah); the nameplate charge energy, if available, of the battery in watt hours (Wh); the manufacturer and model, when applicable, of the external power supply used for testing; the average duration of the charge and maintenance mode test in hours (hr) for the units sampled; battery discharge energy in watt hours (Wh); 24-hour energy consumption in watt hours (Wh); maintenance mode power in watts (W); standby mode power in watts (W); and off mode power in watts (W).

■ 3. Revise paragraph (e) of § 429.110 to read as follows:

§ 429.110 Enforcement testing.

* * * * *

(e) *Basic model compliance.* DOE will evaluate whether a basic model complies with the applicable energy conservation standard(s) based on testing conducted in accordance with the applicable test procedures specified in parts 430 and 431 of this chapter, and with the following statistical sampling procedures:

(1) For products with applicable energy conservation standard(s) in § 430.32, and commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, commercial clothes washers, and metal halide lamp ballasts, DOE will use a sample size of not more than 21 units and follow the sampling plans in

appendix A of this subpart (Sampling for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment).

(2) For automatic commercial ice makers; commercial refrigerators, freezers, and refrigerator-freezers; refrigerated bottled or canned vending machines; and commercial HVAC and WH equipment, DOE will use an initial sample size of not more than four units and follow the sampling plans in appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products).

(3) If fewer than four units of a basic model are available for testing when the manufacturer receives the notice, then:

(i) DOE will test the available unit(s); or

(ii) If one or more other units of the basic model are expected to become available within 30 calendar days, DOE may instead, at its discretion, test either:

(A) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of four); or

(B) Up to four of the other units that subsequently become available.

(4) For battery chargers, DOE will use a sample size of not more than 21 units and follow the sampling plan in appendix D of this subpart (Sampling Plan for Enforcement Testing of Battery Chargers).

(5) For distribution transformers, DOE will use an initial sample size of not more than five units and follow the sampling plans in appendix C of this subpart (Sampling Plan for Enforcement Testing of Distribution Transformers). If fewer than five units of a basic model are available for testing when the manufacturer receives the test notice, then:

(i) DOE will test the available unit(s); or

(ii) If one or more other units of the basic model are expected to become available within 30 calendar days, the Department may instead, at its discretion, test either:

(A) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of five); or

(B) Up to five of the other units that subsequently become available.

(6) Notwithstanding paragraphs (e)(1) through (4) of this section, if testing of the available or subsequently available units of a basic model would be impractical, as for example when a basic model has unusual testing requirements or has limited production, DOE may in its discretion decide to base the determination of compliance on the testing of fewer than the otherwise required number of units.

(7) When DOE makes a determination in accordance with section (e)(6) to test less than the number of units specified in paragraphs (e)(1) through (4) of this section, DOE will base the compliance determination on the results of such testing in accordance with appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) using a sample size (n_1) equal to the number of units tested.

(8) For the purposes of this section, available units are those that are available for distribution in commerce within the United States.

■ 4. Add appendix D to subpart C of part 429 to read as follows:

Appendix D to Subpart C of Part 429—Sampling Plan for Enforcement Testing of Battery Chargers

a. The initial sample size (n) for enforcement testing of battery chargers is four units.

b. Test each unit in the sample according to the test procedure in 10 CFR part 430, subpart B, appendix Y, recording the following metrics: 24-hour energy (Wh), battery discharge energy (Wh), maintenance mode power (W), standby mode power (W), off mode power (W), and the duration of the charge and maintenance mode test.

c. Compute the sample mean for each of the metrics, where

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample.

d. Compute Unit Energy Consumption (UEC) for the sample using the applicable equation from the applicable energy conservation standard for battery chargers in § 430.32 and the sample means for each of the metrics, as calculated in step c.

e. Determine the applicable standard for the basic model being tested (ECS), using the sample mean for battery discharge energy.

f. Compare the UEC to the ECS.

g. If the UEC of the sample is greater than the ECS, then the basic model is not compliant.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 5. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 6. Section 430.2 is amended by adding in alphabetical order a definition for ''back-up battery charger'' to read as follows:

§ 430.2 Definitions.

* * * * *

Back-up battery charger means a battery charger:

(1) That is embedded in a separate end-use product that is designed to continuously operate using main power (AC or DC); and

(2) Whose sole purpose is to recharge a battery used to maintain continuity of load power in case of input power failure.

* * * * *

§ 430.3 [Amended]

■ 7. In § 430.3, paragraph (p)(4) is amended by removing ''and X'' and adding in its place ''X, and Y''.

■ 8. In § 430.23, revise paragraph (aa) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(aa) *Battery chargers.* Measure battery discharge energy, expressed in watt-hours, in accordance with section 5.8 of appendix Y of this subpart. Measure the 24-hour energy consumption of a battery charger in active and maintenance modes, expressed in watt-hours, and the power consumption of a battery charger in maintenance mode, expressed in watts, in accordance with section 5.10 of appendix Y of this subpart. Measure the power consumption of a battery charger in standby mode and off mode, expressed in watts, in accordance with sections 5.11 and 5.12, respectively, of appendix Y of this subpart.

* * * * *

■ 9. Appendix Y to subpart B of part 430 is amended by:

■ a. Revising the introductory text to appendix Y;

■ b. Revising section 1. Scope;

■ c. Revising Table 3.1 and section 3.2;

■ d. Revising the undesignated center heading directly above section 4.1. General Setup;

■ e. Revising section 4.3b. and Table 4.1;

■ f. Revising sections 5.3a., 5.3c.(2)(i), 5.3d., 5.8c.(2); and

■ g. Moving Table 5.2 to appear after section 5.8d. and revising it.

The revisions and additions read as follows:

Appendix Y to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Battery Chargers

Note: On or after [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], any representation regarding the energy consumption of battery chargers must be

based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for battery chargers, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required.

1. Scope

This appendix covers the test requirements used to measure the energy consumption for battery chargers operating at either DC or United States AC line voltage (115V at 60Hz). This appendix does not provide a method for testing back-up battery chargers.

* * * * *

3. * * *

* * * * *

TABLE 3.1—LIST OF MEASURED OR CALCULATED VALUES

Name of measured or calculated value	Reference
Duration of the charge and maintenance mode test (Hrs)	Section 5.2.
Battery Discharge Energy (Wh)	Section 4.6.
Initial time and power (W) of the input current of connected battery (A)	Section 5.8.
Active and Maintenance Mode Energy Consumption (W, Hrs)	Section 5.6.
Maintenance Mode Power (W)	Section 5.9.
24-Hour Energy Consumption (Wh)	Section 5.10.
Standby Mode Power (W)	Section 5.11.
Off Mode Power (W)	Section 5.12.

3.2. Verifying Accuracy and Precision of Measuring Equipment

Any power measurements recorded, as well as any power measurement equipment utilized for testing, shall conform to the uncertainty and resolution requirements outlined in Section 4, ''General conditions for measurements,'' as well as Annexes B, ''Notes on the measurement of low power modes,'' and D, ''Determination of uncertainty of measurement,'' of IEC 62301 (incorporated by reference, see § 430.3).

* * * * *

Unit Under Test Setup Requirements

4.3. * * *

b. From the detachable batteries specified above, use Table 4.1 of this appendix to select the batteries to be used for testing depending on the type of battery charger being tested. Each row in the table represents a mutually exclusive battery charger type. In the table, find the single applicable row for the UUT, and test according to those requirements. Select a single battery configuration for testing, according to the battery selection criteria in Table 4.1.

If the battery selection criteria outlined in Table 4.1 results in two or more batteries of differing configurations, but with equal voltage and capacity ratings, use the battery that results in the highest maintenance mode power, as determined in section 5.9 of this appendix, for testing.

* * * * *

TABLE 4.1—BATTERY SELECTION FOR TESTING

Type of charger			Tests to perform
Multi-voltage	Multi-port	Multi-capacity	Battery selection (from all configurations of all associated batteries)
No	No	No	Any associated battery.
No	No	Yes	Highest charge capacity battery.
No	Yes	Yes or No	Use all ports and use the maximum number of identical batteries with the highest rated charge capacity that the charger can accommodate.
Yes	No	No	Highest voltage battery.
Yes	Yes to either or both		Use all ports and use the battery or the configuration of batteries with the highest individual voltage and highest total rated energy capacity.

* * * * *

5. * * *

5.3. * * *

a. No conditioning is to be done on lithium-ion batteries. Proceed directly to battery preparation, section 5.4 of this appendix, when testing chargers for these batteries.

* * * * *

c. * * *

(2) * * *

(i) A battery analyzer at a rate not to exceed 1 C, until its average cell voltage under load reaches the end-of-discharge voltage specified in Table 5.2 of this appendix for the relevant battery chemistry, with the exception of VRLA and Flooded Lead Acid batteries with a capacity of greater than 1000Wh which may be discharged at .2C, .1C, or .05C and must be discharged to 50% of their rated voltage; or

* * * * *

d. Batteries of chemistries, other than lithium-ion, that are known to have been through at least two previous full charge/discharge cycles shall be fully charged only once as in step c.(1) of this section.

* * * * *

5.8. * * *

c. * * *

(2) Set the battery analyzer for a constant discharge current and the end-of-discharge voltage in Table 5.2 of this appendix for the relevant battery chemistry.

* * * * *

TABLE 5.2—REQUIRED BATTERY DISCHARGE RATES AND END-OF-DISCHARGE BATTERY VOLTAGES

Battery chemistry	Discharge rate (C)	End-of-discharge voltage (volts per cell)
Valve-Regulated Lead Acid (VRLA)	0.1	1.75
Flooded Lead Acid	0.1	1.70
Nickel Cadmium (NiCd)	0.2	1.0
Nickel Metal Hydride (NiMH)	0.2	1.0
Lithium Ion (Li-Ion)	0.2	2.5
Lithium Polymer	0.2	2.5
Rechargeable Alkaline	0.2	0.9
Nanophosphate Lithium Ion	0.2	2.0
Silver Zinc	0.2	1.2

* * * * *

[FR Doc. 2015–19105 Filed 8–5–15; 8:45 a.m.]

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DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[Docket No. EERE–2015–BT–TP–0015]

RIN 1904–AD54

Energy Conservation Program: Test Procedures for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking (NOPR), the U.S. Department of Energy (DOE) proposes to reaffirm that the currently prescribed test procedure must be used when measuring the energy efficiency ratio, integrated energy efficiency ratio, and coefficient of performance for small, large, and very large air-cooled commercial unitary air conditioners (CUAC) and commercial unitary heat pumps (CUHP). With this test procedure rulemaking, DOE fulfills its obligation under EPCA to review its test procedures for covered equipment at least once every seven years and either amend the applicable test procedures or publish a determination in the **Federal Register** not to amend them. The proposed amendments would limit the incorporation by reference of the industry test procedure AHRI Standard 340/360–2007, ''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment'' to certain sections and addenda; specify requirements for indoor airflow tolerance and adjustment to meet other rating conditions; clarify requirements for condenser head pressure controls; clarify units of measurement for airflow; and establish a tolerance on part-load rating points. DOE also proposes to amend the certification, compliance, and enforcement provisions for CUACs and CUHPs to specify additional reporting requirements for indoor airflow and add enforcement provisions for verifying the rated cooling capacity, as the rated cooling capacity determines which class of equipment the product belongs to and also determines certain testing conditions.

DATES: DOE will hold a public meeting on this proposed test procedure if one is requested by August 13, 2015. If a public meeting is requested, DOE will announce its date and location on the DOE Web site and via email. The meeting will also be broadcast as a webinar. DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after any public meeting, but no later than September 8, 2015. See section V, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the NOPR for Test Procedures for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment, and provide docket number EERE–2015–BT–TP–0015 and/or regulatory information number (RIN) number 1904–AD54. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: CommPkgACHeat2015TP0015@ee.doe.gov* Include the docket number EERE–2015–BT–TP–0015 and/or RIN 1904–AD54 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC, 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V, ''Public Participation,'' near the end of this document.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page can be found at: [*www.regulations.gov/#!docketDetail;D=EERE-2015-BT-TP-0015*]. This Web page contains a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through regulations.gov.

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building

Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 586–9590, or email *Ashley.Armstrong@ee.doe.gov.*

For legal issues, please contact Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE intends to incorporate by reference the following industry standard into part 429: ANSI/AHRI Standard 340/360–2007, *''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,''* approved by ANSI on October 27, 2011 and updated by addendum 1 in December 2010 and addendum 2 in June 2011 (AHRI 340/360–2007) ANSI/AHRI Standard 340/360–2007 is available at the Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, (703) 524–8800, or go to: *http://www.ahrinet.org.*

Table of Contents

I. Authority and Background
II. Summary of the Notice of Proposed Rulemaking
III. Discussion
A. Amendments to the Current DOE Test Procedure
1. Sections of ANSI/AHRI 340/360–2007 Incorporated by Reference
2. Indoor Airflow Adjustment and Reporting
3. Condenser Head Pressure Controls
4. Unit of Measurement for Airflow
5. Tolerance on Percent Load for IEER Part-Load Tests
B. Certification and Enforcement Issues
1. Measuring Cooling Capacity for Purposes of Certification, Assessment, and Enforcement
2. Compliance Dates of the Test Procedure Amendments
IV. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
M. Description of Material Incorporated by Reference
V. Public Participation
A. Submission of Comments
B. Issues on Which DOE Seeks Comment
VI. Approval of the Office of the Secretary

I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, *et seq.;* ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Pub. L. 114–11 (Apr. 30, 2015).) Part C of Title III, which for editorial reasons was redesignated as Part A–1 upon incorporation into the U.S. Code (42 U.S.C. 6311–6317, as codified), establishes the Energy Conservation Program for Certain Commercial and Industrial Equipment. This equipment includes small, large, and very large air-cooled commercial package air conditioning and heating equipment—which includes commercial unitary air conditioners (CUACs) and commercial unitary heat pumps (CUHPs), the subjects of today's notice. (42 U.S.C. 6311(1)(B)–(D))

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered equipment must use as the basis for (1) certifying to DOE that their equipment complies with applicable energy conservation standards adopted under EPCA, and (2) making representations about the efficiency of the equipment. Similarly, DOE must use these test procedures to determine whether the equipment complies with any relevant standards promulgated under EPCA.

General Test Procedure Rulemaking Process

In 42 U.S.C. 6314, EPCA sets forth the general criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment. EPCA provides in relevant part that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and must not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6314(b))

DOE is also required by EPCA to conduct an evaluation of test procedures at least every seven years for each class of covered equipment (including CUACs and CUHPs) to determine if an amended test procedure would more accurately or fully comply with the requirement to be reasonably designed to produce test results that reflect the energy efficiency, energy use, and operating costs during a representative average use cycle. DOE must either prescribe amended test procedures or publish a notice in the **Federal Register** regarding its determination not to amend test procedures. (42 U.S.C. 6314(a)(1)–(2))

Background

DOE's test procedure for CUACs and CUHPs is codified at Title 10 of the Code of Federal Regulations (CFR), section 431.96. The current regulations require that manufacturers use ANSI/AHRI Standard 340/360–2007, ''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment'' (henceforth referred to as ANSI/AHRI 340/360–2007) when measuring the efficiency of a given CUAC or CUHP and certifying that equipment as compliant with the applicable standard.[1] 77 FR 28928, 28990 (May 16, 2012).

On February 1, 2013, DOE published a request for information and notice of document availability regarding energy conservation standards for CUACs and CUHPs. 78 FR 7296. The request for information solicited information from the public to help DOE determine whether national standards more stringent than those that are currently in place would result in a significant amount of additional energy savings and whether those national standards would be technologically feasible and economically justified. DOE also sought information from the public on the merits of adopting the integrated energy efficiency ratio (IEER) as the energy efficiency descriptor for small, large, and very large air-cooled commercial air conditioners and heat pumps. Currently, manufacturers must measure the energy efficiency of their equipment using the energy efficiency ratio (EER), which provides a measurement of the full-load efficiency of a given unit. The procedure to follow when measuring and calculating that value, like the proposed IEER metric, is found in ANSI/ASHRAE

[1] DOE notes that for purposes of this notice, all references to ANSI/ASHRAE 340/360–2007 include Addenda 1 and 2 to this industry-based standard.

340/360–2007. See ANSI/ASHRAE 340/360–2007 at sec. 6. Comments received on the topic of IEER are discussed in a related energy conservation standards NOPR, which was published in September 2014. 79 FR 58948 (Sept. 30, 2014).

Subsequently, on April 1, 2015, DOE issued a notice of intent to establish the Commercial Package Air Conditioners and Heat Pumps and Commercial Warm Air Furnaces Working Group to negotiate either a notice of proposed rulemaking (NOPR) or final rule for energy conservation standards for this equipment. 80 FR 17363. This Working Group was established under the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) in accordance with the Federal Advisory Committee Act and the Negotiated Rulemaking Act. See 5 U.S.C. Appendix—Federal Advisory Committee Act and 5 U.S.C. 561–570a. The Working Group, which consisted of 17 members, including one member from ASRAC and one DOE representative, met six times (five times in-person and once by teleconference). The meetings were held on April 28, May 11–12, May 20–21, June 1–2, June 9–10, and June 15, 2015. The Working Group successfully reached consensus on energy conservation standards for commercial package air conditioners and heat pumps and commercial warm air furnaces, which included the Working Group's recommendations to ASRAC on the energy conservation standards. The group also chose to provide test procedure and metric-related recommendations to the committee. ASRAC voted unanimously to approve the Working Group's recommendations on June 17, 2015. Consistent with those recommendations, DOE proposes to amend the test procedure and associated certification regulations for small, large, and very large air-cooled commercial package air conditioning and heating equipment to implement the Working Group's recommendations. Participants in the Working Group consisted of the following entities aside from DOE:

Participant	Acronym, abbreviation	Affiliation
Air Conditioning Contractors of America	ACCA	Contractor/Installer Group.
Air-Conditioning, Heating, and Refrigeration Institute	AHRI	HVAC Manufacturers Group.
Appliance Standards Awareness Project	ASAP	Energy Efficiency Advocacy Group.
Emerson Climate Technologies	Emerson	Manufacturer.
Goodman Manufacturing	Goodman	Manufacturer.
Lennox International	Lennox	Manufacturer.
Mitsubishi Electric	Mitsubishi	Manufacturer.
Natural Resources Defense Council	NRDC	Energy Efficiency Advocacy Group.
Northwest Energy Efficiency Alliance	NEEA	Energy Efficiency Advocacy Group.
Pacific Gas & Electric Company, San Diego Gas & Electric Company, Southern California Edison, and Southern California Gas Company.	Cal. IOUs	Investor-Owned Utilities.
Rheem Manufacturing Company	Rheem	Manufacturer.
Sheet Metal and Air Conditioning Contractors National Association, Inc.	SMACCNA	Contractor/Installer Group.
Trane/Ingersoll Rand	Trane	Manufacturer.
United Technologies Corporation (Carrier)	Carrier	Manufacturer.
Underwriters Laboratories	UL	Test Lab.

DOE considers the activity associated with this rulemaking sufficient to satisfy the statutory requirement that DOE review its test procedures for all covered equipment, including CUACs and CUHPs, at least once every seven years and either amend the applicable test procedures or publish a determination in the **Federal Register** not to amend them. (42 U.S.C. 6314(a)(1))

II. Summary of the Notice of Proposed Rulemaking

DOE is proposing several amendments to its regulations related to the test procedures prescribed for CUACs and CUHPs in 10 CFR part 431, subpart F. First, DOE proposes to amend the current DOE test procedure to incorporate only certain sections of ANSI/AHRI 340/360–2007 rather than in its entirety. Second, DOE proposes amendments to incorporate a tolerance on the indoor airflow rate. In particular, during full load testing in cooling mode, the indoor airflow rate would be required to remain within +/−5 percent of the rated full-load indoor airflow. The unit and/or test facility must be adjusted to maintain this tolerance for indoor airflow rate while ensuring that the ESP remains within the tolerance required by the test procedure. For any other condition using full-load airflow (*e.g.* full-load heating for a heat pump), the +/−5 percent tolerance would also apply and, if necessary, a test facility adjustment would be made in order to maintain air flow within the required tolerance, but the unit itself may not be adjusted. Third, DOE proposes to clarify that condenser head pressure controls, if included with the unit, must be active during testing. Fourth, DOE proposes to clarify that reference to cubic feet per minute (CFM) in ANSI/AHRI 340/360–2007 must be interpreted as referring to standard CFM (SCFM). Fifth, DOE proposes that when conducting part-load testing to measure IEER, the difference between the percent load calculated for a part-load test point and its target value may be as much as three percent without requiring interpolation or application of the cyclic degradation factor specified in ANSI/AHRI 340/360–2007. Sixth, DOE proposes to amend the certification, compliance, and enforcement provisions for CUACs and CUHPs. These amendments include adding enforcement provisions for verifying the cooling capacity, as the cooling capacity determines which class of equipment the product belongs to and also determines certain testing conditions. Lastly, DOE has proposed a definition of integrated energy efficiency ratio (IEER).

DOE believes that none of these clarifications or amendments would result in any changes to the energy efficiency of current equipment. Representations of energy efficiency metrics would be required to be based on the amended test procedure beginning 360 days after the date of publication of the final rule. 42 U.S.C. 6314(d) (prescribing a 360-day period after a test procedure's publication by which manufacturer representations of energy consumption or energy costs must be based on that procedure).

III. Discussion

A. Amendments to the Current DOE Test Procedure

DOE proposes making several amendments to the current DOE test procedure, which incorporates ANSI/AHRI 340/360–2007 by reference. These amendments are detailed below.

1. Sections of ANSI/AHRI 340/360–2007 Incorporated by Reference

Currently, 10 CFR 431.96, Table 2, specifies that when measuring the energy efficiency of CUACs and CUHPs using the metrics EER and coefficient of performance (COP), ANSI/AHRI 340/360–2007 must be used, but omitting section 6.3 of that industry testing standard. DOE proposes that when testing CUACs and CUHPs using the EER, COP, and IEER metrics, only certain sections of ANSI/AHRI 340/360–2007 are required, specifically sections 3, 4, and 6 (but, again, omitting section 6.3), rather than applying the entirety of ANSI/AHRI 340/360–2007. The sections DOE proposes to incorporate are those that include the relevant testing provisions that apply directly to the DOE test procedure, while the excluded sections contain provisions unrelated to the DOE test procedure. DOE proposes not to incorporate section 5 of ANSI/AHRI 340/360–2007, which consists of a single sentence referring to use of ASHRAE 37, ''Methods of Testing for Rating Unitary Air-Conditioning and Heat Pump Equipment,'' for test methods and procedures. DOE proposes this change because the version of this test method is not specified. Instead, DOE proposes to incorporate by reference the most recent version of this test procedure—ANSI/ASHRAE 37–2009. The test standard would be listed in 10 CFR 431.95, and incorporated by reference in 10 CFR 431.96. In case of a conflict between ANSI/AHRI 340/360–2007 or ANSI/ASHRAE 37–2009 and the CFR, the CFR provisions control.

2. Indoor Airflow Adjustment and Reporting

Section 6.1.3.2 of ANSI/AHRI 340/360–2007 establishes minimum external static pressure (ESP) rating requirements for different equipment capacities and requirements for the indoor-coil airflow rate for determining standard ratings. DOE notes that AHRI 340/360 also refers to ESP as ''external pressure'' and ''external resistance.'' Section 6.1.3.2 establishes a tolerance of −0 in. H_2O to +0.05 in. H_2O for ESP (*i.e.,* the measured ESP may not be any lower but can be up to 0.05 in. H_2O higher than the required minimum) but does not contain a tolerance for the airflow rate. Manufacturers are currently required to report, among other information, the model number and specifications of the motor and the drive kit, including settings, associated with that specific motor that were used to determine the certified rating; as well as the rated airflow in SCFM for each fan coil; in the supplemental information submitted with the certification report for the unit. (*See* 10 CFR 429.43(b)(4)(i))

DOE proposes that any subsequent testing (*e.g.,* DOE assessment and enforcement testing) must use the same motor and drive assembly and settings specified in the certification information, and that the party conducting testing would be required to ensure that the ESP is within the tolerances set forth in Section 6.1.3.2 of ANSI/AHRI 340/360–2007 and must verify that the indoor airflow rate is within +/−5 percent of the manufacturer-rated full-load indoor airflow rate. If the indoor airflow in SCFM measured at the required ESP is outside the +/−5 percent tolerance, the unit and/or test facility must be adjusted to set up the unit such that both the airflow and ESP are within the required tolerances. This process may include, but is not limited to, adjusting any adjustable motor sheaves, adjusting variable frequency drive (VFD) settings, or adjusting the code tester fan. DOE believes that the proposed 5 percent tolerance on airflow is an appropriate compromise of test burden and precision because holding this tolerance has been possible without difficulty in DOE's own testing, and because testing and analysis shows that the impact of up to 5 percent airflow rate variation on capacity and IEER is minimal. For example, DOE testing of a 7.5-ton CUAC unit suggested that 5 percent variation in the full-load airflow would cause 0.5 percent variation in EER and 0.8 percent variation in capacity. DOE also used data available in manufacturer data sheets to calculate IEER as a function of indoor airflow for several commercial air conditioners and determined that a 5 percent variation in airflow would be expected to cause, on average, a 1.5 percent variation in IEER. (See EERE–2015–BT–TP–0015.) DOE requests comment on the appropriateness of the +/−5 percent tolerance and/or data that might show that a different tolerance level might be more appropriate. This is Issue 1 in section V.B, ''Issues on Which DOE Seeks Comment.''

ANSI/AHRI 340/360–2007, section 6.1.3.2.e specifies that the full-load cooling airflow rate must be employed for any other condition using full-load air flow (*e.g.,* full-load heating) without regard to resulting ESP. DOE proposes that the +/−5 percent tolerance for air flow rate must be applied for these other conditions as well. If necessary, a test facility adjustment may have to be made in order to maintain air flow within the required tolerance; for example, adjustment of the code tester fan may be needed to ensure air flow within the specified tolerance range even if the ESP is no longer within the range specified for operation in full-capacity cooling mode. (In this situation, the tester would *not* adjust the unit under test.) DOE requests comments on this interpretation and clarification of the requirements of ANSI/AHRI 340/360–2007, section 6.1.3.2.e, regarding operation in modes other than full-capacity cooling. This is Issue 2 in section V.B, ''Issues on Which DOE Seeks Comment.''

DOE realizes that some units may be designed to operate with a different indoor airflow rate for cooling or heating mode, such as when the unit incorporates variable speed indoor fans. In that case, DOE proposes that manufacturers would report the individual indoor airflow rates in cooling and heating mode. DOE is proposing this approach in order to capture air flow rates used in the different full-load tests (*i.e.,* heating and cooling). DOE requests comment on whether marketed units actually operate in this manner, and if so, whether this proposed provision would be appropriate for such units. This is Issue 3 in section V.B, ''Issues on Which DOE Seeks Comment.''

DOE also proposes that a manufacturer must include in its certification report the adjusted indoor airflow at each part-load condition. Inclusion of these part-load air flow rates would allow confirmation that, during any subsequent third-party testing, the equipment is operating at part-load as rated.

3. Condenser Head Pressure Controls

Note 2 of Table 6 of ANSI/AHRI 340/360–2007 specifies that condenser airflow should be adjusted as required by the unit controls for head pressure control. Condenser head pressure controls regulate the flow of refrigerant through the condenser and/or adjust operation of condenser fans to prevent condenser pressures from dropping too low during low-ambient operation. When employed, these controls ensure that the refrigerant pressure is high enough to maintain adequate flow through refrigerant expansion devices such as thermostatic expansion valves. The use of condenser head pressure controls influences a unit's performance, making it important that

this feature be operating during the test because it would be operating in the field. DOE proposes to specify that condenser head pressure controls, if included with the unit, must be active during testing.

The use of condenser head pressure controls may prevent a unit from reaching steady state prior to testing. For example, a unit employing condenser head pressure control might cycle a condenser fan to control head pressure. The current DOE test procedure does not address such operation. Hence, if a unit with condenser head pressure controls cannot achieve steady-state operation with the controls active, and thus cannot be tested, the manufacturer would have to request a waiver. See 10 CFR 431.401 (''Any interested person may submit a petition to waive for a particular basic model the requirements of any uniform test method contained in this part, upon the grounds that . . . the basic model contains one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures.'') DOE requests comment on whether there are any units sold for which this might occur and what changes, if any, may be needed to DOE's proposal to address this scenario. This is Issue 4 in section V.B, ''Issues on Which DOE Seeks Comment.''

4. Unit of Measurement for Airflow

ANSI/AHRI 340/360–2007 lacks clarity regarding references to CFM as opposed to SCFM. In order to resolve this, DOE proposes that all instances of CFM as a unit of airflow must be interpreted to mean SCFM where they appear in the sections of ANSI/AHRI 340/360–2007 incorporated by reference in 10 CFR part 431, subpart F.

5. Tolerance on Percent Load for IEER Part-Load Tests

For calculating IEER, section 6.2.2 of ANSI/AHRI 340/360–2007 specifies that the unit efficiency must be determined at 100 percent, 75 percent, 50 percent, and 25 percent load (defined as part-load net cooling capacity divided by full-load net cooling capacity, then multiplied by 100 percent) at the conditions specified in Table 6 of ANSI/AHRI 340/360–2007 (Table 6). ANSI/AHRI 340/360–2007 also provides instruction for when a unit cannot operate at the 75 percent, 50 percent, and 25 percent part-load test points, but does not specify a *tolerance* for the percent load, *i.e.* how much can the load deviate from the part-load test point and still be considered operating at the part-load test point. For example, if the calculated percent load for one of the part-load tests is 75.5 percent, are the results of this test acceptable for use as the 75 percent part-load test point condition?

DOE proposes to apply a +/−3 percent tolerance to each part load test point. In other words, the difference between the percent load calculated for a part-load test point and its target value may be as much as 3 percent and still be considered to be operating at the target part-load test point. DOE anticipates that this proposal will reduce testing time and burden by eliminating additional part-load tests in cases where operation closely approaches but does not exactly meet the target part-load test points. DOE requests comment on establishing this tolerance and on the appropriateness of the proposed tolerance level. This is Issue 5 in section V.B, ''Issues on Which DOE Seeks Comment.''

B. Certification and Enforcement Issues

1. Measuring Cooling Capacity for Purposes of Certification, Assessment, and Enforcement

Manufacturers must certify and report CUAC and CUHP cooling capacity (in Btu/h) when certifying the efficiency of this equipment, per 10 CFR 429.43(b)(2). The cooling capacity represented by manufacturers for certification and compliance purposes must be determined through testing in accordance with 10 CFR 431.96. DOE proposes that the cooling capacity certified to DOE for a given basic model must be the average of the capacities measured for the sample of units tested to certify that basic model, rounded according to the multiples in Table 4 in ANSI/AHRI 340/360–2007.

DOE proposes that when conducting assessment and enforcement testing, the total cooling capacity must be measured pursuant to the test requirements of 10 CFR 431.96 for each unit tested, and the results of the measurement(s) (either the measured cooling capacity for a single unit sample or the average of the measured cooling capacities for a multiple-unit sample) compared to the value of cooling capacity certified by the manufacturer. The manufacturer-certified cooling capacity will be considered valid if the cooling capacity determined through DOE testing is within five percent of the certified cooling capacity.

2. Compliance Dates of the Test Procedure Amendments

In amending a test procedure for small, large, or very large commercial package air conditioning and heating equipment, EPCA directs DOE to determine to what extent, if any, the test procedure would alter the measured energy efficiency or measured energy use of a covered product. (42 U.S.C. 6314(a)(4)) If the amended test procedure alters the measured energy efficiency or measured energy use, the Secretary must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6314(a)(4) (requiring that the provisions of 42 U.S.C. 6293(e), which includes determining the impact that changes to a test procedure would have on the measured energy efficiency or energy use of a covered product))

In DOE's view, no aspect of this NOPR is likely to alter the measured efficiency of CUACs and CUHPs. These proposed amendments, which follow the Working Group's recommendations, relate to DOE's efforts to establish amended energy conservation standards for CUACs and CUHPs. As part of that standards rulemaking effort, DOE had proposed, and the Working Group adopted, an approach that would base the amended standards for this equipment on IEER instead of EER. See 79 FR 58947 at 58956 (September 30, 2014); ASRAC Commercial Package Air Conditioners and Commercial Warm Air Furnaces Working Group Term Sheet, at 2 (June 15, 2015). DOE has also proposed a definition of IEER to support the Working Group's approach. Consistent with this transition to IEER as the reporting metric for this equipment, DOE proposes to require the reporting of indoor part-load airflow rates used in the IEER calculation as of the compliance date of the new standard. DOE also proposes another amendment associated with the measurement of IEER—applying a +/−3 percent tolerance to each part-load test point for IEER ratings. This proposed amendment, if adopted, would be required as of the compliance date of the new standard.

The proposed amendments not specifically related to IEER would, rather than alter the measured efficiency or measured energy use of CUAC and CUHP equipment, clarify how to test this equipment. These proposed amendments would limit the incorporation by reference of ANSI/AHRI 340/360–2007 to certain sections, establish a tolerance on full-load indoor airflow, add condenser head pressure control requirements, and clarify units of measurement for airflow. These proposals, if adopted, would result in no procedural changes related to how testing would be performed. These proposed amendments, if adopted,

would become effective 30 days after publication of the final rule in the **Federal Register**. Consistent with 42 U.S.C. 6314(d), any representations of energy consumption of CUACs and CUHPs must be based on any final amended test procedures 360 days after the publication of the test procedure final rule.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel*.

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule prescribes test procedures that will be used to test compliance with energy conservation standards for the equipment that are the subject of this rulemaking. DOE has tentatively concluded that the proposed rule would not have a significant impact on a substantial number of small entities.

For manufacturers of small, large, and very large air-cooled CUAC and CUHP, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/category/navigation-structure/contracting/contracting-officials/small-business-size-standards*. Manufacturing of small, large, and very large air-cooled CUAC and CUHP is classified under NAICS 333415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 750 employees or less for an entity to be considered as a small business for this category. DOE initially identified 12 potential manufacturers of commercial packaged air conditioners sold in the U.S. DOE then determined that 10 were large manufacturers, manufacturers that are foreign-owned and -operated, or manufacturers that do not produce products covered by this rulemaking. DOE was able to determine that 2 manufacturers meet the SBA's definition of a ''small business'' and manufacture products covered by this rulemaking.

DOE expects the impact of the proposed rule on manufacturers, including small businesses, to be minimal. The proposed rule would amend DOE's certification requirements to specify additional reporting requirements and add enforcement provisions for verifying cooling capacity. The proposed rule would also clarify or amend DOE's test procedures to amend AHRI Standard 340/360–2007, ''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,'' to incorporate certain sections by reference, specify requirements for airflow adjustment and tolerance to meet other rating conditions, require units with condenser head pressure controls to be tested with those controls active, clarify the unit of measurement for airflow, and establish a tolerance on part-load rating points.

The Working Group has recommended amended energy conservation standards rulemaking that the standards will be based on the metric of integrated energy efficiency ratio (IEER) instead of energy efficiency ratio (EER). DOE expects the impact on test burden to be modest. AHRI ratings already include IEER, indicating that many manufacturers, representing a large portion of the market, already determine IEER for their units. ANSI/ASHRAE/IES Standard 90.1–2013—Energy Standard for Buildings Except Low-Rise Residential Buildings (ASHRAE 90.1–2013) has adopted an IEER requirement, which makes reporting of IEER necessary for shipment to those states and localities that will adopt that standard in building codes. Current procedures relating to alternative efficiency determination methods (AEDMs), including procedures for certifying IEER, require a limited amount of testing to be conducted when validating an AEDM for CUACs and CUHPs. 10 CFR 429.70(c)(2)(iv) (detailing the minimum number of distinct basic models required to be test for purposes of AEDM validation for different equipment types and classes) . DOE expects that most CUAC and CUHP ratings will be based on results obtained from AEDMs. Although DOE recognizes that some ratings will be based on testing, DOE expects these ratings to comprise a small minority of products.

However, to help DOE better understand the burdens when measuring IEER instead of EER, DOE requests comment and data on manufacturer expectations of the number of models that will likely be tested rather than rated with an AEDM. DOE encourages confidential data submissions if necessary in order to ensure that such data can be provided.

For these reasons, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of small, large, and very large air-cooled CUAC and CUHP equipment must certify to DOE that their equipment complies with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the appropriate DOE test procedures for this equipment, including any applicable amendments. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including CUACs and CUHPs. See 10

CFR part 429, subpart B. The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA).

In the Certification of Commercial Equipment Final Rule published in May 2014, DOE amended existing regulations governing compliance certification for a variety of commercial equipment covered by EPCA, which affected CUAC and CUHP manufacturers. 79 FR 25486 at 25502 (May 5, 2014). In today's NOPR, DOE proposes to amend its certification requirements to specify additional reporting requirements. DOE does not believe that these additions to the certification requirements constitute a significant additional burden upon respondents, as they require minimal additional information to what manufacturers must already report in their certification reports. DOE believes that the Certification of Commercial Equipment Final Rule provides an accurate estimate of the existing burden on respondents and would continue to apply to the relevant aspects of the proposed amendments. See 79 FR at 25496–25498 (detailing burden estimates and indicating an average burden of approximately 30 hours per company on an annual basis). OMB has approved the revised information collection for DOE's certification and recordkeeping requirements. 80 FR 5099 (January 30, 2015).

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.

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for commercial unitary air conditioners and commercial unitary heat pumps. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that is the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause 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), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel*. DOE examined this proposed rule according to UMRA and its statement of policy and determined that the proposed rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in

any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of CUACs and CUHPs is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed rule incorporates testing methods contained in the following commercial standards: ANSI/AHRI Standard 340/360–2007 and ANSI/ASHRAE Standard 37–2009. The Department has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA, (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). DOE will consult with the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition, prior to prescribing a final rule.

M. Description of Materials Incorporated by Reference

DOE is proposing to incorporate by reference ANSI/AHRI Standard 340/360–2007 (with Addenda 1 and 2), ''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment.'' This is an industry-accepted standard used by manufacturers when testing and rating the performance of commercial and industrial unitary air-conditioning and heat pump equipment. Copies of this testing standard are available for download at *http://www.ahrinet.org/App_Content/ahri/files/standards%20pdfs/ANSI%20standards%20pdfs/ANSI%20AHRI%20Standard%20340-360-2007%20with%20Addenda%201%20and%202.pdf*.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for

the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE proposes that when conducting full-load cooling tests with the appropriate external static pressure (ESP) condition in Table 5 of ANSI/AHRI 340/360–2007, the tester must use the motor and drive kit that was used to determine the certified rating, as specified in the manufacturer's certification information. During such testing, the indoor airflow must be within +/−5 percent of the manufacturer's rated full-load indoor airflow rate. If the indoor airflow at the required ESP is outside the +/−5 percent tolerance, make necessary adjustments to the test setup and/or the unit such that both the airflow and ESP are within the required tolerances. DOE requests comment on the appropriateness of the +/−5 percent tolerance and/or data showing that a different tolerance level might be more appropriate, as well as feedback on the burden of maintaining airflow within the tolerance. See section III.A.2 for details.

2. Section 6.1.3.2.e of ANSI/AHRI 340/360–2007 specifies that the full-load cooling airflow rate must be maintained for any other condition using full-load air flow (*e.g.,* full-load heating) without regard to resulting ESP. DOE proposes that in this situation, the +/−5 percent tolerance on the full-load cooling airflow rate must also apply. To maintain the airflow within the required tolerance, the tester may make adjustments to the test facility or apparatus, but not the unit being tested. DOE requests comments on this interpretation and clarification of the requirements of section 6.1.3.2.e of ANSI/AHRI 340/360–2007 regarding operation in modes other than full-capacity cooling. See section III.A.2 for details.

3. For all units, certification requirements already include reporting of the indoor airflow at full capacity cooling operation. If units are designed to operate with a different indoor airflow for cooling and heating mode, DOE proposes that manufacturers would separately report the indoor airflow in cooling and heating mode. DOE requests comment on whether this approach is appropriate and also requests comment on whether any units in the market are designed to operate with a different full-load air flow for heating and cooling modes. See section III.A.2 for details.

4. DOE proposes that condenser head pressure controls, if included in a unit, must be active during testing. DOE requests comment on whether there are any units on the market with condenser head pressure controls that would prevent the unit from achieving steady state under the test conditions. If so, how should DOE address these kinds of units for testing purposes? See section III.A.3 for details.

5. For calculating IEER, section 6 of ANSI/AHRI 340/360–2007 specifies that the unit efficiency must be determined at 100 percent, 75 percent, 50 percent, and 25 percent load (defined as net part-load cooling capacity divided by full-load net cooling capacity times 100 percent). ANSI/AHRI 340/360–2007 also provides instruction for when a unit cannot operate at the 75 percent, 50 percent, and 25 percent part-load test points, but does not specify a *tolerance* for the percent load, *i.e.* how much can the load deviate from the part-load test point and still be considered operating at the part-load test point. DOE proposes to apply a +/−3 percent tolerance on the percent load for approach to each part-load rating point. In other words, the difference between the percent load calculated for a part-load test point and its target value may be as much as 3 percent and still be considered to be

operating at the target part-load test point. DOE requests comment on the appropriateness of the tolerance level. See section III.A.5 for details.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Commercial equipment, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Commercial equipment, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on July 27, 2015.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 431 of Chapter II, Subchapter D, of Title 10 the Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Amend § 429.4 by redesignating paragraph (c) as (d) and adding a new paragraph (c) to read as follows:

§ 429.4 Materials incorporated by reference.

* * * * *

(c) AHRI. Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, (703) 524–8800, or go to: *http://www.ahrinet.org.*

(1) ANSI/AHRI Standard 340/360–2007, ''2007 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,'' approved by ANSI on October 27, 2011 and updated by addendum 1 in December 2010 and addendum 2 in June 2011 (AHRI 340/360–2007), IBR approved for § 429.43.

(2) Reserved.

* * * * *

■ 3. Amend § 429.43 by revising paragraphs (a)(1)(iii), (b)(2)(i) and (ii), (b)(4)(i) and (ii), to read as follows:

§ 429.43 Commercial heating, ventilating, air conditioning (HVAC) equipment.

(a) * * *

(1) * * *

(iii) For commercial unitary air conditioners and commercial unitary heat pumps the represented value of cooling capacity must be the average of the capacities measured for the units in the sample selected as described in paragraph (a)(1)(ii) of this section, rounded to the nearest appropriate Btu/h multiple according to Table 4 of ANSI/AHRI 340/360–2007 (incorporated by reference, see § 429.43).

* * * * *

(b) * * *

(2) * * *

(i) Commercial package air-conditioning equipment (except commercial package air conditioning equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h):

(A) When certifying compliance with the January 1, 2010 energy conservation standards: The energy efficiency ratio (EER in British thermal units per Watt-hour (Btu/Wh)), the rated cooling capacity in British thermal units per hour (Btu/h), and the type(s) of heating used by the basic model (*e.g.,* electric, gas, hydronic, none).

(B) When certifying compliance with the January 1, 2018 or the January 1, 2023 energy conservation standards: The integrated energy efficiency ratio (IEER in British thermal units per Watt-hour (Btu/Wh)), the rated cooling capacity in British thermal units per hour (Btu/h), and the type(s) of heating used by the basic model (*e.g.,* electric, gas, hydronic, none).

(ii) Commercial package heating equipment (except commercial package heating equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h):

(A) When certifying compliance with the January 1, 2010 energy conservation standards: The energy efficiency ratio (EER in British thermal units per Watt-hour (Btu/Wh)), the coefficient of performance (COP), the rated cooling capacity in British thermal units per hour (Btu/h), and the type(s) of heating used by the basic model (*e.g.,* electric, gas, hydronic, none).

(B) When certifying compliance with the January 1, 2018 or the January 1, 2023 energy conservation standards: The integrated energy efficiency ratio (IEER in British thermal units per Watt-hour (Btu/Wh)), the coefficient of performance (COP), the rated cooling capacity in British thermal units per hour (Btu/h), and the type(s) of heating used by the basic model (*e.g.,* electric, gas, hydronic, none).

* * * * *

(4) * * *

(i) Commercial package air-conditioning equipment (except commercial package air conditioning equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h): Rated indoor airflow in standard cubic feet per minute (SCFM) for each fan coil; water flow rate in gallons per minute (gpm) for water-cooled units only; rated external static pressure in inches of water; frequency or control set points for variable speed components (*e.g.,* compressors, VFDs); required dip switch/control settings for step or variable components; a statement whether the model will operate at test conditions without manufacturer programming; any additional testing instructions, if applicable; and if a variety of motors/drive kits are offered for sale as options in the basic model to account for varying installation requirements, the model number and specifications of the motor (to include efficiency, horsepower, open/closed, and number of poles) and the drive kit, including settings, associated with that specific motor that were used to determine the certified rating. When certifying compliance with the January 1, 2018 or the January 1, 2023 energy conservation standards, rated indoor airflow in SCFM for each part-load point used in the IEER calculation and any special instructions required to obtain operation at each part-load point, such as frequency or control set points for variable speed components (*e.g.,* compressors, VFDs), dip switch/control settings for step or variable components, or any additional applicable testing instructions, are also required.

(ii) Commercial package heating equipment (except commercial package heating equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h): The rated heating capacity in British thermal units per hour (Btu/h); rated indoor airflow in standard cubic feet per minute (SCFM) for each fan coil (in cooling mode); rated airflow in SCFM for each fan coil in heating mode if the unit is designed to operate with different airflow rates for cooling and heating mode; water flow rate in gallons per minute (gpm) for water cooled units only; rated external static pressure in inches of water; frequency or control set points for variable speed components (*e.g.,* compressors, VFDs); required dip

switch/control settings for step or variable components; a statement whether the model will operate at test conditions without manufacturer programming; any additional testing instructions, if applicable; and if a variety of motors/drive kits are offered for sale as options in the basic model to account for varying installation requirements, the model number and specifications of the motor (to include efficiency, horsepower, open/closed, and number of poles) and the drive kit, including settings, associated with that specific motor that were used to determine the certified rating. When certifying compliance with the January 1, 2018 or the January 1, 2023 energy conservation standards, rated indoor airflow in SCFM for each part-load point used in the IEER calculation and any special instructions required to obtain operation at each part-load point, such as frequency or control set points for variable speed components (*e.g.,* compressors, VFDs), dip switch/control settings for step or variable components, or any additional applicable testing instructions, are also required.

* * * * *

■ 4. Amend § 429.134 by adding paragraph (c) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(c) Commercial unitary air conditioners and commercial unitary heat pumps—Verification of cooling capacity. The cooling capacity of each tested unit of the basic model will be measured pursuant to the test requirements of part 431 of this chapter for each unit tested. The results of the measurement(s) will be compared to the value of cooling capacity certified by the manufacturer. The certified cooling capacity will be considered valid only if the measurement(s) (either the measured cooling capacity for a single unit sample or the average of the measured cooling capacities for a multiple unit sample) is within five percent of the certified cooling capacity.

(1) If the certified cooling capacity is found to be valid, the certified cooling capacity will be used as the basis for determining the equipment class.

(2) If the certified cooling capacity is found to be invalid, the average of the measured cooling capacity will be used as the basis for determining the equipment class.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 5. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 6. Amend § 431.92 by adding a definition of ''integrated energy efficiency ratio'' in alphabetical order to read as follows:

§ 431.92 Definitions concerning commercial air conditioners and heat pumps.

* * * * *

Integrated energy efficiency ratio, or IEER, means a single number part-load efficiency based on weighting of EER at various load capacities, as measured in Appendix A to Subpart F of part 431, expressed in Btu/watt-hour.

* * * * *

§ 431.95 [Amended]

■ 6. Amend § 431.95 by adding ''and Appendix A to subpart F of part 431'' at the end of paragraphs (b)(5) and (c)(2).

■ 5. Amend § 431.96 by revising paragraphs (b)(1) and (c) and Table 1 to read as follows:

§ 431.96 Uniform test method for the measurement of energy efficiency of commercial air conditioners and heat pumps.

* * * * *

(b) * * *

(1) Determine the energy efficiency of each type of covered equipment by conducting the test procedure(s) listed in Table 1 of this section along with any additional testing provisions set forth in paragraphs (c) through (g) of this section and appendix A to this subpart, that apply to the energy efficiency descriptor for that equipment, category, and cooling capacity. The omitted sections of the test procedures listed in Table 1 of this section must not be used.

TABLE 1 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Use tests, conditions, and procedures [1] in	Additional test procedure provisions as indicated in the listed paragraphs of this section
Small Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled, 3-Phase, AC and HP.	<65,000 Btu/h	SEER and HSPF	AHRI 210/240–2008 (omit section 6.5).	Paragraphs (c) and (e).
	Air-Cooled AC and HP.	≥65,000 Btu/h and <135,000 Btu/h.	EER, IEER, and COP	Appendix A to this subpart.	None.
	Water-Cooled and Evaporatively-Cooled AC.	<65,000 Btu/h	EER	AHRI 210/240–2008 (omit section 6.5).	Paragraphs (c) and (e).
		≥65,000 Btu/h and <135,000 Btu/h.	EER	AHRI 340/360–2007 (omit section 6.3).	Paragraphs (c) and (e).
	Water-Source HP	<135,000 Btu/h	EER and COP	ISO Standard 13256–1 (1998).	Paragraph (e).
Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP.	≥135,000 Btu/h and <240,000 Btu/h.	EER, IEER and COP	Appendix A to this subpart.	None.
	Water-Cooled and Evaporatively-Cooled AC.	≥135,000 Btu/h and <240,000 Btu/h.	EER	AHRI 340/360–2007 (omit section 6.3).	Paragraphs (c) and (e).
Very Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP.	≥240,000 Btu/h and <760,000 Btu/h.	EER, IEER and COP	Appendix A to this subpart.	None.
	Water-Cooled and Evaporatively-Cooled AC.	≥240,000 Btu/h and <760,000 Btu/h.	EER	AHRI 340/360–2007 (omit section 6.3).	Paragraphs (c) and (e).
Packaged Terminal Air Conditioners and Heat Pumps.	AC and HP	<760,000 Btu/h	EER and COP	Paragraph (g) of this section.	Paragraphs (c), (e), and (g).
Computer Room Air Conditioners.	AC	<65,000 Btu/h	SCOP	ASHRAE 127–2007 (omit section 5.11).	Paragraphs (c) and (e).
		≥65,000 Btu/h and <760,000 Btu/h.	SCOP	ASHRAE 127–2007 (omit section 5.11).	Paragraphs (c) and (e).

TABLE 1 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS—Continued

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Use tests, conditions, and procedures [1] in	Additional test procedure provisions as indicated in the listed paragraphs of this section
Variable Refrigerant Flow Multi-split Systems, Air-Cooled.	AC	<65,000 Btu/h	SEER	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).	Paragraphs (c), (d), (e), and (f).
		≥65,000 Btu/h and <760,000 Btu/h.	EER	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).	Paragraphs (c), (d), (e), and (f).
	HP	<65,000 Btu/h	SEER and HSPF	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).	Paragraphs (c), (d), (e), and (f).
		≥65,000 Btu/h and <760,000 Btu/h.	EER and COP	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).	Paragraphs (c), (d), (e), and (f).
Variable Refrigerant Flow Multi-split Systems, Water-source.	HP	<760,000 Btu/h	EER and COP	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).	Paragraphs (c), (d), (e), and (f).
Single Package Vertical Air Conditioners and Single Package Vertical Heat Pumps.	AC and HP	<760,000 Btu/h	EER and COP	AHRI 390–2003 (omit section 6.4).	Paragraphs (c) and (e).

[1] Incorporated by reference, see § 431.95.

* * * * *

(c) *Optional break-in period for tests conducted using AHRI 210/240–2008, AHRI 390–2003, AHRI 1230–2010, and ASHRAE 127–2007.* Manufacturers may optionally specify a ''break-in'' period, not to exceed 20 hours, to operate the equipment under test prior to conducting the test method specified by AHRI 210/240–2008, AHRI 390–2003, AHRI 1230–2010, or ASHRAE 127–2007 (incorporated by reference, see § 431.95). A manufacturer who elects to use an optional compressor break-in period in its certification testing should record this information (including the duration) in the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71.

* * * * *

■ 7. Add Appendix A to subpart F of part 431 to read as follows:

Appendix A to Subpart F of Part 431—Uniform Test Method for the Measurement of Energy Consumption of Air-Cooled Small, Large, and Very Large Commercial Packaged (Unitary) Air Conditioning and Heating Equipment

Note: Prior to [DATE 360 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], representations with respect to the energy use or efficiency of commercial unitary air conditioners and heat pumps (CUACs and CUHPs), including compliance certifications, must be based on testing conducted in accordance with either Table 1 to § 431.96 as it now appears or Table 1 to § 431.96 as it appeared at 10 CFR part 431, subpart F, in the 10 CFR parts 200 to 499 edition revised as of January 1, 2015. After [DATE 360 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], representations with respect to energy use or efficiency of commercial unitary air conditioners and heat pumps (CUACs and CUHPs), including compliance certifications, must be based on testing conducted in accordance with Table 1 to § 431.96.

(1) *Cooling mode test method.* The test method for testing commercial unitary air conditioners and commercial unitary heat pumps in cooling mode must consist of application of the methods and conditions in ANSI/AHRI 340/360–2007 sections 3, 4, and 6 (omitting section 6.3) (incorporated by reference; see § 431.95), and in ANSI/ASHRAE 37–2009 (incorporated by reference; see § 431.95). In case of a conflict between ANSI/AHRI 340/360–2007 or ANSI/ASHRAE 37–2009 and the CFR, the CFR provisions control.

(2) *Heating mode test method.* The test method for testing commercial unitary heat pumps in heating mode must consist of application of the methods and conditions in ANSI/AHRI 340/360–2007 sections 3, 4, and 6 (omitting section 6.3) (incorporated by reference; see § 431.95), and in ANSI/ASHRAE 37–2009 (incorporated by reference; see § 431.95). In case of a conflict between ANSI/AHRI 340/360–2007 or ANSI/ASHRAE 37–2009 and the CFR, the CFR provisions control.

(3) *Minimum External Static Pressure.* Use the certified cooling capacity for the basic model to choose the minimum external static pressure found in table 5 of section 6 of ANSI/AHRI 340/360–2007 for testing.

(4) *Optional Break-in Period.* Manufacturers may optionally specify a ''break-in'' period, not to exceed 20 hours, to operate the equipment under test prior to conducting the test method in appendix A. A manufacturer who elects to use an optional compressor break-in period in its certification testing should record this information (including the duration) as part of the information in the supplemental testing instructions under 10 CFR 429.43.

(5) *Additional Provisions for Equipment Set-up.* The only additional specifications that may be used in setting up a unit for test are those set forth in the installation and operation manual shipped with the unit. Each unit should be set up for test in accordance with the manufacturer installation and operation manuals. Paragraphs (5)(a) through (b) of this section provide specifications for addressing key information typically found in the installation and operation manuals.

(a) If a manufacturer specifies a range of superheat, sub-cooling, and/or refrigerant pressure in its installation and operation manual for a given basic model, any value(s) within that range may be used to determine refrigerant charge or mass of refrigerant, unless the manufacturer clearly specifies a rating value in its installation and operation manual, in which case the specified rating value shall be used.

(b) The air flow rate used for testing must be that set forth in the installation and operation manuals being shipped to the commercial customer with the basic model and clearly identified as that used to generate the DOE performance ratings. If a certified air flow value for testing is not clearly identified, a value of 400 standard cubic feet per minute (scfm) per ton shall be used.

(6) *Indoor airflow testing and adjustment.*

(i) When testing full-capacity cooling operation at the required external static pressure condition, the full-load indoor airflow rate must be within +/−5 percent of the certified-rated airflow at full-capacity cooling operation. If the indoor airflow rate at the required minimum external pressure is outside the +/−5 percent tolerance, the unit and/or test setup must be adjusted such that both the airflow and ESP are within the required tolerances. This process may include, but is not limited to, adjusting any adjustable motor sheaves, adjusting variable drive settings, or adjusting the code tester fan.

(ii) When testing other than full-capacity cooling operation using the full-load indoor airflow rate (*e.g.,* full-load heating), the full-load indoor airflow rate must be within +/−5 percent of the certified-rated full-load cooling airflow (without regard to the resulting external static pressure), unless the unit is designed to operate at a different airflow for cooling and heating mode. If necessary, a test facility setup may be made

in order to maintain air flow within the required tolerance; however, no adjustments to the unit under test may be made.

(7) *Condenser head pressure controls.* Condenser head pressure controls of commercial unitary air conditioners and commercial unitary heat pumps, if typically shipped with units of the basic model by the manufacturer or available as an option to the basic model, must be active during testing.

(8) *Standard CFM.* In the referenced sections of ANSI/AHRI 340/360–2007 for commercial unitary air conditioners and commercial unitary heat pumps, all instances of CFM refer to standard CFM (SCFM). Likewise, all references to airflow or air quantity refer to standard airflow and standard air quantity.

(9) *Capacity rating at part-load.* When testing commercial unitary air conditioners and commercial unitary heat pumps to determine EER for the part-load rating points (*i.e.* 75 percent load, 50 percent load, and 25 percent load), if the measured capacity expressed as a percent of full load capacity for a given part-load test is within three percent above or below the target part-load percentage, the EER calculated for the test may be used without any interpolation to determine IEER.

[FR Doc. 2015–19232 Filed 8–5–15; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–102648–15]

RIN 1545–BM66

Suspension of Benefits Under the Multiemployer Pension Reform Act of 2014; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations, and notice of public hearing.

SUMMARY: This document contains corrections to a notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations, and notice of public hearing (REG–102648–15) that were published in the **Federal Register** on Friday, June 19, 2015 (80 FR 35262). The proposed regulations relate to multiemployer pension plans that are projected to have insufficient funds, at some point in the future, to pay the full benefits to which individuals will be entitled under the plans (referred to as plans in ''critical and declining status'').

DATES: Written or electronic comments, and outlines of topics to be discussed at the public hearing scheduled for September 10, 2015 for the notice of proposed rulemaking at 80 FR 35262, June 19, 2015, are still being accepted and must be received by August 18, 2015.

FOR FURTHER INFORMATION CONTACT: Department of the Treasury MPRA guidance information line (202) 622–1559 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations, and notice of public hearing (REG–102648–15) that are the subject of this correction, are under section 432(e)(9) of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations, and notice of public hearing (REG–102648–15) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations, and notice of public hearing (REG–102648–15), that are subject to FR Doc. 2015–14948, are corrected as follows:

1. On page 35264, in the preamble, second column, under paragraph heading ''*Limitations on Suspensions,*'' thirteenth line, the language ''829 (1974)), as amended (ERISA) on the'' is corrected to read ''829 (1974)), as amended (ERISA), on the''.

2. On page 35266, in the preamble, second column, second full paragraph, eleventh line, the language ''in the documents under which the plain'' is corrected to read ''in the documents under which the plan''.

3. On page 35266, in the preamble, third column, fifth line of the first full paragraph, the language ''beneficiaries, or alternate payee that'' is corrected to read ''beneficiary, or alternate payee that''.

4. On page 35266, in the preamble, third column, fifth line from the bottom of second full paragraph, the language ''4022A(c)(2)(A) of ERISA) by the'' is corrected to read ''4022A(c)(2)(A) of ERISA) divided by the''.

5. On page 35268, in the preamble, second column, first full paragraph, twenty-eighth line, the language ''contributions, withdrawal liability, or'' is corrected to read ''contributions, withdrawal liability payments, or''.

6. On page 35270, in the preamble, second column, fourth full paragraph, fifth line, the language ''(and, if applicable, a proposed partition'' is corrected to read ''(and, if applicable, a proposed partition of the''.

7. On page 35271, in the preamble, first column, under paragraph heading ''*Contact Information,*'' on the third line, the language ''Department of the Treasury at (202)'' is corrected to read ''Department of the Treasury MPRA guidance information line at (202)''.

§ 1.432(e)(9)–1 [Corrected]

8. On page 35274, first column, paragraph (d)(3)(viii), *Example 1.,* paragraph (ii), the sixth line, the language ''equal to the lesser of reduction that would'' is corrected to read ''equal to the lesser of the amount of reduction that would''.

9. On page 35274, second column, paragraph (d)(3)(viii), *Example 3.,* paragraph (iii), the thirteenth line, the language ''(which is equal to the lesser of reduction that'' is corrected to read ''(which is equal to the lesser of the amount of reduction that''.

10. On page 35274, second column, paragraph (d)(3)(viii), *Example 3.,* paragraph (iii), eighteenth line, the language ''1.1 × 639.50)).'' is corrected to read ''1.1 × $639.50))''.

11. On page 35274, third column, paragraph (d)(3)(viii), *Example 4.,* paragraph (ii), third line from the bottom of the paragraph, the language ''be less than minimum benefit payable'' is corrected to read ''be less than the minimum benefit payable''.

12. On page 35274, third column, paragraph (d)(4)(i), second line, the language ''*General rule* [The text of the proposed'' is corrected to read ''*General rule.* [The text of the proposed''.

13. On page 35276, second column, paragraph (d)(5)(iv)(C)(*1*), second line, the language ''of end of the most recent calendar'' is corrected to read ''of the end of the most recent calendar''.

14. On page 35280, second column, paragraph (h)(3)(i)(J), fifth line, the language ''(and, if applicable, a proposed partition'' is corrected to read ''(and, if applicable, a proposed partition of the''.

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2015–19365 Filed 8–5–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2015–0011; Notice No. 155]

RIN 1513–AC22

Proposed Establishment of the Tip of the Mitt Viticultural Area

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the approximately 2,760-square mile ''Tip of the Mitt'' viticultural area in all or portions of Charlevoix, Emmet, Cheboygan, Presque Isle, Alpena, and Antrim Counties in Michigan. The proposed viticultural area is not located within, nor does it contain, any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received by October 5, 2015.

ADDRESSES: Please send your comments on this proposed rule to one of the following addresses (please note that TTB has a new address for comments submitted by U.S. mail):

- *Internet: http://www.regulations.gov* (via the online comment form for this proposed rule as posted within Docket No. TTB–2015–0011 at ''Regulations.gov,'' the Federal e-rulemaking portal);
- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

See the Public Participation section of this proposed rule for specific instructions and requirements for submitting comments, and for information on how to request a public hearing or view or request copies of the petition and supporting materials.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated December 10, 2013, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law.

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth the standards for the preparation and submission of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features, as described in part 9 of the regulations, and a name and a delineated boundary, as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Tip of the Mitt Petition

TTB received a petition from the Straits Area Grape Growers Association, on behalf of vineyard and winery owners in the northern portion of the Lower Peninsula of Michigan, proposing the establishment of the ''Tip of the Mitt'' AVA. The proposed AVA contains approximately 2,760-square miles and has 41 commercial vineyards, covering approximately 94 acres, distributed across the proposed AVA. The proposed AVA also has eight bonded wineries. According to the petition, an additional 48 acres of vineyards and an additional 4 bonded wineries are planned in the near future. The distinguishing features of the proposed Tip of the Mitt AVA include climate and soils. Unless otherwise noted, all information and data contained in this proposed rule that pertains to the proposed AVA comes from the petition for the proposed Tip of the Mitt AVA and its supporting exhibits.

Name Evidence

The proposed Tip of the Mitt AVA derives its name from its location at the northernmost end of Michigan's Lower Peninsula. The Lower Peninsula of Michigan is shaped like a mitten, and the proposed AVA is located at the northern tip of the ''mitten.'' The petition noted that ''Tip of the Mitt'' has long been used to describe the region in

which the proposed AVA is located, and the petitioner included copies of three postcards dated from the 1960s which were submitted to demonstrate the historical use of the phrase in connection with that region. The first postcard contains a photo of the Tip of the Mitt Motel in Mackinaw City, Michigan, which is located within the proposed AVA. The second postcard depicts a map of the northern portion of the Lower Peninsula and is labeled ''The Tip of the Mitt.'' The third postcard contains a photo of the Tip of the Mitt Restaurant in Topinabee, Michigan, a city located within the proposed AVA.

The petition included additional evidence that the region of the proposed AVA is currently known as ''Tip of the Mitt.'' The petitioner submitted as one piece of evidence an online guide of hiking trails [1] that divides Michigan into nine regions, including the ''Tip of the Mitt'' region in the northern portion of the Lower Peninsula. Several annual events held throughout the proposed AVA use the name ''Tip of the Mitt,'' including the Tip of the Mitt Paddle Fest, the Tip of the Mitt Tractor Show, the Tip of the Mitt Classic road bike race, and a sailing race known as Michigan Challenge: Tip of the Mitt. Finally, the petition included a list of 14 businesses and non-profit organizations within the proposed AVA, including Tip of the Mitt Windshield Repair, Tip of the Mitt IT, Tip of the Mitt Sail & Power Squadron, Tip of the Mitt Antique Tractor Association, Tip of the Mitt Watershed Council, and Tip of the Mitt Flea Market.

Boundary Evidence

The proposed Tip of the Mitt AVA is located at the northernmost end of Michigan's Lower Peninsula and includes all or portions of Charlevoix, Emmet, Cheboygan, Presque Isle, Alpena, and Antrim Counties. The western portion of the boundary follows the shorelines of Grand Traverse Bay, Little Traverse Bay, and Lake Michigan. The northern portion of the boundary follows the shorelines of the Straits of Mackinac and Lake Huron. The eastern portion of the boundary also follows the Lake Huron shoreline. The southern boundary follows county lines and a series of lines drawn between points on the USGS maps to separate the lake-influenced climate of the proposed Tip of the Mitt AVA from the cooler regions to the south.

Distinguishing Features

The distinguishing features of the proposed Tip of the Mitt AVA include its climate and soils. Because the proposed AVA is bordered by large bodies of water to the west, north, and east, the climate and soil data from within the proposed AVA is only contrasted with data from the region directly to the south of the proposed AVA.

Climate

The climate of the proposed Tip of the Mitt AVA is generally warmer than that of the region to the south. According to the petition, the primary reason for the warmer temperatures within the proposed AVA is the westerly prevailing winds that distribute warmer air from the surface of Lake Michigan across the region. As a result of these warm winds, the proposed AVA has a suitable climate for growing cold-hardy hybrid grape varieties such as Frontenac, La Crescent, and Marquette.

The following table compares the average annual high and low temperatures, as well as the average annual extreme low temperature and the average number of days per year with high temperatures below 32 degrees Fahrenheit (F) and below 0 degrees F, for 6 weather stations within the proposed Tip of the Mitt AVA and 5 weather stations south of the proposed AVA.[2] A map showing the locations of the weather stations is included in Docket No. TTB–2015–0011 as Exhibit 1 to Appendix II of the petition.

TABLE 1—AVERAGE ANNUAL TEMPERATURES

Weather station	Average annual high	Average annual low	Average annual extreme low	Annual days with highs below 32 degrees F	Annual days with highs below 0 degrees F
Within Proposed AVA					
Alpena Waste Water Treatment Plant	52.7	36.5	−8.3	66	10
Onaway State Park	56.2	34.6	−20.0	59	17
Cross Village	53.0	35.6	−14.2	65	13
Petoskey	53.5	32.2	−13.3	71	24
Boyne Falls	56.8	35.1	−21.3	61	15
East Jordan	56.9	34.5	−16.7	55	13
South of Proposed AVA					
Alpena WSO Airport	54.0	33.4	−17.8	77	22
Atlanta 2SW	53.4	32.5	−19.6	77	17
Gaylord	53.6	33.5	−19.7	76	26
Grayling	53.7	31.1	−22.2	69	22
Lake City	54.0	32.5	−18.1	68	17

The data shows that although temperatures within the proposed AVA are cold, the region to the south has average annual low temperatures that are generally lower than those within the proposed AVA. The region to the south also generally has more days per year with high temperatures below 32 degrees F and also below 0 degrees F. The petition states that the number of very cold days is important to viticulture because only certain varieties of grapes can withstand very low temperatures. The petition states that, according to data produced by Iowa State University, there are 17 less-hardy varieties of grapes that can tolerate temperatures between −15 and −20

[1] *www.trails.com.*

[2] Source: Midwest Climate Center database, Michigan State Climatology Office. Data covers the period from 1981 to 2010.

degrees F, including Marechel Foch and Leon Millot. Because the average annual extreme low temperatures for 4 of the 6 locations within the proposed AVA are warmer than −20 degrees, and half of the locations within the proposed AVA have extreme low temperatures above −15 degrees, these 17 varieties of grapes could reasonably be expected to survive and produce consistent crops within the proposed AVA. However, because none of the locations south of the proposed AVA have annual extreme low temperatures above −15 degrees, it is less likely that these 17 varieties would thrive and produce crops reliably south of the proposed AVA.

The petition included information on growing season length and growing degree days (GDDs) [3] gathered from locations both within and outside of the proposed AVA.[4] The data in the following tables shows that the growing season for most locations within the proposed AVA is longer than the growing season for most locations south of the proposed AVA, and that most locations within the proposed AVA have higher GDD accumulations than locations to the south.

TABLE 2—GROWING SEASON DATA

Weather station	Average last spring frost date	Average first fall frost date	Average length of growing season (days)
Within Proposed AVA			
Alpena Waste Water Treatment Plant	May 3	October 11	161
Onaway State Park	May 15	September 29	137
Cross Village	May 27	October 9	135
Petoskey	May 9	October 13	157
Boyne Falls	May 31	September 18	110
East Jordan	May 30	September 24	117
South of Proposed AVA			
Alpena WSO Airport	May 26	September 24	121
Atlanta 2SW	May 20	September 24	127
Gaylord	May 28	September 21	116
Grayling	June 2	September 13	103
Lake City	May 28	September 22	117

TABLE 3—GROWING DEGREE DAY DATA

Weather station	March GDDs	April GDDs	May GDDs	June GDDs	July GDDs	August GDDs	September GDDs	October GDDs	Total growing season GDDs
Within Proposed AVA									
Alpena Waste Water Treatment Plant	6	31.3	151.6	389.4	579.4	541.1	306.7	66	2,071.5
Onaway State Park	11.3	43.1	198.4	413.5	578.1	506.3	259.5	65.2	2,075.4
Cross Village	6	39.5	158.5	356	521.8	502.5	299.4	75.4	1,959.1
Petoskey	6.5	33.6	144.1	359.0	541.4	519.4	298.8	90.5	1,993.8
Boyne Falls	13.9	66	229.6	466.2	618.6	571.8	342.3	99.3	2,407.7
East Jordan	12.9	55.3	207.2	432.4	577.6	531.6	315.7	88.4	2,221.1
South of Proposed AVA									
Alpena WSO Airport	8	36.7	153.3	380.6	553.1	492.3	261.2	60.8	1,946.0
Atlanta 2SW	11.2	48.3	169.5	379.9	537.8	472.5	269.5	60.6	1,949.3
Gaylord	12.3	48.7	190.7	413.2	560.0	499.0	271.8	66.9	2,062.6
Grayling	8.6	41.3	170.2	389.4	531.7	467.6	237.1	54.1	1,900.0
Lake City	9.9	40	182.2	388.7	534.2	467.5	230.7	56.5	1,909.7

GDDs are important to viticulture because they represent how often the daily temperatures rise above 50 degrees F, which is the minimum temperature required for active vine growth and fruit development. Because the proposed AVA has a growing season that is generally longer, and GDD accumulations that are generally higher, than the region to the south, vineyard owners are able to grow less-hardy grapes as well as mid-to-late season ripening varieties, such as Frontenac, which would not ripen as consistently if they were grown south of the proposed AVA. The higher GDD accumulations within the proposed Tip of the Mitt AVA compensate for the relatively short growing season because the growing season temperatures rise above 50 degrees frequently enough during the growing season to allow the grapes to mature. For example, Boyne Falls has the shortest growing season of any location within the proposed AVA, and the growing season is shorter than all but one of the locations south of the

[3] In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual growing degree days (GDDs), defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth. See Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 1974), pages 61–64.

[4] Source: Midwest Climate Center database, Michigan State Climatology Office. Data covers the period from 1981 to 2010.

proposed AVA. However, grapes are still able to ripen reliably in Boyne Falls because the average growing season GDD accumulation is 2,407.7. By contrast, even though four of the five locations south of the proposed AVA have longer growing seasons than Boyne Falls, all of the locations south of the proposed AVA still have significantly lower GDD accumulations.

Soils

The predominant soils within the proposed Tip of the Mitt AVA contain coarse-textured glacial till and Lacustrine sand and gravel. Soils that contain either glacial outwash sand and gravel or ice-contact sand and gravel are only present in small amounts. The soils of the proposed AVA have high levels of organic matter, which prevents nutrients from leaching rapidly. As a result, vineyard owners do not have to apply supplemental nutrients as frequently or heavily as in areas with soils that have lower levels of organic material. Soils with high levels of organic material also have a high water-holding capacity, so vineyard owners within the proposed AVA often take steps to limit accumulations of soil moisture, such as planting cover crops between the rows of vines to help absorb excess water. Finally, the soils of the proposed AVA do not heat up as quickly in the early spring as soils that contain higher levels of sand and gravel. The cool soil temperatures naturally prevent bud-break, often delaying new growth from forming until after the threat of damaging frost is over. According to the petition, delaying bud-break until after the threat of frost has passed is particularly important when growing cultivars that typically have an early bud-break such as Leon Millot or Marquette, which are both commonly grown in the proposed AVA.

South of the proposed AVA, the soils are primarily glacial outwash sand and gravel and ice-contact sand and gravel, which are low in organic matter. Lesser quantities of coarse-textured glacial till and end moraines of fine- and coarse-textured till also occur. Because the soils south of the proposed AVA contain low amounts of organic matter, they require heavier and more frequent additions of nutrients. The soils also have a lower water-holding capacity, increasing the need for supplemental irrigation. Vineyard owners also attempt to maintain plant-free conditions between rows, in order to maximize the amount of water available for the vines. Finally, the lower levels of organic matter, combined with higher levels of sand and gravel, allow soils south of the proposed AVA to warm up more rapidly in the spring, which encourages bud-break before the last spring frost has occurred.

Summary of Distinguishing Features

In summary, the evidence provided in the petition indicates that the viticulturally significant geographic features of the proposed Tip of the Mitt AVA distinguish it from the surrounding regions in each direction. The proposed AVA is surrounded by large bodies of water to the west, north, and east. The region to the south of the proposed AVA is characterized by cooler temperatures, shorter growing seasons, lower GDD accumulations, and soils with low amounts of organic material and high amounts of sand and gravel.

TTB Determination

TTB concludes that the petition to establish the approximately 2,760-square mile Tip of the Mitt AVA merits consideration and public comment, as invited in this proposed rule.

Boundary Description

See the narrative description of the boundary of the petitioned-for AVA in the proposed regulatory text published at the end of this proposed rule.

Maps

The petitioner provided the required maps, and they are listed below in the proposed regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in § 4.25(e)(3) of the TTB regulations (27 CFR 4.25(e)(3)). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See § 4.39(i)(2) of the TTB regulations (27 CFR § 4.39(i)(2)) for details.

If TTB establishes this proposed AVA, its name, ''Tip of the Mitt,'' will be recognized as a name of viticultural significance under 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the proposed regulation clarifies this point. Consequently, if this proposed rule is adopted as a final rule, wine bottlers using the name ''Tip of the Mitt'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the AVA name as an appellation of origin.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should establish the proposed AVA. TTB is also interested in receiving comments on the sufficiency and accuracy of the name, boundary, soils, climate, and other required information submitted in support of the petition. Please provide any available specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Tip of the Mitt AVA on wine labels that include the term ''Tip of the Mitt,'' as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed area name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed AVA will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the AVA.

Submitting Comments

You may submit comments on this proposed rule by using one of the following three methods (please note that TTB has a new address for comments submitted by U.S. Mail):

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this proposed rule within Docket No. TTB–2015–0011 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 155 on the TTB Web site at *http://www.ttb.gov/wine/wine-rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, visit the site and click on the ''Help'' tab.

• *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.

• *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

Please submit your comments by the closing date shown above in this proposed rule. Your comments must reference Notice No. 155 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and TTB considers all comments as originals.

In your comment, please clearly indicate if you are commenting on your own behalf or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name, as well as your name and position title. If you comment via Regulations.gov, please enter the entity's name in the ''Organization'' blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

TTB will post, and you may view, copies of this proposed rule, selected supporting materials, and any online or mailed comments received about this proposal within Docket No. TTB–2015–0011 on the Federal e-rulemaking portal, Regulations.gov, at *http://www.regulations.gov.* A direct link to that docket is available on the TTB Web site at *http://www.ttb.gov/wine/wine-rulemaking.shtml* under Notice No. 155. You may also reach the relevant docket through the Regulations.gov search page at *http://www.regulations.gov.* For information on how to use Regulations.gov, click on the site's ''Help'' tab.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that the Bureau considers unsuitable for posting.

You may also view copies of this proposed rule, all related petitions, maps and other supporting materials, and any electronic or mailed comments that TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- × 11-inch page. Please note that TTB is unable to provide copies of USGS maps or any similarly-sized documents that may be included as part of the AVA petition. Contact TTB's information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

TTB certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of an AVA name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action as defined by Executive Order 12866 of September 30, 1993. Therefore, no regulatory assessment is required.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this proposed rule.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, TTB proposes to amend title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.____to read as follows:

§ 9.____ Tip of the Mitt.

(a) *Name.* The name of the viticultural area described in this section is ''Tip of the Mitt''. For purposes of part 4 of this chapter, ''Tip of the Mitt'' is a term of viticultural significance.

(b) *Approved maps.* The 2 United States Geological Survey (USGS) 1:250,000 scale topographic maps used to determine the boundary of the Tip of the Mitt viticultural area are titled:

(1) Cheboygan, Michigan, 1955; revised 1981; and

(2) Alpena, Mich., US–Ontario, Can.; 1954.

(c) *Boundary.* The Tip of the Mitt viticultural area is located in all or portions of Charlevoix, Emmet, Cheboygan, Presque Isle, Alpena, and Antrim Counties in Michigan. The boundary of the Tip of the Mitt viticultural area is as described below:

(1) The beginning point is on the Cheboygan map, at the point where the Mackinac Bridge intersects the southern shoreline of the Straits of Mackinac. From the beginning point, proceed east-southeasterly along the shoreline of the South Channel of the Straits of Mackinac and Lake Huron, crossing onto the Alpena map and continuing to follow the Lake Huron shoreline and then the Thunder Bay shoreline to the point where the Thunder Bay shoreline intersects the common T31N/T30N township line south of the city of Alpena and north of Bare Point; then

(2) Proceed northwesterly in a straight line to the intersection of an unnamed medium-duty road known locally as Long Rapids Road and an unnamed light-duty road known locally as Cathro Road; then

(3) Proceed west in a straight line to the line's intersection with State Highway 65 and an unnamed light-duty road known locally as Hibner Road; then

(4) Proceed northwesterly in a straight line to the intersection of the Presque Isle, Alpena, and Montmorency county lines; then

(5) Proceed west along the southern boundary of Presque Isle County, crossing onto the Cheboygan map, to the point where the Presque Isle county line

becomes the southern boundary of Cheboygan County, and continuing along the Cheboygan county line to the intersection of the Cheboygan county line with the eastern boundary of Charlevoix County; then

(6) Proceed south then east along the Charlevoix county line to the intersection of the Charlevoix county line with the eastern boundary of Antrim County; then

(7) Proceed south along the Antrim county line to the point where the county line turns due east; then

(8) Proceed west in a straight line to the eastern shoreline of Grand Traverse Bay; then

(9) Proceed north-northeasterly along the shorelines of Grand Traverse Bay, Lake Michigan, Little Traverse Bay, Sturgeon Bay, Trails End Bay, and the Straits of Mackinac, returning to the beginning point.

Signed: July 28, 2015.

John J. Manfreda,

Administrator.

[FR Doc. 2015–19277 Filed 8–5–15; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900–AO19

Schedule for Rating Disabilities: The Hematologic and Lymphatic Systems

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the portion of the VA Schedule for Rating Disabilities (Rating Schedule) that addresses the hematologic and lymphatic systems. The intended effect of this change is to incorporate medical advances that have occurred since the last review, update medical terminology, add medical conditions not currently in the Rating Schedule, and refine criteria for further clarity and ease of rater application.

DATES: Comments must be received by VA on or before October 5, 2015.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to RIN 2900–AO19—Schedule for Rating Disabilities: The Hematologic and Lymphatic Systems. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Nick Olmos-Lau, M.D., Medical Officer (211C), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–9695. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: As part of our ongoing revision of the VA Schedule for Rating Disabilities (Rating Schedule), we are proposing changes to 38 CFR 4.117, Schedule of ratings—hemic and lymphatic systems, and appendices A, B, and C of part 4 pertaining to this section. This section was last updated in 1995. By these revisions, we aim to update medical terminology; add medical conditions not currently in the Rating Schedule; and revise the rating criteria to reflect medical advances and to clarify them for ease of application.

Proposed Title Change: The Hematologic and Lymphatic Systems

''Hemic'' is an adjective previously used to describe diseases of or related to the blood. The current medical term for diseases of the blood or blood-forming organs is ''hematologic.'' In addition, the 2013 National Library of Medicine-Medical Subject Headings (MESH) descriptor advisory discourages the use of the term ''hemic'' as too general, and recommends instead the use of the term ''hematologic'' as more specific (*http://www.nlm.nih.gov/cgi/mesh/2013/MB_cgi?mode=&index=6154&field=all&HM=&II=&PA=&form=&input=*).

VA therefore proposes to edit the header of § 4.117 to ''The Hematologic and Lymphatic Systems'' and the title of § 4.117 to ''Schedule of ratings—hematologic and lymphatic systems.''

Modification and Reorganization of Current Diagnostic Code (DC) 7700 (Anemia, Hypochromic-Microcytic and Megaloblastic, Such as Iron-Deficiency and Pernicious Anemia)

Anemia is predominantly hereditary or secondary, a symptom of another condition. Secondary anemia is corrected by treatment of the underlying condition. Examples of conditions that cause secondary anemia include osteomyelitis (DC 5000) and hypothyroidism (DC 7903). Anemia is most appropriately evaluated as part of the underlying service-connected disability causing the anemia. VA proposes to address in proposed DCs 7720, 7721, 7722, and 7723 anemias that are neither hereditary nor addressed under DCs for the causative conditions.

The title of current DC 7700 is ''Anemia, hypochromic-microcytic and megaloblastic, such as iron-deficiency and pernicious anemia.'' This title groups anemias based on red blood cell (RBC) morphology. VA proposes separate DCs and criteria for the major types of anemia. Separation would assist raters in distinguishing amongst and clarifying severity of anemias. Accordingly, VA proposes the removal of DC 7700 from the Rating Schedule, and adding DC 7720 Iron deficiency anemia, 7721 Folic acid deficiency, 7722 Pernicious anemia and Vitamin B_{12} deficiency anemia, and 7723 Acquired hemolytic anemia.

Anemia is currently rated at levels of 100, 70, 30, 10, and 0-percent, depending on the hemoglobin level and the associated signs and symptoms. It is evaluated at 100-percent for hemoglobin of 5gm/100ml or less, with findings such as high-output congestive heart failure or dyspnea at rest. It is evaluated at 70-percent for hemoglobin of 7gm/100ml or less, with findings such as dyspnea on mild exertion, cardiomegaly, tachycardia (100 to 120 beats per minute) or syncope (three episodes in the last six months). It is evaluated at 30-percent for hemoglobin of 8gm/100ml or less, with findings such as weakness, easy fatigability, headaches, lightheadedness, or shortness of breath. It is evaluated at 10-percent for hemoglobin of 10gm/100ml or less, with findings such as weakness, easy fatigability, or headaches. It is evaluated at 0-percent for hemoglobin of 10gm/100ml or less and asymptomatic.

While there is a high correlation between hemoglobin levels and signs or symptoms of anemia in acute anemia, the correlation is less accurate in chronic anemia. As the duration of the anemia lengthens, the individual becomes more tolerant of lower hemoglobin levels and symptom manifestation decreases. The functional impact of chronic anemia is more accurately measured by mode and frequency of treatment. VA proposes rating criteria based on the specific mode(s) and frequency of treatment.

VA notes that the existing 100 and 70 percent categories for rating anemia are more descriptive of acute rather than

chronic anemia. Acute anemia is usually related to gastrointestinal or uterine bleeding or traumatic injuries with acute hemorrhage. The descriptors in the 100 and 70 percent categories reflect a clinical picture of rapid and extensive blood loss, and their symptoms include high output cardiac failure with hypoxemia due to inability to sustain proper tissue oxygenation, caused by low hemoglobin levels which can lead to shock or collapse. The laboratory values and symptoms described in the 100 and 70 percent categories of the current anemia DC reflect intolerable and life threatening symptoms that require emergency hospitalization and transfusion. See G. Limbruno, ''Recommendations for transfusion of red blood cells,'' 7 Blood Transfusion 49 (2009).

Chronic anemia on the other hand, develops at a more gradual pace, and is usually related to serious medical conditions such as malignancies (cancer) on chemotherapy, infection (osteomyelitis), thyroid disease, hemoglobin disorders (such as sickle-cell disease or thalassemia), renal failure or chronic lower gastrointestinal bleeding. In such cases a slower decline in hemoglobin values allows gradual adjustment. However, even when an individual reaches such low levels as contemplated in the 100 and 70 percent evaluation, such a case reflects acute critical health emergencies that are unsustainable rather than having an ongoing chronic long term disability impairment as with chronic anemia. In those cases where chronic anemia results in urgent hospitalization, VA finds that compensation is more appropriately determined by evaluating the underlying primary medical problem that gave rise to the service-connected chronic anemia. As these more severe cases represent less than 2 percent of the total number of disability awards for anemia in the past years, VA does not anticipate a significant impact on future evaluations based on anemia.

Proposed DC 7720 (Iron Deficiency Anemia)

Iron deficiency anemia is defined as a decrease in total body iron content. Total body iron content is regulated through the balance of iron absorption and loss. Iron deficiency anemia is most commonly due to blood loss, post-hemorrhagic anemia. Iron deficiency anemia due to blood loss would be evaluated under criteria for the causative condition, *e.g.,* duodenal ulcer (DC 7305) or hemorrhoids (DC 7336), rather than under DC 7720. VA proposes to clarify the rating of anemia due to blood loss by adding the following note: ''Do not evaluate iron deficiency anemia due to blood loss under this diagnostic code. Evaluate iron deficiency anemia due to blood loss under the criteria for the condition causing the blood loss.''

Iron deficiency anemia can be readily treated by diet or dietary supplements. It is ordinarily short term with mild symptoms and responds to treatment. However, fatigue due to chronic, severe iron deficiency anemia can decrease the ability to perform physical labor. VA proposes rating levels of 30, 10, and 0-percent for iron deficiency anemia not due to blood loss. VA proposes a 30-percent evaluation for iron deficiency anemia requiring intravenous (IV) iron infusions on average 4 or more times per 12-month period; a 10-percent evaluation if requiring continuous treatment with high-dose oral supplementation; and a 0-percent evaluation if asymptomatic or requiring treatment only by dietary modification.

Proposed DC 7721 (Folic Acid Deficiency)

The prevalence of folic acid deficiency has decreased in the United States due to dietary fortification. This form of anemia is amenable to dietary modification and oral supplementation. VA proposes a 10-percent evaluation for folic acid deficiency requiring continuous treatment with high-dose oral supplementation. VA proposes a 0-percent evaluation when asymptomatic or requiring treatment only by dietary modification.

Proposed DC 7722 (Pernicious Anemia and Vitamin B_{12} Deficiency Anemia)

Pernicious anemia is the most common form of severe Vitamin B_{12} deficiency. S. Stabler, ''Vitamin B12 deficiency,'' 368(2) New Eng. J. Med. 149 (2013). Other causes of Vitamin B_{12} deficiency that could lead to anemia include: Dietary avoidance (vegetarianism), malabsorption, gastrectomy or gastric bypass, inflammatory bowel disease (IBD), pancreatic insufficiency, use of histamine 2-blockers and proton pump inhibitors. Pernicious anemia is associated with gastric atrophy, due to autoimmune destruction, and a lack of intrinsic factor, a glycoprotein necessary for the absorption of Vitamin B_{12}, in the gastric mucosa. Pernicious anemia requires lifelong treatment with Vitamin B_{12} injections, sublingual or high-dose oral Vitamin B_{12} tablets, or Vitamin B_{12} nasal spray or gel. Since disabilities from nutritional B_{12} deficiency are consistent with pernicious anemia, nutritional B_{12} deficiency would be rated under the same diagnostic code as pernicious anemia.

In accordance with the above discussion, VA proposes to evaluate pernicious anemia and other forms of severe B_{12} deficiency at 100 percent for initial diagnosis requiring transfusion due to severe anemia, or if there are signs or symptoms related to central nervous system impairment, such as encephalopathy, myelopathy, or severe peripheral neuropathy, requiring parenteral B_{12} therapy. Since certitude of neurologic reversibility cannot be initially determined, and B_{12} absorption issues may require lifelong supplementation with B_{12} injections every 1–3 months, VA proposes to re-evaluate at 6 months and rate according to presence of neurologic or gastrointestinal residuals.

If absorption is adequate, lifelong oral or intranasal B_{12} treatment may be used. VA proposes to evaluate pernicious anemia and other forms of severe Vitamin B_{12} deficiency at 10 percent if it requires continuous treatment with Vitamin B_{12} injections, Vitamin B_{12} sublingual or high-dose oral tablets, or Vitamin B_{12} nasal spray or gel.

VA proposes to add a note regarding evaluation which states that the 100-percent evaluation for pernicious anemia and Vitamin B_{12} deficiency shall be assigned as of the date of initial diagnosis requiring transfusion due to severe anemia or parenteral B_{12} therapy and shall continue with a mandatory VA examination six months following hospital discharge or cessation of continuous parenteral B_{12} therapy. The note would also state that any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of 38 CFR 3.105(e) and that, thereafter, evaluation would be at 10-percent and any residual effects of pernicious anemia, such as neurologic involvement causing peripheral neuropathy, myelopathy, dementia, or related gastrointestinal residuals, would be separately evaluated under the most appropriate diagnostic code.

Proposed 7723 (Acquired Hemolytic Anemia)

There are over 200 causes of hemolytic anemia, including both acquired and hereditary types. The causes of acquired hemolytic anemia include immune disorders, toxic chemicals, medications, physical damage (such as may occur with prosthetic heart valves), and infections. Treatment may include intermittent corticosteroids; other immunosuppressive drugs; immune globulin; monoclonal antibody therapy, such as rituximab; splenectomy; erythropoiesis stimulating agent (ESA) to boost production of RBC;

plasmapheresis (a process similar to dialysis that can remove certain components, such as harmful antibodies, from the blood); blood transfusions; and peripheral blood or bone marrow stem cell transplantation (*www.nhlbi.nih.gov/health).*

VA proposes to list the evaluation criteria for acquired hemolytic anemia under DC 7723.

VA proposes to rate acquired hemolytic anemia at 100 percent, if requiring a bone marrow transplant or continuous intravenous or immunosuppressive therapy (*e.g.,* prednisone, Cytoxan (cyclophosphamide), azathioprine, or rituximab). VA proposes to rate acquired hemolytic anemia at 60 percent, if requiring immunosuppressive medication an average of 4 or more times per 12-month period. VA proposes to rate acquired hemolytic anemia at 30 percent, if requiring an average of 2–3 courses of immunosuppressive therapy per 12-month period. VA proposes to rate acquired hemolytic anemia at 10 percent, if requiring an average of 1 course of immunosuppressive therapy per 12-month period. VA proposes to evaluate acquired hemolytic anemia at 0 percent if asymptomatic.

VA also proposes to add a Note (1) in relation to this DC, stating that a 100-percent evaluation for bone marrow transplant shall be assigned as of the date of hospital admission and shall continue for six months after hospital discharge with a mandatory VA examination six months following hospital discharge. The note would also state that any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of 38 CFR 3.105(e).

To remind rating specialists that there is a separate DC for splenectomy, VA proposes to add a Note (2), which would state that VA will separately evaluate splenectomy under DC 7706 and combine with an evaluation under DC 7723.

DC 7702 (Agranulocytosis, Acute); Proposed DC 7702 (Agranulocytosis, Acquired)

Agranulocytosis, by definition, is an acute condition. Therefore, this disease is better categorized as agranulocytosis, acquired, than as agranulocytosis, acute. VA proposes to list updated evaluation criteria for this condition under DC 7702 with the title ''Agranulocytosis, acquired'' to reflect current medical terminology.

Acute agranulocytosis is currently evaluated at levels of 100, 60, 30, and 10 percent based on type of treatment or frequency of episodes of recurring infections. A 100-percent evaluation is currently assigned if requiring bone marrow transplant or transfusion of platelets or red cells at least once every six weeks or if infections recur at least once every six weeks. A 60-percent evaluation is assigned if requiring transfusion of platelets or red cells at least once every three months or if infections recur at least once every three months. A 30-percent evaluation is assigned if requiring transfusion of platelets or red cells at least once per year but less than once every three months or if infections recur at least once per year but less than once every three months. A 10-percent evaluation is assigned if requiring continuous medication for control.

Due to advances in the pharmacological treatment of agranulocytosis and a shift in standard of care, VA proposes the deletion of the number of transfusions as a criterion for rating agranulocytosis. ''Granulocyte transfusions have undergone a cycle of popularity followed by disfavor,'' although they may be useful in patients with life-threatening infections whose conditions are not responding to antibiotics. A. Distenfeld, M.D., N.Y. Univ. Sch. of Med., ''Agranulocytosis,'' eMedicine (Updated Jan 9, 2015, by C. Braden). These transfusions are accompanied by many complications, including severe febrile reactions. The use of granulocyte transfusions remains controversial. VA proposes to evaluate agranulocytosis based on type and frequency of treatment or the average number of infections per 12-month period. VA proposes to evaluate agranulocytosis at 100 percent if requiring bone marrow transplant or if infections recur, on average, at least once every six weeks per 12-month period. VA proposes to evaluate agranulocytosis at 60 percent if requiring intermittent myeloid growth factors (granulocyte colony-stimulating factor (G–CSF) or granulocyte-macrophage colony-stimulating factor (GM–CSF)) or continuous immunosuppressive therapy such as cyclosporine to maintain absolute neutrophil count (ANC) greater than 500/µl but less than 1000/µl, or if infections recur, on average, at least once every three months per 12-month period. VA proposes to evaluate agranulocytosis at 30 percent if requiring intermittent myeloid growth factors to maintain ANC greater than 1000/µl or if infections recur, on average, at least once per 12-month period but less than once every three months per 12-month period. VA proposes to evaluate agranulocytosis at 10 percent if requiring continuous medication (*e.g.,* antibiotics) for control or if requiring intermittent use of a myeloid growth factor to maintain ANC greater than or equal to 1500/µl.

VA proposes to preserve the existing note under current DC 7702.

DC 7703 (Leukemia)

One type of leukemia, chronic myelogenous leukemia (CML), is evaluated as a myeloproliferative disorder. CML is a heterogeneous disease with three clinical phases: Chronic, transitional (accelerated), and acute (blast). Most individuals with CML are diagnosed in the chronic phase and with adequate treatment can remain in this phase for several years. However, patients with CML are never ''cured'' with current therapy, but often have no evidence of the disease at a molecular level. The term used for this state is ''complete molecular remission'' (CMR). These patients require continuous treatment because otherwise they would relapse. Patients with CML need to be considered as having active disease even when they would otherwise appear to be in remission. Therefore, VA proposes to evaluate CML under separate DC 7719.

Leukemia is currently evaluated at 100 percent for active disease or during a treatment phase. There is also a directive to otherwise rate as anemia (current DC 7700) or aplastic anemia (DC 7716), whichever would result in the greater benefit.

VA proposes to evaluate all forms of active leukemia other than chronic myelogenous leukemia under DC 7703.

VA proposes to retain the 100-percent evaluation ''[w]hen there is active disease or during a treatment phase.'' For rating purposes, VA considers any diagnosed cancer as ''active disease'' if medical evidence does not demonstrate the eradication of cancerous cells, if the cancer is not in remission, or when the condition requires continuous treatment since otherwise there would invariably be a relapse.

Since there are numerous residual effects of leukemia and its treatment, which may involve any body system, VA proposes to remove the current directive, which addresses only certain hematologic residuals: ''Otherwise rate as anemia (code 7700) or aplastic anemia (code 7716), whichever would result in the greater benefit.'' VA proposes another directive, which would read: ''Otherwise rate residuals under the appropriate diagnostic code(s).''

One of the four main types of leukemia, chronic lymphocytic

leukemia (CLL), is now often diagnosed at a very early stage when the blood lymphocyte count is high, but the patient does not have enlargement of the lymph nodes, spleen, or liver, and the red blood cells and platelets are normal or nearly so. The average age of patients with this type of leukemia is 70. In the staging system commonly used to assess the severity of CLL, this early stage is known as Rai Stage 0. Occasionally patients are diagnosed instead as having monoclonal B-cell lymphocytosis (MBL). The diagnosis is in a similar category as Rai Stage 0 CLL. Unlike the course of the other major types of leukemia, this early stage of CLL may not progress for many years. The median survival time for this stage of disease is over 12 years. No treatment is required, and it is considered a low risk stage. For individuals with CLL at Rai Stage 0, assigning a 100-percent evaluation would be inappropriate, since antineoplastic treatment is not warranted, and at this early stage, there is little or no effect on a patient's well-being, according to the Leukemia and Lymphoma Society (*www.leukemia-lymphoma.org/*). Therefore, VA proposes to add a 0-percent evaluation level for asymptomatic low risk level patients with CLL at Rai Stage 0.

Patients with lymphocytosis, enlarged lymph nodes and splenomegaly or hepatomegaly are defined as having an intermediate risk for disease progression (Rai Stages I or II). Patients with hepatomegaly (enlarged liver), anemia (Hemoglobin <11 g/dL), or thrombocytopenia (platelet counts lower than 100,000) are considered to be in the higher risk categories for disease progression (Rai Stages III and IV). Oncologists have developed criteria to determine when to initiate treatment based on the presence of genetic mutation, micro-globulins, lymphocyte doubling times and other markers to help boost the accuracy criteria of the CLL tumor burden along with staging provided by the Rai scale. Patients with newly diagnosed asymptomatic early-stage disease are generally monitored without therapy unless they show signs of disease progression or symptoms. Patients with intermediate risk (Rai Stages I and II) and those with high risk (Rai Stages III or IV) are usually started on treatment.

VA proposes editorial changes to the currently existing note, which would be numbered as Note (1).

Rai Stages I–IV (intermediate and high risk) usually require progressively aggressive therapy, consistent with leukemias and other malignancies. VA proposes addition of notes to clarify evaluation of CLL that progresses beyond Rai Stage 0.

The proposed Note (2) would read: ''Evaluate symptomatic chronic lymphocytic leukemia that is at Rai Stage I, II, III, or IV the same as any other leukemia evaluated under this diagnostic code.''

The proposed Note (3) would read: ''Evaluate residuals of leukemia or leukemia therapy under the appropriate diagnostic code(s). Myeloproliferative Disorders: (Diagnostic Codes 7704, 7718, 7719).''

Myeloproliferative Disorders

This section includes: DC 7704 (Polycythemia vera); Proposed DC 7718 (Essential thrombocythemia and primary myelofibrosis); Proposed DC 7719 (Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia)).

Myeloproliferative disorders are a group of slow-growing blood neoplasms in which the bone marrow produces excess numbers of red blood cells, white blood cells, or platelets. Polycythemia vera is one type of myeloproliferative disorder. Other conditions included in this category are essential thrombocythemia, primary idiopathic myelofibrosis, and chronic myelogenous leukemia (CML) (also called chronic myeloid leukemia or chronic granulocytic leukemia) (*www.cancer.gov/cancertopics/types/myeloproliferative* and *www.leukemia-lymphoma.org*). These conditions may evolve into acute leukemia.

According to the National Cancer Institute of the U.S. National Institutes of Health, a variety of treatments are used for myeloproliferative disorders. For example, polycythemia vera is commonly treated by phlebotomy (removal of blood, as needed, to decrease the number of red blood cells and platelets). However, other treatments used to achieve appropriate levels of cells and to reduce complications, such as thrombosis, include radioactive phosphorous (which suppresses the overproduction of blood cells), interferon alpha (which boosts the immune system), chemotherapeutic agents (including myelosuppressants, which decrease bone marrow production), and low dose aspirin. Some of these treatments are also used for other myeloproliferative disorders.

Other treatments used for myeloproliferative disorders include: stem cell transplant; platelet apheresis (removal of platelets from the blood in a process similar to dialysis); blood or platelet transfusions (when the bone marrow production is insufficient); periods of hospitalizations to treat infections (since patients with these conditions are at high risk for serious infections); erythropoiesis-stimulating agents (ESA) to boost production of red blood cells; tyrosine kinase inhibitors such as imatinib (Gleevec) (commonly used to treat chronic myelogenous leukemia) or ruxolitinib (new kinase inhibitor); and androgen-like drugs (which also may stimulate the bone marrow).

Polycythemia vera is the only myeloproliferative disorder, of the above-mentioned disorders, currently evaluated in the Rating Schedule. Therefore, VA proposes the addition of DCs to provide rating criteria for other diseases under the category of myeloproliferative disorders: 7718 Essential thrombocythemia/primary myelofibrosis, and 7719 Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia).

VA proposes to add a note applicable to all myeloproliferative disorders, which would state that if the condition undergoes leukemic transformation, it should be evaluated as leukemia under DC 7703. This note is intended to remind rating specialists that a myeloproliferative disorder may undergo leukemic transformation and warrant evaluation under DC 7703.

VA also proposes to add another note applicable to all myeloproliferative disorders, which would state that a 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant, or during the period of treatment with radioactive phosphorus or chemotherapy (including myelosuppressants), and that six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. The note would also state that any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of 38 CFR 3.105(e).

DC 7704 (Polycythemia Vera)

VA proposes a 100-percent evaluation if requiring peripheral blood or bone marrow stem-cell transplant or treatment with radioactive phosphorus or chemotherapy (including myelosuppressants).

VA proposes a 60-percent evaluation if requiring phlebotomy 6 or more times per 12-month period to control RBC count or if requiring radioactive phosphorous treatment, chemotherapy, or targeted agents like ruxolitinib or

imatinib. VA proposes a 30-percent evaluation if requiring phlebotomy 4–5 times per 12-month period or if requiring continuous biologic therapy or myelosuppressive agents to maintain platelet count in the less than 200,000 range or white blood cells (WBC) in the less than 12,000 range. VA proposes a 10-percent evaluation if requiring, on an intermittent basis, phlebotomy, biologic therapy, or interferon, as needed, but less than 4 times per 12-month period.

VA proposes to number the current note for DC 7704 as Note (1). VA proposes the addition of the two notes described above for all myeloproliferative disorders to be added as Notes (2) and (3) after the current note for DC 7704.

Proposed DC 7718 (Essential Thrombocythemia and Primary Myelofibrosis)

VA proposes a 100-percent evaluation if requiring either continuous myelosuppressive therapy or, for six months following hospital admission, any of the following treatments: Peripheral blood or bone marrow stem cell transplant, or treatment with radioactive phosphorus or chemotherapy (including myelosuppressants); a 70 percent evaluation if requiring either continuous or intermittent myelosuppressive therapy to maintain platelet count less than 500×10^{9}/L; a 30-percent evaluation if requiring continuous or intermittent myelosuppressive therapy to maintain platelet count of 200,000–400,000 or white blood cell (WBC) count of 4,000–10,000; and a 0-percent evaluation if asymptomatic.

VA proposes the addition of the two notes described above for all myeloproliferative disorders.

Proposed DC 7719 (Chronic Myelogenous Leukemia (CML) (Chronic Myeloid Leukemia or Chronic Granulocytic Leukemia))

VA proposes a 100-percent evaluation if requiring peripheral blood or bone marrow stem cell transplant or requiring continuous myelosuppressive or immunosuppressive therapy. VA proposes a 60-percent evaluation if requiring intermittent myelosuppressive therapy, or targeted therapy with tyrosine kinase inhibitors, or interferon treatment. VA proposes a 30-percent evaluation if in apparent remission on continuous targeted therapy with tyrosine kinase inhibitors.

VA proposes the addition of the two notes described above for all myeloproliferative disorders.

Current DC 7705 (Thrombocytopenia, Primary, Idiopathic or Immune); Proposed DC 7705 (Immune Thrombocytopenia)

Thrombocytopenia is currently evaluated at levels of 100, 70, 30, and 0 percent based on the platelet count, the presence or absence of bleeding episodes, and whether treatment is required. VA proposes to change the title from ''Thrombocytopenia, primary, idiopathic or immune'' to ''Immune thrombocytopenia.''

VA proposes to use the same bases for evaluation of disability, while updating criteria to reflect advances in medical knowledge. A 100-percent evaluation is currently assigned if the platelet count is less than 20,000, with active bleeding, requiring treatment with medication and transfusions. A 70-percent evaluation is currently assigned for a platelet count between 20,000 and 70,000, not requiring treatment, without bleeding. A 30-percent evaluation is currently assigned for a stable platelet count between 70,000 and 100,000, without bleeding. A 0-percent evaluation is currently assigned for a stable platelet count of 100,000 or more, without bleeding. VA proposes to provide evaluation levels of 100, 70, 30, 10 and 0 percent, with criteria based in part on the recommendations of the American Society of Hematology for diagnosis and treatment of idiopathic thrombocytopenic purpura, updated in 2010.

VA proposes to assign a 100-percent evaluation for immune thrombocytopenia requiring chemotherapy for chronic refractory thrombocytopenia or a platelet count from 20,000 to 30,000 despite treatment. VA proposes to assign a 70-percent evaluation if requiring immunosuppressive therapy or for a platelet count higher than 30,000 but not higher than 50,000, with history of hospitalization because of severe bleeding requiring intravenous immune globulin, high-dose parenteral corticosteroids, and platelet transfusions. VA proposes to assign a 30-percent evaluation for a platelet count higher than 30,000 but not higher than 50,000, with either immune thrombocytopenia or mild mucous membrane bleeding which requires oral corticosteroid therapy or intravenous immune globulin. VA proposes to assign a 10-percent evaluation for a platelet count higher than 30,000 but not higher than 50,000, not requiring treatment. VA proposes to assign a 0-percent evaluation for platelet count above 50,000 and asymptomatic, or for immune thrombocytopenia in remission.

VA also proposes to add a note instructing raters to separately evaluate splenectomy under DC 7706 and combine with an evaluation under this DC. VA proposes to add a second note clarifying re-evaluation following chemotherapy as follows: ''A 100-percent evaluation shall continue beyond the cessation of chemotherapy. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of [38 CFR 3.105(e)].''

DC 7706 (Splenectomy); DC 7707 (Spleen, Injury of, Healed)

VA proposes no change to these DCs except to move the word ''separately'' in the note following DC 7706 to clarify the meaning.

Current DC 7709 (Hodgkin's Disease); Proposed DC 7709 (Hodgkin's Lymphoma)

VA proposes to change the title associated with current DC 7709 from ''Hodgkin's disease'' to ''Hodgkin's lymphoma'' to be consistent with current medical terminology and knowledge. VA proposes minor editorial changes to the existing note. The following sentence was modified to read as follows at the end of the existing note: ''If there has been no local recurrence or metastasis, rate on residuals under the appropriate diagnostic code(s).''

DC 7710 (Adenitis, Tuberculous, Active or Inactive)

VA proposes no changes for this diagnostic code except for the deletion of a section symbol (§).

Proposed DC 7712 (Multiple Myeloma)

VA proposes to add a new DC 7712 for multiple myeloma (MM). MM is a type of systemic, incurable malignancy resulting from the proliferation of abnormal plasma cells in the bone marrow. The overgrowth of these plasma cells results in tumors that are deposited primarily in the bones, but also in the kidneys and other organs. The median age at diagnosis is 65 years, and the average 5-year survival rate is about 30 percent. Survival time depends on many factors, such as age, gender, race, stage of disease at time of diagnosis, and treatment. Recent therapeutic advances have improved the quality of life and length of survival time, but MM remains incurable. Some patients go into remission for various

periods but require maintenance therapy even while in remission.

MM has a wide variety of clinical presentations that can vary between asymptomatic to severely symptomatic.

Asymptomatic (smoldering or indolent) myeloma is a slow-growing, asymptomatic precursor or pre-malignant phase of MM. It is usually not treated until evidence of end organ damage develops. It has a high risk of developing into MM. However, since it is not malignant, is asymptomatic, and does not require treatment, it would not warrant a compensable evaluation under this diagnostic code, and VA proposes to rate it at 0 percent.

Even if smoldering MM is currently regarded as a pre-malignant state, there are subsets of patients with different rates of progression towards MM. No single pathological or molecular feature can be used to distinguish between smoldering and pre-malignant MM with clonal plasma cells from those with clonal malignant plasma cells. A biomarker-based definition that can predict this transformation is needed but is not yet currently available.

Symptomatic multiple myeloma, as further defined in the below proposed notes to new DC 7712, would therefore be rated at 100 percent. VA proposes the following notes to new DC 7712 based on the most recently updated diagnostic criteria staging system of the International Diagnostic Working Group of 2014. See S. Rajkumar, M.D., ''International Myeloma Working Group updated criteria for the diagnosis of multiple myeloma,'' 15(12) Lancet Oncol. e538 (2014).

The first note would state the following: ''Symptomatic myeloma requires an elevated serum or urine M (monoclonal) protein value (however no specific concentration is required for diagnosis) or presence of increased bone marrow clonal plasma cells ≥10%. There must be also evidence of related organ tissue impairment (ROTI) due to the plasma cell proliferation. This process is manifested by elevated serum calcium, renal failure, anemia, and bone lesions (CRAB). The corresponding laboratory values are: Serum calcium ≥11.5 mg/100 mL, renal insufficiency with creatinine clearance <40 cc/min or serum creatinine >1.73 mmol/L, normochromic, normocytic anemia with a hemoglobin value >2 g/100 mL below the lower limit of normal, or a hemoglobin value <10 g/100 mL, lytic lesions (one or more osteolytic lesions by radiographic or other imaging system), severe osteopenia, or pathologic bone fractures. A small percentage of patients with symptomatic myeloma have no detectable M-protein in serum or urine but do have myeloma-related organ impairment ROTI and increased bone marrow plasma cells. Any of the following validated biomarkers of malignancy are acceptable for the diagnosis of MM, including clonal bone marrow plasma cells ≥60%, serum free light chain ratio ≥100, or free light chain ≥100 mg/L, or more than one focal bone or bone marrow lesion on MRI >5 mm in size.''

The second note would state the following: ''A nonsecretory myeloma (a variant form of symptomatic myeloma) shows absent M-protein in the serum and urine, bone marrow plasmacytosis, and ROTI. While this group of patients represents a minority of cases (1–2%), this uncommon presentation may lead to delay in diagnosis because of the scarcity of laboratory findings commonly in the face of an isolated bone process such as low back pain.''

The third note would state the following: ''The diagnostic criteria for asymptomatic (smoldering or indolent) myeloma requires the following two criteria: (1) An elevated serum monoclonal protein (IgG or IgA) >30 g/L, urine monoclonal protein >500 mg/24 hrs. or clonal bone marrow plasmal cells 10%–60%, and (2) absence of myeloma defining events or amyloidosis without any related organ or tissue impairment (ROTI) or end-organ damage. There is usually normal serum calcium, hemoglobin, and serum creatinine, and no bone lesions on full skeletal survey and no evidence of amyloidosis or light chain deposition disease.''

Multiple myeloma is incurable, and carries a poor prognosis. Therefore, VA proposes Note (4), which would state that the 100-percent evaluation shall continue for five years after the diagnosis of symptomatic multiple myeloma, at which time the appropriate disability evaluation shall be determined by mandatory VA examination. It would also state that any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of 38 CFR 3.105(e) and 3.344 (a) and (b).

DC 7714 (Sickle Cell Anemia)

Sickle cell anemia is currently evaluated at levels of 100, 60, 30, and 10 percent. The current 100-percent evaluation criteria are: ''With repeated painful crises, occurring in skin, joints, bones or any major organs caused by hemolysis and sickling of red blood cells, with anemia, thrombosis and infarction, with symptoms precluding even light manual labor.'' VA proposes at the 100-percent level to change the term ''painful crises'' to ''painful episodes'' in keeping with current medical terminology, to insert the word ''residual'' before the word ''symptoms,'' and to change punctuation to clarify meaning. The 100 percent category would also require at least 4 or more painful episodes in the past 12 months for clarification purposes.

The current 60-percent evaluation criteria are: ''With painful crises several times a year or with symptoms precluding other than light manual labor.'' As in the 100-percent evaluation criteria, VA proposes to change the term ''painful crises'' to ''painful episodes.'' To remove ambiguity, we also propose replacement of the phrase ''With painful crises several times a year'' with ''Averaging 3 or more painful episodes per 12-month period.''

The current 30-percent evaluation criterion is: ''Following repeated hemolytic sickling crises with continuing impairment of health.'' VA proposes to replace ''Following repeated hemolytic sickling crises with continuing impairment of health'' with ''Averaging 1 or 2 painful episodes per 12-month period'' in order to make the criterion less ambiguous and promote consistent evaluations. VA proposes no change in the current 10-percent evaluation criteria of ''Asymptomatic, established case in remission, but with identifiable organ impairment,'' and only an editorial change in the note under this DC to reflect the fact that the former Compensation and Pension Service has been reorganized as the Compensation Service and the Pension and Fiduciary Service.

DC 7715 (Non-Hodgkin's Lymphoma)

Currently, non-Hodgkin's lymphoma (NHL), DC 7715, is evaluated at 100 percent for active disease or during a treatment phase. VA proposes to modify the current note under DC 7715 with some non-substantive changes and by extending the allowable time required for mandatory examination from six months to 2 years, as provided in the proposed note to DC 7715. This is based upon current medical information suggesting that recurrences in non-Hodgkin's lymphoma are very high, with common tumor recurrences within or after the period that mandates lowering of disability rating for treatment completion or apparent remission of 6 months. Data on relapsed aggressive NHL: *http://www.texasoncology.com/types-of-cancer/non-hodgkins-lymphoma/intermediate-grade-aggressive-grade-nhl/relapsed-aggressive-nhl/*). VA also proposes to modify the criteria as, ''When there is active disease, during treatment phase or with indolent and

non-contiguous phase of low grade NHL.'' See National Cancer Institute Adult NHL PDQ treatment Update (*http://www.cancer.gov/cancertopics/pdq/treatment/adult-non-hodgkins/HealthProfessional/page9#_195_toc* (Dec. 2014).

DC 7716 (Aplastic Anemia)

Aplastic anemia, DC 7716, is currently evaluated at levels of 100, 60, 30, and 10 percent. The current 100-percent evaluation criteria are: ''Requiring bone marrow transplant, or; requiring transfusion of platelets or red cells at least once every six weeks, or; infections recurring at least once every six weeks.'' VA proposes to expand ''bone marrow transplant'' to ''peripheral blood or bone marrow stem cell transplant,'' as either may be used for treatment. In addition, VA proposes to add the phrase ''on average'' to the specific numbers of platelet or red cell transfusions required and to the frequency of recurring infections, and to add ''per 12-month period'' to promote consistent evaluations at the 100-, 60-, and 30-percent levels.

The current 60-percent criteria are: ''Requiring transfusion of platelets or red cells at least once every three months, or; infections recurring at least once every three months.'' Continuous immunosuppressive therapy is currently a standard treatment option for aplastic anemia. A. Bacigalupo, ''Diagnosis and treatment of acquired aplastic anemia,'' 23(2) Hematol Oncol. Clinical N. Am. 159 (2009). We therefore propose to add, ''using continuous immunosuppressive therapy'' as an alternative criterion for the 60-percent level. VA also proposes the changes described above for the 100-percent criteria concerning adding ''on average'' and ''per 12-month period.'' The current 30-percent evaluation criteria are: ''Requiring transfusion of platelets or red cells at least once per year but less than once every three months, or; infections recurring at least once per year but less than once every three months.'' VA proposes only the changes described above for the 100-percent criteria concerning adding ''on average'' and ''per 12-month period.'' The current 10-percent criterion is ''Requiring continuous medication for control.'' VA proposes to delete this evaluation level as the medications used to treat aplastic anemia warrant higher levels of evaluation.

VA proposes a change in the note following this DC stating that a 100-percent evaluation will be provided for either peripheral blood or bone marrow stem cell transplant. The reminder of the note is otherwise unchanged.

Proposed DC 7724 (Solitary Plasmacytoma)

Solitary bone or extramedullary (occurring in soft tissue outside of the bone marrow) plasmacytomas are malignant plasma cell neoplasms that are closely related to multiple myeloma. A solitary bone plasmacytoma develops into multiple myeloma in 50 to 60 percent of cases, and into an extramedullary plasmacytoma in 10 to 30 percent of cases. A solitary plasmacytoma that remains solitary has a better prognosis than multiple myeloma and may be curable. VA proposes to rate solitary plasmacytomas similarly to other malignant neoplasms that are potentially curable. VA proposes to rate solitary plasmacytoma at 100 percent when there is active disease or during a treatment phase and to add Note (1) to state that a 100-percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures (including autologous stem cell transplantation), and that six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. The note would also state that any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of 38 CFR 3.105(e) and that, if there has been no recurrence, to rate residuals under the appropriate diagnostic codes.

VA proposes to add Note (2) to remind rating specialists of the potential for the transformation of solitary plasmacytomas into multiple myeloma. VA also proposes to add Note (3) to remind rating specialists of the residual effects of a solitary plasmacytoma and the adverse effects of medical treatment.

Proposed DC 7725 (Myelodysplastic Syndromes)

VA proposes to add a new DC 7725 for myelodysplastic syndromes because these conditions are relatively common in veterans and do not have a diagnostic code under which they can be appropriately evaluated. These syndromes, sometimes called ''pre-leukemia'' in the past, are a group of disorders associated with bone marrow dysfunction, in which healthy and mature red blood cells, white blood cells, and platelets are not produced. Therefore, there may be a deficiency of any type of blood cell. About one-third of those with myelodysplastic syndromes progress to acute myelogenous leukemia in months or years. Some types of myelodysplastic syndromes are primary, in which there is no known cause for the syndromes, and others are secondary types, which develop after treatment with chemotherapy or radiation therapy for other diseases. The classification of these disorders is complex and differs among different medical organizations. Treatment depends in part on the specific disorder but also on many other factors. The mean overall survival time for these conditions is 6 months to 6 years.

VA proposes to evaluate myelodysplastic syndromes based on type and frequency of treatment and number of infections per 12-month period. VA also proposes to include in the evaluation criteria treatment with biologic therapy, either interferon alpha on an ongoing basis or erythropoiesis-stimulating agent (ESA) to boost red blood cell production. These treatments are used in some types of myelodysplastic disorders. VA proposes to provide evaluation levels of 100, 60, and 30 percent. VA proposes to assign 100 percent for either of the following: Requiring peripheral blood or bone marrow stem cell transplant, or requiring chemotherapy (including hypomethylating agents and immunmodulators, *e.g.,* lenalidomide). VA proposes to assign 60 percent for either of the following: Requiring, on average, 4 or more blood or platelet transfusions per 12-month period, or infections requiring hospitalization, on average, 3 or more times per 12-month period. VA proposes to assign 30 percent for any of the following: Requiring, on average, 1 to 3 blood or platelet transfusions per 12-month period, infections requiring hospitalization, on average, 1 to 2 times per 12-month period; or requiring biologic therapy, either interferon alpha on an ongoing basis or erythropoiesis stimulating agent (ESA) for up to 12 weeks per 12-month period.

VA also proposes to add Note (1) stating that if this condition progresses to leukemia, to evaluate it as leukemia under DC 7703 and Note (2) stating that a 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant, or during the period of treatment with chemotherapy and shall continue with a mandatory VA examination six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment. Note (2) would also state that any reduction in evaluation based upon that or any subsequent examination shall be subject

to the provisions of 38 CFR 3.105(e) and that, if there has been no recurrence, residuals will be rated under the appropriate diagnostic codes.

Proposed Changes to Appendices A, B, and C to Part 4

VA proposes to amend appendices A, B, and C to reflect the above-noted proposed changes. In appendix A to part 4, § 4.117, remove diagnostic code 7700, revise diagnostic codes 7702–7705, 7709, and 7714–7716, and add diagnostic codes 7718–7725.

In appendix B to part 4, revise the title from ''The Hemic and Lymphatic Systems'' to ''The Hematologic and Lymphatic Systems'', remove diagnostic code 7700 and its disability entry, revise the section heading and the disability entry for diagnostic codes 7702, 7705 and 7709, and add disability codes and disability entries for 7712 and 7718–7725.

In appendix C to part 4, convert the existing entry for ''Anemia'' into a new section titled ''Anemia'', remove diagnostic code 7700 and its disability entry and insert diagnostic codes 7720–7723 and their disability entries in that section; revise the disability entry for diagnostic codes 7702, 7705 and 7709; create a new section titled ''Hematologic'' and insert diagnostic codes 7705, 7712, 7718, 7724 and 7725 and their disability entries in that section; and convert the existing entry for leukemia into a new section titled ''Leukemia'' and insert diagnostic codes 7703 and 7719 into that section.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action has been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's Web site at *http://www1.va.gov/orpm/,* by following the link for ''VA Regulations Published.''

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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 (adjusted annually for inflation) in any year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.104, Pension for Non-Service-Connected Disability for Veterans, and 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on July 30, 2015, for publication.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Dated: July 31, 2015.

Jeffrey M. Martin,

Office Program Manager, Office of Regulation Policy & Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 4, subpart B, to read as follows:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

■ 2. Revise the undesignated center heading preceding § 4.117 to read as follows:

The Hematologic and Lymphatic Systems

■ 3. Revise § 4.117 to read as follows:

§ 4.117 Schedule of ratings—hematologic and lymphatic systems.

	Rating
7702 Agranulocytosis, acquired:	
Requiring bone marrow transplant or infections recurring, on average, at least once every six weeks per 12-month period	100
Requiring intermittent myeloid growth factors (granulocyte colony-stimulating factor (G–CSF) or granulocyte-macrophage colony-stimulating factor (GM–CSF)) or continuous immunosuppressive therapy such as cyclosporine to maintain absolute neutrophil count (ANC) greater than 500/μl but less than 1,000/μl; or infections recurring, on average, at least once every three months per 12-month period	60
Requiring intermittent myeloid growth factors to maintain ANC greater than 1,000/μl; or infections recurring, on average, at least once per 12-month period but less than once every three months per 12-month period	30
Requiring continuous medication (e.g., antibiotics) for control; or requiring intermittent use of a myeloid growth factor to maintain ANC greater than or equal to 1,500/μl	10
Note: A 100-percent evaluation for bone marrow transplant shall be assigned as of the date of hospital admission and shall continue with a mandatory VA examination six months following hospital discharge. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7703 Leukemia (except for chronic myelogenous leukemia):	
When there is active disease or during a treatment phase	100
Otherwise rate residuals under the appropriate diagnostic code(s).	
Chronic lymphocytic leukemia or monoclonal B-cell lymphocytosis (MBL), asymptomatic, Rai Stage 0	0
Note (1): A 100-percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate on residuals.	
Note (2): Evaluate symptomatic chronic lymphocytic leukemia that is at Rai Stage I, II, III, or IV the same as any other leukemia evaluated under this diagnostic code.	
Note (3): Evaluate residuals of leukemia or leukemia therapy under the appropriate diagnostic code(s). Myeloproliferative Disorders: (Diagnostic Codes 7704, 7718, 7719).	
7704 Polycythemia vera:	
Requiring peripheral blood or bone marrow stem-cell transplant or treatment with radioactive phosphorus or chemotherapy (including myelosuppressants)	100
Requiring phlebotomy 6 or more times per 12-month period to control RBC count or if requiring radioactive phosphorous treatment, chemotherapy, or targeted agents such as imatinib or ruxolitinib	60
Requiring phlebotomy 4–5 times per 12-month period or if requiring continuous biologic therapy or myelosuppresive agents to maintain platelets <200,000 or white blood cells (WBC) <12,000	30
Requiring phlebotomy, biologic therapy, or interferon on an intermittent basis, as needed, 3 or fewer times per 12-month period	10
Note (1): Rate complications such as hypertension, gout, stroke, or thrombotic disease separately.	
Note (2): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	
Note (3): A 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with radioactive phosphorus or chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7705 Immune thrombocytopenia:	
Requiring chemotherapy for chronic refractory thrombocytopenia or a platelet count from 20,000 to 30,000 despite treatment	100
Requiring immunosuppressive therapy or for a platelet count higher than 30,000 but not higher than 50,000, with history of hospitalization because of severe bleeding requiring intravenous immune globulin, high-dose parenteral corticosteroids, and platelet transfusions	70
Platelet count higher than 30,000 but not higher than 50,000, with either immune thrombocytopenia or mild mucous membrane bleeding which requires oral corticosteroid therapy or intravenous immune globulin	30
Platelet count higher than 30,000 but not higher than 50,000, not requiring treatment	10
Platelet count above 50,000 and asymptomatic, or for immune thrombocytopenia in remission.	0
Note (1): Separately evaluate splenectomy under diagnostic code 7706 and combine with an evaluation under this diagnostic code.	
Note (2): A 100-percent evaluation shall continue beyond the cessation of chemotherapy. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7706 Splenectomy	20
Note: Separately rate complications such as systemic infections with encapsulated bacteria.	20
7707 Spleen, injury of, healed.	
Rate for any residuals.	
7709 Hodgkin's lymphoma:	
With active disease or during a treatment phase	100
Note: A 100-percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals under the appropriate diagnostic code(s).	
7710 Adenitis, tuberculous, active or inactive.	
Rate under § 4.88c or 4.89 of this part, whichever is appropriate.	
7712 Multiple myeloma:	
Symptomatic multiple myeloma	100
Asymptomatic (smoldering or indolent)	0

	Rating
Note (1): Symptomatic myeloma requires, (i) an elevated serum or urine M (monoclonal) protein value (however no specific concentration is required for diagnosis), or (ii) presence of increased bone marrow clonal plasma cells ≥10%. There must be also evidence of related organ tissue impairment (ROTI) due to the plasma cell proliferation. This process is manifested by elevated serum calcium, renal failure, anemia, and bone lesions (CRAB). The corresponding laboratory values are: Serum calcium ≥11.5 mg/100 mL, renal insufficiency with creatinine clearance <40 cc/min or serum creatinine >1.73 mmol/L, normochromic, normocytic anemia with a hemoglobin value >2 g/100 mL below the lower limit of normal, or a hemoglobin value <10 g/100 mL, lytic lesions (one or more osteolytic lesions by radiographic or other imaging system) severe osteopenia, or pathologic bone fractures. A small percentage of patients with symptomatic myeloma have no detectable M-protein in serum or urine but do have myeloma-related organ impairment ROTI and increased bone marrow plasma cells. Any of the following validated biomarkers of malignancy are acceptable for the diagnosis of MM, including clonal bone marrow plasma cells ≥60%, serum free light chain ratio of ≥100, or free light chain of ≥100 mg/L, or more than one focal bone or bone marrow lesion on MRI >5 mm in size.	
Note (2): A nonsecretory myeloma (a variant form of symptomatic myeloma) shows absent M-protein in the serum and urine, bone marrow plasmacytosis, and ROTI. While this group of patients represents a minority of cases (1–2%), this uncommon presentation may lead to delay in diagnosis because of the scarcity of laboratory findings commonly in the face of an isolated bone process such as low back pain.	
Note (3): The diagnostic criteria for asymptomatic (smoldering or indolent) myeloma requires the following two criteria: (1) An elevated serum monoclonal protein (IgG or IgA) >30 g/L, urine monoclonal protein >500 mg/24 hrs., or clonal bone marrow plasma cells 10%–60%, and (2) absence of myeloma defining events of amyloidosis without any related organ or tissue impairment (ROTI) or end-organ damage. There is usually normal serum calcium, hemoglobin, and serum creatinine, and no bone lesions on full skeletal survey and no evidence of amyloidosis or light chain deposition disease.	
Note (4): The 100-percent evaluation shall continue for five years after the diagnosis of symptomatic multiple myeloma, at which time the appropriate disability evaluation shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) and § 3.344 (a) and (b) of this chapter.	
7714 Sickle cell anemia:	
With at least 4 or more painful episodes per 12-month period, occurring in skin, joints, bones, or any major organs, caused by hemolysis and sickling of red blood cells, with anemia, thrombosis, and infarction, with residual symptoms precluding even light manual labor	100
Averaging 3 or more painful episodes per 12-month period or with symptoms precluding other than light manual labor	60
Averaging 1 or 2 painful episodes per 12-month period	30
Asymptomatic, established case in remission, but with identifiable organ impairment	10
Note: Sickle cell trait alone, without a history of directly attributable pathological findings, is not a ratable disability. Cases of symptomatic sickle cell trait will be forwarded to the Director, Compensation Service, for consideration under § 3.321(b)(1) of this chapter.	
7715 Non-Hodgkin's lymphoma:	
When there is active disease, during treatment phase or with indolent and non-contiguous phase of low grade NHL	100
Note: A 100-percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Two years after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate on residuals under the appropriate diagnostic code(s).	
7716 Aplastic anemia:	
Requiring peripheral blood or bone marrow stem cell transplant; or requiring transfusion of platelets or red cells, on average, at least once every six weeks per 12-month period; or infections recurring, on average, at least once every six weeks per 12-month period	100
Requiring transfusion of platelets or red cells, on average, at least once every three months per 12-month period; or infections recurring, on average, at least once every three months per 12-month period; or using continuous immunosuppressive therapy	60
Requiring transfusion of platelets or red cells, on average, at least once per 12-month period, but less than once every three months per 12-month period; or infections recurring, on average, at least once per 12-month period, but less than once every three months per 12-month period	30
Note: A 100-percent evaluation for peripheral blood or bone marrow stem cell transplant shall be assigned as of the date of hospital admission and shall continue with a mandatory VA examination six months following hospital discharge. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7718 Essential thrombocythemia and primary myelofibrosis	
Requiring either continuous myelosuppressive therapy or, for six months following hospital admission, peripheral blood or bone marrow stem cell transplant, or treatment with radioactive phosphorus or chemotherapy (including myelosuppressants)	100
Requiring continuous or intermittent myelosuppressive therapy to maintain platelet count $<500 \times 10^9$/L	70
Requiring continuous or intermittent myelosuppressive therapy to maintain platelet count of 200,000–400,000, or white blood cell (WBC) count of 4,000–10,000	30
Asymptomatic	0
Note (1): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	
Note (2): A 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with radioactive phosphorus or chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7719 Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia):	
Requiring peripheral blood or bone marrow stem cell transplant, or continuous myelosuppressive or immunosuppressive therapy treatment	100
Requiring intermittent myelosuppressive therapy, or targeted therapy with tyrosine kinase inhibitors, or interferon treatment	60
In apparent remission on continuous targeted therapy with tyrosine kinase inhibitors	30
Note (1): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	

	Rating
Note (2): A 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with radioactive phosphorus or chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105 of this chapter.	
7720 Iron deficiency anemia:	
Requiring intravenous iron infusions on average 4 or more times per 12-month period	30
Requiring continuous treatment with high-dose oral supplementation	10
Asymptomatic or requiring treatment only by dietary modification	0
Note: Do not evaluate iron deficiency anemia due to blood loss under this diagnostic code. Evaluate iron deficiency anemia due to blood loss under the criteria for the condition causing the blood loss.	0
7721 Folic acid deficiency:	
Requiring continuous treatment with high-dose oral supplementation	10
Asymptomatic or requiring treatment only by dietary modification	0
7722 Pernicious anemia and Vitamin B_{12} deficiency anemia:	
For initial diagnosis requiring transfusion due to severe anemia, or if there are signs or symptoms related to central nervous system impairment, such as encephalopathy, myelopathy, or severe peripheral neuropathy, requiring parenteral B_{12} therapy	100
Requiring continuous treatment with Vitamin B_{12} injections, Vitamin B_{12} sublingual or high-dose oral tablets, or Vitamin B_{12} nasal spray or gel	10
Note: A 100-percent evaluation for pernicious anemia and Vitamin B_{12} deficiency shall be assigned as of the date of the initial diagnosis requiring transfusion due to severe anemia or parenteral B_{12} therapy and shall continue with a mandatory VA examination six months following hospital discharge or cessation of parenteral B_{12} therapy. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Thereafter, evaluate at 10-percent and separately evaluate any residual effects of pernicious anemia, such as neurologic involvement causing peripheral neuropathy, myelopathy, dementia, or related gastrointestinal residuals, under the most appropriate diagnostic code.	
7723 Acquired hemolytic anemia:	
Requiring a bone marrow transplant or continuous intravenous or immunosuppressive therapy (e.g., prednisone, Cytoxan, azathioprine, or rituximab)	100
Requiring immunosuppressive medication an average of 4 or more times per 12-month period	60
Requiring an average of 2–3 courses of immunosuppressive therapy per 12-month period	30
Requiring an average of one course of immunosuppressive therapy per 12-month period	10
Asymptomatic	0
Note (1): A 100-percent evaluation for bone marrow transplant shall be assigned as of the date of hospital admission and shall continue for six months after hospital discharge with a mandatory VA examination six months following hospital discharge. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
Note (2): Separately evaluate splenectomy under diagnostic code 7706 and combine with an evaluation under diagnostic code 7723.	
7724 Solitary plasmacytoma:	
Solitary plasmacytoma, when there is active disease or during a treatment phase	100
Note (1): A 100-percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures (including autologous stem cell transplantation). Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate residuals under the appropriate diagnostic codes.	
Note (2): Rate a solitary plasmacytoma that has developed into multiple myeloma as symptomatic multiple myeloma.	
Note (3): Rate residuals of plasma cell dysplasia (e.g., thrombosis) and adverse effects of medical treatment (e.g., neuropathy) under the appropriate diagnostic codes.	
7725 Myelodysplastic syndromes:	
Requiring peripheral blood or bone marrow stem cell transplant; or requiring chemotherapy	100
Requiring, on average, 4 or more blood or platelet transfusions per 12-month period; or infections requiring hospitalization, on average, 3 or more times per 12-month period	60
Requiring, on average, 1 to 3 blood or platelet transfusions per 12-month period; infections requiring hospitalization, on average, 1 to 2 times per 12-month period; or requiring biologic therapy, either interferon alpha on an ongoing basis or erythropoiesis stimulating agent (ESA) for 12 weeks or less per 12-month period	30
Note (1): If the condition progresses to leukemia, evaluate as leukemia under diagnostic code 7703.	
Note (2): A 100-percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant, or during the period of treatment with chemotherapy and shall continue with a mandatory VA examination six months following hospital discharge or, in the case of radioactive phosphorus or chemotherapy treatment, six months after completion of treatment. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, residuals will be rated under the appropriate diagnostic codes.	

(Authority: 38 U.S.C. 1155.)

■ 3. Amend appendix A to part 4 by:

■ a. Revising the entries for diagnostic codes 7700, 7702 through 7705, 7709, 7712, and 7714 through 7716; and

■ b. Adding entries for diagnostic codes 7718 through 7725.

The revisions and additions read as follows:

APPENDIX A TO PART 4—TABLE OF AMENDMENTS AND EFFECTIVE DATES SINCE 1946

Sec.	Diagnostic Code No.	
*	*	* * * * * *
4.117 ...	7700	Removed [*effective date of final rule*].
*	*	* * * * * *
	7702	Evaluation October 23, 1995; title [*effective date of final rule*]; evaluation [*effective date of final rule*].
	7703	Evaluation August 23, 1948; criterion October 23, 1995; evaluation [*effective date of final rule*]; criterion [*effective date of final rule*].
	7704	Evaluation October 23, 1995; evaluation [*effective date of final rule*].
	7705	Evaluation October 23, 1995; title [insert effective date of final rule]; evaluation [*effective date of final rule*]; criterion [*effective date of final rule*].
*	*	* * * * * *
	7709	Evaluation March 10, 1976; criterion October 23, 1995; title [*effective date of final rule*]; criterion [*effective date of final rule*].
*	*	* * * * * *
	7712	Added [*effective date of final rule*].
*	*	* * * * * *
	7714	Added September 9, 1975; criterion October 23, 1995; criterion [*effective date of final rule*]
	7715	Added October 26, 1990; criterion [*effective date of final rule*].
	7716	Added October 23, 1995; evaluation [*effective date of final rule*]; criterion [*effective date of final rule*].
*	*	* * * * * *
	7718	Added [*effective date of final rule*].
	7719	Added [*effective date of final rule*].
	7720	Added [*effective date of final rule*].
	7721	Added [*effective date of final rule*].
	7722	Added [*effective date of final rule*].
	7723	Added [*effective date of final rule*].
	7724	Added [*effective date of final rule*].
	7725	Added [*effective date of final rule*].
*	*	* * * * * *

■ 4. Amend appendix B to part 4 by:

■ a. Revising the undesignated center heading immediately preceding diagnostic code 7700;

■ b. Removing the entry for diagnostic code 7700;

■ c. Revising the entries for diagnostic codes 7702, 7705 and 7709; and

■ d. Adding entries for diagnostic codes 7712 and 7718 through 7725.

The revisions and additions read as follows:

APPENDIX B TO PART 4—NUMERICAL INDEX OF DISABILITIES

Diagnostic Code No.	
* *	* * * * * *
THE HEMATOLOGIC AND LYMPHATIC SYSTEMS	
7702	Agranulocytosis, acquired.
* *	* * * * * *
7705	Immune thrombocytopenia.
* *	* * * * * *
7709	Hodgkin's lymphoma.
* *	* * * * * *
7712	Multiple myeloma.
* *	* * * * * *
7718	Essential thrombocythemia and primary myelofibrosis.
* *	* * * * * *
7719	Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia).

APPENDIX B TO PART 4—NUMERICAL INDEX OF DISABILITIES—Continued

Diagnostic Code No.	
7720	Iron deficiency anemia.
7721	Folic acid deficiency.
7722	Pernicious anemia and Vitamin B_{12} deficiency anemia.
7723	Acquired hemolytic anemia.
7724	Solitary plasmacytoma.
7725	Myelodysplastic syndromes.

* * * * * * *

■ 5. Amend appendix C to part 4 by:
■ a. Revising the entries for Agranulocytosis and Anemia;
■ c. Adding an entry for Hematologic in alphabetical order;
■ d. Removing the entry for Hodgkin's disease and adding in its place an entry for Hodgkin's lymphoma;
■ e. Revising the entry for Leukemia;

The revisions and additions read as follows:

APPENDIX C TO PART 4—ALPHABETICAL INDEX OF DISABILITIES

	Diagnostic Code No.
* * * * * * *	
Agranulocytosis, acquired	7702
* * * * * * *	
Anemia:	
Acquired hemolytic anemia	7723
Folic acid deficiency	7721
Iron deficiency anemia	7720
Pernicious anemia and Vitamin B_{12} deficiency anemia	7722
* * * * * * *	
Hematologic:	
Essential thrombocythemia and primary myelofibrosis	7718
Immune thrombocytopenia	7705
Multiple myeloma	7712
Myelodysplastic syndromes	7725
Solitary plasmacytoma	7724
* * * * * * *	
Hodgkin's lymphoma	7709
* * * * * * *	
Leukemia:	
Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia)	7719
Leukemia	7703
* * * * * * *	

[FR Doc. 2015–19197 Filed 8–5–15; 8:45 am]
BILLING CODE 8320–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 2, 15, and 18

[ET Docket No. 15–170; RM–11673; FCC 15–92]

Equipment Authorization and Electronic Labeling for Wireless Devices

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes updates to the rules that govern the evaluation and approval of RF devices. The Commission last comprehensively reviewed its equipment authorization procedures more than fifteen years ago. The RF equipment ecosystem has significantly expanded in that time, and the manner in which today's RF equipment is now designed, manufactured, and marketed—as well as the sheer number of devices subject to authorization—warrant the proposed rule modifications.

DATES: Comments must be filed on or before September 8, 2015, and reply comments must be filed on or before September 21, 2015.

FOR FURTHER INFORMATION CONTACT: Brian Butler, Office of Engineering and Technology, (202) 418–2702, email: *Brian.Butler@fcc.gov.,* TTY (202) 418–2989.

ADDRESSES: You may submit comments, identified by ET Docket No. 15–170; RM–11673, by any of the following methods:

- Federal Communications Commission's Web site: *http://apps.fcc.gov/ecfs//.* Follow the instructions for submitting comments.

• Mail: Brian Butler, Office of Engineering and Technology, Room 7–A267, 445 12th Street SW., Washington, DC 20554.

• People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 888–835–5322.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

• Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*

• Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

• Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 888–835–5322 (tty). For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission *Notice of Proposed Rule Making,* ET Docket No. 15–170, FCC 15–92, adopted July 17, 2015, and released July 21, 2015. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.*

Synopsis

1. The telecommunications sector depends on the variety and utility of radiofrequency (RF) devices. The purpose of this Notice of Proposed Rulemaking (NPRM) is to update the rules that govern the evaluation and approval of RF devices. The proposals build on actions the Commission recently took to modify its equipment authorization processing rules.

2. The Commission proposed to combine two separate product approval programs—Declaration of Conformity and verification—into one product self-approval program. It also proposed to revise and clarify the rules that govern equipment certification, including those specifying when device changes necessitate a new FCC ID. These revisions would codify the current practices related to certification of modular transmitters for licensed services as well as the filing requirements for RF devices that incorporate multiple certified modular transmitters. They would also replace requirements that apply only to devices specifically classified as ''software defined radios'' (SDRs) with broadly applicable rules, based in part on the current Commission practices regarding software control of radio parameters, and would eliminate restrictions on hardware modifications of SDR devices.

3. The Commission also proposed to codify procedures related to electronic labeling, streamline the rules for the measurement procedures that are used to demonstrate device compliance, and codify existing practices that protect the confidentiality of market-sensitive information. It proposed to eliminate unnecessary or duplicative rules and consolidate rules from various specific rule parts into the equipment authorization rules in part 2 of the Commission's rules and to discontinue the requirement that importers file information associated with FCC Form 740 with Customs and Border Protection for RF devices that are imported into the United States. Finally, the Commission sought comment on how to codify any filing or notification requirements that may be necessitated by the adoption of these proposals.

4. The Commission found that its proposals would better align its equipment authorization procedures with the current state of equipment development, design, and manufacturing practices, thus promoting significant cost savings, reducing the burdens, and avoiding any unnecessary delay associated with the equipment authorization process. It invited commenters to discuss the costs and benefits of the rule changes proposed in the NPRM, and provide relevant supporting data, along with additional suggestions for enhancing the benefits or reducing the costs associated with the proposals.

Background

5. The Commission ensures compliance with its technical rules through the equipment authorization program for RF devices, which is codified in part 2 of the Commission's rules. Additionally, RF devices must comply with the Commission's technical and equipment authorization requirements before they can be imported to or marketed in the United States. The current RF equipment authorization procedures have evolved over the course of more than 40 years.

6. The NPRM is informed by the evolution of the RF device ecosystem. The development of highly integrated circuitry, software-based designs and new production procedures has resulted in the use of substantially more complex RF transmitters in increasingly compact devices. The transmitters may operate individually or simultaneously using multiple transmission modes. Certain of the transmitters may operate under rules for the various licensed radio services, while others operate under the unlicensed device rules, all within a single product. Such devices may be too small to fit a permanently attached label that includes the compliance information, particularly in the case where a finished product includes multiple modular transmitters with each one required to display certain information such as an FCC ID.

Unifying Self-Approval Procedures

7. Currently, RF devices must be authorized in accordance with one of three procedures specified in subpart J of part 2–certification, Declaration of Conformity (DoC), and verification. DoC and verification are self-approval procedures in which the responsible

party is required to take specific actions to ensure that its equipment complies with the Commission's rules. Unlike certification, these procedures do not require submittal of an application to the FCC or a Telecommunication Certification Body (TCB) and do not require the explicit grant of certification. Also, unlike a certified device, such equipment does not have an FCC ID, and is not listed in an FCC database. Under DoC, the responsible party must use a recognized accredited test laboratory when testing devices and include a compliance information statement with the product that identifies the product and a responsible party within the United States. Verification does not require the use of FCC-recognized test laboratories or the provision of a compliance information statement with the product.

8. The number and variety of devices subject to DoC has grown significantly since the Commission last investigated the possibility of combining the DoC and verification procedures, and there are now comprehensive and widely used measurement procedures, significant testing expertise and capabilities for devices subject to DoC, and a greater comfort with the use of self-approval procedures. At the same time, the development of highly integrated circuits to implement functions which were previously performed by discrete components has resulted in lower typical RF emissions from such devices. The Commission found little benefit in maintaining two distinct procedures or in maintaining the rigor of the Declaration of Conformity procedure given these changes, and recognized the potential for reducing costs for manufacturers. It tentatively concluded that a single process would simplify the equipment authorization requirements and reduce confusion as to which process may apply to any given device, while continuing to adequately ensure compliance with the rules, and sought comment on the proposed rule revisions.

9. The Commission proposed to incorporate certain elements of the existing Suppliers Declaration of Conformity (SDoC) process now used for Telephone Network Terminal Equipment into the new single process, which would apply to all equipment currently subject to the DoC and verification procedures. Under this proposal, the responsible party for equipment subject to rules other than part 68 would test equipment for compliance to specified standards or requirements and certify compliance to the public, by way of a statement supplied with the product, without securing an independent third-party review or approval of compliance. Unlike the existing part 68 SDoC rules, the Commission did not propose to require that the RF devices be registered in any database. The use of accredited testing facilities would not be required under our proposal. The NPRM sought comment on use of the specific term ''Supplier's Declaration of Conformity'' or ''SDoC'' for this new process.

10. The Commission proposed to modify its rules to remove the ambiguous reference to ''tak[ing] necessary steps'' as a potential alternative to testing. It also proposed to consolidate the existing § 2.1073, ''Responsibilities,'' into an expanded § 2.909, ''Responsible party;'' and to consolidate existing § 2.1075, which addresses records retention, into a revised § 2.938 that would apply broadly to all equipment subject to our equipment authorization procedures. It proposed to otherwise retain the other DoC rules (*i.e.* those within §§ 2.1071 through 2.1077) and to apply them to the new approval procedure, and sought comment on proposed revisions to § 2.1077 that would require all equipment to include a compliance statement with the product literature that identifies for consumers who is responsible for the device's compliance with the Commission's technical regulations. The NPRM also asked whether the Commission should require the compliance statement to include additional information when equipment has been modified, but is nevertheless still subject to the self-approval process.

11. The proposed rules would no longer require the use of a specific logo (§§ 15.19(b) and 18.209). In lieu of the logo requirement, the NPRM proposed to expand use of the statement of compliance with the part 15 rules that currently applies to devices subject to verification and certification (§ 15.19(a)) to include its use as part of the new procedure. It asked questions about the impact of such an approach, including reliance on the logo as a mark of device approval, use of the logo on a voluntary basis, and potential effect on the identification of unauthorized devices. Under parts 15 and 18 of the rules, a responsible party can opt for the certification process in lieu of required DoC for the approval of certain unintentional radiators (*e.g.,* Class B personal computers and peripheral devices). The NPRM asked whether the Commission should allow devices that would be subject to the new SDoC requirements to optionally be certified.

A. Updating Certification Procedures

12. Certification differs from the other equipment authorization processes in that a grant of certification signifies that a Commission-qualified party other than the manufacturer or compliance testing laboratory has found that the equipment can be marketed in compliance with the technical and administrative requirements of the rule part(s) under which it will be operated. The procedure also requires submission of compliance information to a TCB as a part of the approval process, and the grant of certification and associated FCC ID is published on the Commission's public Web site. The Commission recently streamlined its certification procedures by modifying the rules associated with the TCB review of certification applications. The NPRM focuses on simplifying and clarifying the procedures related to the filing of certification applications.

13. Traditionally, most certifications were granted for complete devices (*i.e.* devices that do not require additional equipment to be capable of functioning). Increasingly, devices such as personal computers, mobile wireless devices, and utility meters embody complex designs and incorporate numerous previously certified modular transmitters made by other manufacturers. Modular transmitters are not intended for standalone use, and can be designed to broadly comply with the applicable Commission rules, or be certified for operation and/or installation in a host device based on compliance with certain specific conditions. In some cases, the compliance of an end product that incorporates certified modular transmitters may be based upon the original testing of the certified modular transmitters. In other cases, particularly where the new host device or end product has significant characteristics different from the original host device, further testing may be needed to ensure compliance of the new device or product. Additionally, manufacturers are increasingly designing transmitters that use software to set the operating parameters. Such RF-controlling software can allow adjustment of individual parameters or enable a device to operate in different modes, and the manufacturer may provide software upgrades in the field to enable new capabilities. We need to be assured that such devices only operate consistent with their certification. Also, software may be designed to only be modified by the grantee of certification or may be designed to permit third parties to enable new functions or frequency bands. Such trends are testing

the limits of the Commission's existing certification rules, and formed the basis for the NPRM's proposals.

14. The Commission proposed to better accommodate these developments by amending its basic certification rule to acknowledge that certification may be obtained for three types of RF devices: a device capable of independent operation, (currently addressed by our certification rules), a modular transmitter that is designed for installation into a host device or as a peripheral to another device, and a host device consisting of one or more modular transmitters certified by other parties. Additionally, the Commission proposed to permit certification of a group of related devices that are certified under a single FCC ID. It also proposed to streamline certain application procedures to reduce the need to file new applications in many cases.

a. Modular Transmitters

15. The Commission proposed to broadly apply the current rule governing certification of modular transmitters that operate in part 15 unlicensed spectrum allocations to all RF devices regulated by the Commission. This change would acknowledge the increasing reliance on modular transmitters in RF devices designed for use in licensed radio services. The Commission's proposed part 2 rule provisions are consistent with this existing guidance in KDB Publication 996369. The proposed new rules would broadly apply to modular transmitters used in any RF device and would also maintain certain specific requirements that are currently only applicable to modular transmitters used in unlicensed devices.

16. The Commission proposed to retain the concept of a ''limited modular approval,'' under which the manufacturer demonstrates in the certification application that the transmitter will comply with our rules only under specific circumstances. The Commission proposed to incorporate the part 15 rules and the guidance in KDB Publication 996369 for limited modular approvals into the revised part 2 rule. In light of the comprehensive RF exposure rules that apply to all devices, the Commission also proposed to no longer specify a unique RF exposure requirement for modular transmitters. It also proposed to eliminate the rule provision that permits authorization of modular transmitters that are ''split'' into the ''radio front end'' (the radio elements) and the ''transmitter control element'' (the hardware on which the software that controls the radio operation resides), based on its determination that such a device configuration has not been widely implemented. Additionally, the Commission proposed to permit certification of modular transmitters that consist of a single chip which has been tested to demonstrate compliance in a typical installation provided that the grantee includes detailed instructions for integration into other RF devices (*i.e.* host devices) to ensure that the ultimate configuration is consistent with the significant parameters for which it was tested. The Commission sought comment on all of these proposals.

17. The Commission anticipated the possible development of devices that are nothing more than physical platforms (form factors) into which individual modular transmitter components can be inserted in an almost limitless variety of combinations. The Commission proposed that an applicant for certification of a modular device or a form factor that includes its own RF characteristics provide design guidelines, interface specifications, and authentication requirements that would guarantee that a module can operate on the form factor only with other modules whose collective RF emissions meet the rules' requirements. The Commission sought comment on whether this regulatory regime would enable the development of this kind of product while ensuring compliance with the rules—including those related to interference, RF exposure, and hearing aid compatibility.

b. Devices With Software-Based Capabilities

18. The SDR rules were intended to allow manufacturers to obtain approval for changes to the RF operating parameters of a radio resulting from software changes without the need to physically re-label a device with a new FCC ID number in the field. For a device to be certified as an SDR, in addition to demonstrating that the device complies with the applicable technical requirements, the applicant must also demonstrate that the device contains security features to prevent the loading of software that would allow the radio to operate in violation of the Commission's rules. The applicant generally has the option of whether to declare a device an SDR. Once the grantee of a device that is classified as an SDR makes any hardware modifications that require approval, the rules do not permit any subsequent software changes absent the filing of an application to obtain a new FCC ID.

19. The Commission found that the existing SDR rules have proven to be insufficiently flexible to meet the growing use of software-defined control elements in RF devices, and proposed to simplify the rules by removing the SDR designation from grants of certification and incorporating any necessary requirements for software control of RF parameters and software security for all devices in the general certification rules and guidance.

20. The proposals would modify the SDR-related requirements in part 2 of its rules based in part on the current Commission practices regarding software configuration control. To minimize the potential for unauthorized modification to the software that controls the RF parameters of the device, grantees would have to implement well-defined measures to ensure that certified equipment is not capable of operating with RF-controlling software for which it has not been approved. All manufacturers of devices that have software-based control of RF parameters would have to provide specific information about the software capabilities of their devices. The Commission proposed to require that an applicant for certification explicitly describe the RF device's capabilities for software configuration and upgradeability in the application for certification. This description would include all frequency bands, power levels, modulation types, or other modes of operation for which the device is designed to operate, including modes not enabled in the device as initially marketed. Also, an applicant for certification would have to specify which parties will be authorized to make software changes (*e.g.,* the grantee, wireless service provider, other authorized parties) and the software controls that are provided to prevent unauthorized parties from enabling different modes of operation. This information would be included as part of the operational description information required in the application for certification. The Commission sought comment on these proposals.

2. Changes to Certified Equipment

21. Under the current rules, the grantee of an equipment authorization may market devices having different model/type numbers or trade names without additional authorization from the Commission, provided that the devices are ''electrically identical'' and the equipment bears an FCC ID validated by a grant of certification. The Commission identified the concept of electrically identical as not appropriate to modern radio designs, discussed how

strict application of this concept can result in outcomes that unnecessarily burden manufacturers and constrain design flexibilities, and proposed revisions to the rules.

22. Section 2.1043 categorizes three broad classes of permissive changes: Class I (changes are equipment modifications that do not degrade the characteristics associated with the initial grant of certification); Class II (changes that do degrade these performance characteristics); and Class III (modifications to devices originally specifically certified as SDRs). The NPRM noted that the proposal to eliminate an SDR-specific certification would eliminate the need to maintain the Class III category. For Class II changes (as well as Class III), the grantee can file an abbreviated application for certification under the same FCC ID. A change that falls outside the permissive change definitions requires a new FCC ID issued in conjunction with a new grant of certification based on a complete certification application.

23. The current rules require a grantee to obtain a new approval with a different FCC ID and label its equipment accordingly when minor electrical component changes are made that have no effect on the overall functionality or compliance of the device. Because modern equipment is often designed using chips with a high level of integrated functions and with the capability to use software to control and/or add functions that modify the RF parameters reported at the time of certification, a device may add a completely new set of RF operating parameters from the already approved device and still be ''electrically identical'' under the rules and, thus, can be authorized under one FCC ID. The NPRM proposed to replace the ''electrically identical'' benchmark with a new standard that considers how the device differs from what was evaluated at the time of equipment certification and whether those differences could affect how the modified device complies with our rules. The Commission sought comment on two proposed broad categories of changes—those that do not require a new FCC ID and those that do. Under this regime, a manufacturer or other responsible party would evaluate the scope of changes and potentially test its modified device to determine the applicable change category.

24. The Commission proposed that certain changes in layout, included components, operating software, or variations in overall electrical or mechanical constructions that do not substantially change the overall function of the device do not require a new FCC ID. Within this category, the Commission proposed to retain a distinction between changes that may be made without an additional filing and those changes that require an application for certification. The Commission proposed to continue to permit Class I permissive changes for those changes that do not degrade the device parameters normally reported in an equipment authorization application (including a decrease in the fundamental emissions that does not increase spurious emissions; an improved spurious emission performance; minor variations in the enclosure or components; and software changes that do not affect RF parameters). The Commission emphasized that such changes could not cause the fundamental emissions to increase, the spurious emissions to deteriorate, RF exposure to increase or HAC ratings to change. Based on the negligible risk that these types of minor changes would make the device noncompliant with the rules, the Commission proposed that the manufacturer or responsible party perform the modifications without notifying the Commission or a TCB. The Commission also asked if there were other circumstances that may be covered by the proposed Class I permissive change procedures.

25. The Commission also proposed to modify its rules for Class II permissive changes that maintain the same FCC ID, but are, nonetheless, subject to filing and approval requirements. It proposed to permit changes that would increase the fundamental emissions or degrade spurious emissions or other parameters reported to the Commission from what was evaluated at the time of certification, as long as rules compliance is maintained and the overall layout, major frequency determining components and circuitry, or function of the device have not changed. Under this proposal, any modification to component layout must have the same device circuit design as that approved initially, and the replaced components for RF determining functions must have similar capabilities. The Commission envisioned that parties would make these types of changes to enable new capabilities such as new frequency bands or transmission formats mostly through software changes. Application of this standard would allow for component changes, including depopulating certain components like power amplifiers from the RF section of a device, without requiring a new FCC ID.

26. When the grantee adds such capabilities through software changes it would be required to demonstrate the device controls that would prevent unauthorized software modifications by filing an application for certification, as a permissive change, under the same FCC ID. Such applications would need to clearly identify the changes made to the device and any revisions of the operational description associated with such changes, and demonstrate the modified device's compliance with the rules. If the grantee of a certified modular transmitter wants to use the transmitter in a manner for which it has not been approved, the grantee would have to also obtain a new grant of certification under the same FCC ID by filing an application with data that demonstrates compliance with all pertinent technical standards. The Commission also asked whether there other circumstances where changes would be allowed under the same FCC ID with the grant of a new certification.

27. The NPRM proposed to permit a group of devices that are essentially similar, based upon the overall design of the devices, their functions, components and layout, to be authorized as a ''family of products'' under the same FCC ID without having to obtain distinct approval from a TCB for each device. The Commission proposed to permit a manufacturer to determine what constitutes a family of products. It asked about appropriate review and oversight mechanisms, and proposed that a manufacturer include in its initial filing or updated filing specific information about the variations in the products within a family, and identify any variations due to removal of some components. It asked whether it should also require the manufacturer to specify different model numbers for each variation of the product.

28. The Commission concluded that certain device modifications (such as major changes in the design, layout or replacement of the components) would be substantial enough to require a new FCC ID that has been validated by a new grant of certification. The Commission proposed to revise § 2.1043 and remove the ''electrically identical'' definition from § 2.924 of the rules, and to add rules that address the modular transmitters, software-defined radio, and device change matters discussed. The Commission sought comment on these proposals.

3. Responsible Parties for Certified Equipment

29. The grantee of certification is responsible for the compliance of the certified equipment. When another party modifies a device through either hardware or software changes without

the authority of the original grantee, or incorporates a certified device into another host device, that party becomes responsible for the modified device's compliance and must obtain a new FCC ID for its product. When a party other than the grantee of certification modifies a device under the authority of the original grantee, the party must obtain a new certification under either the original FCC ID with the original grantee's approval, or with a new FCC ID. The NPRM proposed to clarify the parties responsible for ensuring the compliance of devices in different scenarios, and to make sure that all devices requiring authorization have been properly tested for compliance and have a clearly-identified responsible party.

a. End Products Incorporating Certified Modular Transmitters

30. Modular transmitters are certified as compliant with the Commission's rules based upon specific data about the intended device configuration and use that are provided by the grantee in its certification application. Limitations on the grant may be required to ensure that a particular host device, modular transmitter, or combination of modular transmitters used in an end product complies with the rules. Complications can arise when a certified modular transmitter has not been certified for use with a specific host device or it is being used in a manner that was not evaluated at the time it was certified. The Commission proposed to continue to apply the general principle that a party that creates an end product is responsible for the compliance of the end product it creates, and to establish rules for two general scenarios involving end products that incorporate certified modular transmitters.

31. The NPRM outlined the following proposal for when the installation of a certified modular transmitter installed would not require a certification application: The Commission proposed to codify existing guidance, under which the party installing a certified modular transmitter (or multiple certified transmitters) into a device must follow all instructions provided by the manufacturer(s) concerning the installation of the modular transmitter(s), the type and layout of the transmit antenna(s), and any other steps that must be taken to ensure the compliance of the end product. A party using a certified modular transmitter in the authorized configuration, must first confirm that the host device was manufactured in compliance with its own equipment authorization and it must also ensure that the end product is of a type that has been tested for use under the modular transmitter's certification(s). If the host device already contains transmitters which may not have been certified separately, or the party is installing multiple certified modular transmitters, then each transmitter must have been certified for use in such a combination and the modular transmitters may only be installed in an approved configuration. If a certified modular transmitter is installed in a host and if the modular transmitter is installed in compliance with all of the conditions tested and established as part of certified modular transmitter's grant of certification, then a new certification would not be required for the resulting end product. The Commission further proposed to clarify that the installer is responsible for ensuring that the host device complies with the rules and was properly authorized prior to the installation of the modular transmitter. It also asked whether there are other conditions which should not require a new grant of certification.

32. The NPRM outlined the following proposal for governing the installation of a certified modular transmitter that would require additional certification application(s): Consistent with the Commission's current guidance, when the certified modular transmitter or the combination of certified modular transmitters would result in a configuration that is not consistent with any of the modular transmitters' certifications; or host device-specific tests are required, the installer would have to ensure that the end product is tested to demonstrate compliance with all applicable technical requirements. Such tests must be conducted with the installed configuration of certified modular transmitters including any host-based non-certified modular transmitters and the grant of certification of certified modular transmitter (or the host, when applicable) must be updated accordingly.

33. The Commission proposed to codify two filing options to ensure that an end product is properly authorized in compliance with its rules. First, the installer could apply for a grant of certification for the complete end product (*i.e.* the host device and the certified transmitter(s)). Under this scenario, if the installing party has obtained the consent of the original certified modular transmitter grantee(s), then its application could reference the test data associated with the modular transmitter(s)' current certification, and provide supplemental test data as necessary. The original grantee of certification would continue to be responsible for compliance of its certified modular transmitter(s) and the end product manufacturer would be responsible for compliance of the additional capabilities of the certified modular transmitter(s) approved under the new FCC ID and for the end product.

34. Under the second scenario, the grantee(s) of the certified modular transmitter(s) could modify the original grant(s) of certification to allow for such an integration into a host device under the original FCC ID(s). In this case, the original grantee of the certified modular transmitter would submit a new certification application with any supplemental data necessary to demonstrate that the previously certified modular transmitter or that certain combinations of modular transmitters would comply with the rules when appropriately installed in the specific host device. Depending on the nature and scope of the modifications, the original grantee would either retain the existing FCC ID for the certified modular transmitter and submit a new certification application pursuant to § 2.1043, or it would submit a new certification application pursuant to § 2.1033 and receive a new FCC ID.

35. This NPRM also seeks comment on how to address certified modular transmitters that are sold directly to consumers to be integrated into host devices or independently combined. The NPRM noted that application of the proposed rules would make the consumer, acting as the integrator, the responsible party for these end products, and identified practical difficulties with such an approach. It proposed to designate the certified modular transmitter grantee or the host provider as responsible for the end products that are intended for assembly by consumers, and asked whether it should place limits or conditions on grants of certification when equipment may be directly sold to consumers for assembly or integration. The Commission suggested that such conditions could require detailed instructions to the end user for proper installation and use of the device, as well as the inclusion of certain electrical or mechanical locks to limit authorized operation. It asked if there were other conditions that would help ensure compliant operation in such cases.

36. The NPRM addressed a specific scenario that may occur when a modular transmitter's authorized parameters may be modified via hardware or software changes, resulting in the filing of a permissive change application for certification for the modular transmitter. Under the

Commission's proposal, when certifications have already been granted for end products that reference the original modular transmitter certification, then the existing certification for the end product would remain valid without further action. It sought comment on ways both manufacturers of certified end products and the FCC can better distinguish among the different versions of certified modular transmitters that may be incorporated into their products from that point forward, and asked if anything, short of requiring a permissive change application for certification of the end product, should be done to track whether authorized version(s) of certified modular transmitters have been incorporated in end products. The Commission also asked how it could ensure that the manufacturer of the end product is using the version of the certified modular transmitter which was approved with the original filing and whether it should continue to rely on the manufacturers of end products to make sure that their products continue to comply if there are variations in the certified modular transmitters.

37. The Commission recognized that adoption of its proposals could require parties to perform additional compliance testing on the end product with one or a combination of modular transmitters installed. However, it tentatively concluded that such costs would be outweighed by the benefits of more clearly defining responsibilities prior to certification and marketing products, which, in turn would better ensure compliance with the Commission's rules. The Commission also sought comment on whether the proposal represented the least burdensome and most efficient way to meet these goals.

b. Modification of Certified Equipment by Third Parties

38. The Commission proposed to eliminate exceptions to the principle that certified devices could not be modified by third parties unless the third party receives its own certification. It proposed to revise § 2.909(d), which allows a new party that performs device modifications without the consent of the original grantee to become responsible for the compliance by labeling the device with a statement indicating it was modified, with the requirement that the party obtain a new grant of certification. It would have to specify a new FCC ID unless the consent of the original is obtained. The Commission asked whether the new procedure should also apply to parties that currently market devices with modified certification labels.

39. The Commission proposed, for certified device operating under all rule parts, to require that any party making changes without the authorization of the original grantee of certification must obtain a new grant of certification and a new FCC ID. This would codify a uniform application process for instances where parties other than the original grantee wish to make changes to certified devices, and would remove the current distinctions in § 2.1043(d) and (f) of the rules.

40. The Commission also proposed that an application from a third party that would result in a new FCC ID for a previously-approved device must include documentation substantiating that the original grantee has given permission for the new applicant to reference its original filing, and asked what documentation should be considered sufficient for this purpose. It proposed to require the submission of a new application without references to the original grant of certification when changes are made without the original grantee's approval.

41. The Commission also proposed to permit third-party RF-controlling software modifications to previously certified devices under the same procedures that currently apply to grantee modifications of SDRs. The Commission also proposed to incorporate the technical requirements currently specified in the current SDR rule (which was proposed to be deleted) into its broadly applicable application processing rule.

c. Repaired and Refurbished Devices

42. The Commission proposed to formally adopt its current practice whereby a third party that repairs or refurbishes certified equipment to the device's original specification does not need to submit an application for certification if the equipment continues to operate as specified in its current grant. If a party does not return the equipment to its original specification, it would be considered to be a modification to a certified device. Third parties that repair or refurbish certified equipment to the device's original specification without the grantee's permission would have to file an application for certification or take other action to ensure that the Commission could readily identify the third party and confirm that the repair would not constitute an impermissible modification. The Commission further proposed that activities routinely performed by users or personnel at retail stores, such as battery pack replacement and hard drive and memory installation, would not be considered modifications of the device's grant of certification. It asked whether there were other types of refurbishing services (such as repair of broken controls) that would make its proposed requirements unduly onerous.

d. Imported Equipment

43. The Commission's rules currently prohibit the importation of devices that require an authorization, and for which no specific authorization has been obtained. Under the current rules, the importer of a certified device is not the party responsible for compliance with its rules. The Commission proposed to require that all applications for certification include the contact information of a party located in the United States that is responsible for compliance, and asked whether there were other options (including rules amendments) that would provide it with jurisdiction over the party responsible for the compliance of the equipment. The Commission also addressed the entry into U.S. markets of non-compliant devices when a foreign-based entity markets and ships a device directly to a United States customer without an intervening importer. It asked if it should consider the company that ships a non-compliant device into the U.S. as an importer under FCC rules, and questioned whether it should treat the United States customer who orders a non-compliant device as an importer in violation of its rules. The Commission proposed to enforce its importation rules against both the seller and the buyer.

4. Information Included With Applications for Certification

44. The Commission proposed to streamline § 2.1033 of the rules by combining the duplicative information requirements listed in the two sections of the rule that list the information that must be included with applications for certification and reorganizing the information required only in specific rule parts or for specific types of operation into a more logical structure. The Commission also proposed to modify its requirements for submission of device's operational description to include information about software used to control RF parameters and security to ensure unauthorized modification. It proposed to allow a third party that makes changes to certified devices or files applications that rely on pre-existing certifications to reference portions of the original grant of certification that are consistent with the device as integrated in its end product. The Commission further proposed to

permit the new responsible parties to refer to test data submitted in the original grantee's filing, and sought comment on what additional portions of the original grant of certification the applicant would it be appropriate to incorporate by reference into the new application for certification. The Commission also asked if there are any portions of the application that the new responsible party always be required to submit, how to codify such requirements, and whether there are certain parts of the original application that the new responsible parties could refer to without the grantee's permission.

45. The Commission proposed to stop allowing filing of applications for certification or acceptance of requests to update documentation in their application file when such actions are not required, except as allowed under our permissive change rules. The Commission recognized that there may be interest in continuing to allow this practice. It asked questions about how it would codify rule to support such filings, including how to define the scope of permitted modifications and the role of TCBs and Commission oversight under such provisions.

5. Confidentiality of Certification Applications

46. A TCB is required to upload all the information associated with a certification application to the Commission's Equipment Authorization System (EAS). When an equipment certification is granted in EAS, all application material is generally made available on the FCC Web site. Commencement of marketing can only begin after the grant of equipment certification and associated materials have been published on our Web site. Some of this information may be held confidential, under the Commission's current rules and procedures as described in the NPRM. The Commission proposed to modify these rules and procedures.

47. Short-term confidentiality allows for the preparation for marketing of devices without disclosure of sensitive information to the public prior to actual sale, and is typically requested for information that will become discoverable once sales commence and the product and its related literature can be physically examined—*e.g.* external photos, internal photos, and user manuals. The Commission proposed to codify the short-term confidentiality procedure for the types of information described in the Commission's June 15, 2004 public notice, DA 04–1705, concerning short-term confidentiality requests. It would grant short-term confidentiality upon the applicant's request for 45 days or an earlier date if specified by the applicant, which may be extended with serial requests to a maximum of 180 days. The applicant would not need to provide a specific justification for its request. The Commission would immediately end the short-term confidentially period if the device is marketed to the public or otherwise publicized by the applicant or by an entity acting on the applicant's behalf prior to the expiration of this period. The Commission may nevertheless reveal the information at any time if a request for inspection is filed and granted under § 0.461 of the rules, our general provision that governs the release of information not routinely available for public inspection.

48. The Commission proposed to require an applicant to identify the specific exhibits associated with an application for certification for which short-term confidentiality is requested, and not to grant confidentiality for information such as test reports and test set-up information that demonstrates that the product complies with the Commission's technical rules. However, it asked whether there would be benefits in making all application exhibits automatically considered part of a short-term confidentiality request, and asked whether 45 days with extensions up to 180 days total is the proper length of time to allow short-term confidentiality. Furthermore, the Commission also proposed to codify its current policy that the applicant must give notice to the TCB issuing the grant of certification prior to the device being marketed to the public or otherwise publicized so that the short-term confidentiality period may be immediately terminated. The Commission asked whether, as an alternative proposal, short-term confidentiality should automatically be granted for some or all exhibits without being specifically requested by the applicant, and, if so, which application exhibits should be given short-term confidentiality.

49. Long-term confidentiality is intended to safeguard trade secrets, is intended for information that is not readily discoverable upon release of the device, and can last indefinitely. Long-term confidentiality is governed by §§ 0.457(d) and 0.459 of the rules, which provides for information to be held confidential by the Commission unless a request for inspection is filed and granted per § 0.461 of the rules, and requires a specific application seeking that material be given long-term confidential treatment. The Commission proposed to provide long-term confidentiality automatically (*i.e.* without specific justification), based on the fact that the vast majority of equipment authorization applications are accompanied by requests for long-term confidentiality for certain types of exhibits and that the requests are regularly granted, for the following types of exhibits: (1) Schematics, (2) block diagrams, (3) operational descriptions, and (4) parts list/tune-up information. It asked whether some of the exhibits should not be automatically be given long-term confidential treatment, and whether other exhibits beyond those listed be given long-term confidentiality. The Commission noted that its proposal is consistent with the process reform goal 5.42 in the FCC staff report in GN Docket 14–25.

50. Finally, the Commission stated that it believes that its proposals for short- and long-term confidentiality would comply with its obligations under the Freedom of Information Act (FOIA) and the Trade Secrets Act, and sought comment on that conclusion.

6. Timeframe for Requesting Review of Certification Grants

51. The Commission proposed to adopt rules to specify that the ''release date'' for the grant of a certification is the date that the grant is published on the Commission's Web site. It stated that it believes that the date that the grant is published on its Web site is the appropriate public notice date as it is the date that the grant of the certification becomes known to the public and is the effective date of the certification grant. While this release date should be the date that will appear on any electronic or hard copies of the grant, the Commission proposed to specify the date of publication on our Web site to avoid any confusion should a mistake or other circumstance occur in which the dates do not match.

52. The Commission stated that its proposals regarding confidentiality could affect the ability of parties to contest a certification grant, and asked whether the information that is always made immediately available provides notice to the public of the substance of a final Commission action that is adequate to determine whether and how to contest a grant. It asked whether, if it adopts the proposal to codify the current practice for granting short-term confidentiality, to require the applicant requesting confidentiality place a summary or a redacted version of the exhibits for which they are requesting short-term confidential treatment on our Web site at the time of the grant. The Commission also asked about issuance of a ''provisional'' certification grant for

a device which otherwise is deemed to meet all the certification requirements that could be used for legal importation and distribution through the supply chain of devices prior to sale. When the device is sold to the public, the final certification grant would be made public, and that would constitute the public notice date. It asked if a different consideration should hold for determining the start of the thirty-day period in which the Commission can set aside an action on its own motion. Lastly, the Commission proposed that it could specify that a provisional grant constitutes a ''grant'' for purposes of its importation rules. It sought comment on all of these proposals, as well as any other options it should consider.

B. Updating Procedures Applicable to Both Certification and Self-Approval

1. Labeling

53. The Commission proposed to amend its regulations to comply with the provisions of the Enhance Labeling, Accessing, and Branding of Electronic Licenses Act (E–LABEL Act), which requires it to make regulations (or take other appropriate action) ''to allow manufacturers of radiofrequency devices with display the option to use electronic labeling for the equipment in place of affixing physical labels to the equipment.'' In addition, the Commission proposed to amend its labeling regulations to address devices that are too small to be legibly labeled with an FCC ID. The NPRM discussed rules that impose different labeling requirements on radio devices, including § 2.925, § 15.19, and other rule sections that require warning labels or other information to be attached to particular types of devices. It also discussed how the Commission's rules and guidance already permit electronic labeling in certain circumstances, including per KDB Publication 784748.

54. Consistent with the E–LABEL Act, the Commission proposed to add a new rule to codify electronic labeling procedures. The rule would generally allow a radiofrequency device with an integrated electronic display to electronically display any labels required by our rules. This would include the FCC ID, as well as any warning statements or other information that our rules require to be placed on a physical label on the device. The rule would require that this electronic labeling information be secured in order to prevent modification by a third party. The NPRM discussed how the proposal is consistent with a 2012 petition for rulemaking filed by the Telecommunications Industry Association (TIA) asking the Commission to permit the use of electronic labels as a substitute for physical labels, and concluded that the proposed rules would effectively satisfy TIA's request and thus makes the rulemaking petition moot.

55. The Commission noted that the E–LABEL Act applies to devices that have ''the capability to digitally display required labeling and regulatory information,'' and proposed that if a device cannot display the labeling and regulatory information to the intended recipient in a manner that effects its purpose, it would not be considered to be capable of ''digitally displaying the required labeling and regulatory information'' as required by E–LABEL Act. The Commission proposed that the user be provided with prominent instructions on how to access the required labeling and regulatory information, in either the packaging material or another easily accessible format, at the time of purchase, and that these instructions be available on the product-related Web site, if one exists. The Commission also proposed that accessing the labeling and regulatory information not require any special codes or permissions. Furthermore, the Commission proposed that accessing the labeling and regulatory information should require no more than three steps. The Commission's proposal would not allow other forms of electronic labeling such as Radio Frequency Identification (RFID) tags or Quick Response (QR) codes to substitute for the on-screen information display, or otherwise permit displays that require the use of special accessories, supplemental software, or similar plug-ins. When the labeling information is electronically displayed, it must be clearly legible without the aid of magnification. The Commission also proposed to continue to require that devices that rely on a wireless or remote connection and have no display have a physical label, and stated that it believes this conclusion is consistent with the explicit terms of the E–LABEL Act which specifically refers to devices with an electronic display. It asked whether, alternatively, it should allow such devices to use an electronic label that is accessible via the connected smartphone, web interface, or other network connection, and if so, what additional requirements on how the labeling requirement is implemented would be needed. The Commission asked whether there are any additional requirements that it should include in the rule to make the labeling and regulatory information more accessible

56. To provide information prior to purchase, to avoid a hazard or when devices are imported, the Commission proposed that devices displaying labeling and regulatory information electronically must also place this information either on the product packaging or on a (removable) physical label placed on the device at the time of importation, marketing, and sales. The Commission tentatively concluded that its proposal would comply with the E–LABEL Act because devices with electronic displays are not usually capable of electronically providing this information in an effective manner when the devices are typically inside packaging and uncharged. The devices therefore do not have ''the capability to digitally display required labeling and regulatory information'' in the context for which the requirement exists. The Commission sought comment on this proposal.

57. The Commission stated that its proposed rules were not intended to change existing requirements to place warning statements or other information on device packaging or in user manuals or make information available at the point of sale, and tentatively concluded that such requirements are outside the scope of the E–LABEL Act. The Commission did not propose to require parties to display any information that is not already required by the rules as part of an electronic label, nor to eliminate the ability of manufacturers to continue to physically label devices if they wish to do so. It also sought comment on the costs and benefits of its proposals.

58. The NPRM discussed other labeling rules that ensure that important safety-of-life information or warnings about illegal use of equipment is made prominently available to users of equipment, such as those contained in §§ 15.121, 87.147, and 95.1402 of rules. The Commission asked whether provision of these types of warning statements using an electronic display would provide the information to the intended recipient in an ''effective'' manner when safety or illegal activity is at issue, or would the size and/or makeup of displays on these devices make visual communication of these warnings ineffective. It asked whether continuing to require physical labels for these warnings would be consistent with the E–LABEL Act and, if so, which physical labeling requirements the Commission should maintain.

59. The Commission also addressed how the FCC ID may be communicated for small devices. The Commission current rules requires that the FCC ID on the label of a certified device be large enough to be readily legible, but does not specify what the device

manufacturer should do if the device is too small to display a legible label. It proposed to codify the guidance in KDB Publication 784748, which states that the FCC ID may be placed in the device user manual if the device is too small for the FCC ID to be readable (smaller than 4–6 point font size).

60. The Commission proposed to eliminate the requirement for part 15 devices to be labeled with the FCC logo, and observed that doing so would make a pending request by the Information Technology Industry Council (ITI) moot. The Commission stated that it intends for its labeling rules to match the equipment authorization rules that it ultimately adopts, and invited commenters, in discussing other elements of its proposals, to identify the implications for device labeling and propose any further rule modifications that may be necessary.

61. The Commission proposed to move the existing rule concerning labeling of modular transmitters from part 15 to part 2 of its rules. It also sought comment on how its proposed modifications to the rules governing modular transmitters would affect our labeling requirements and on alternative approaches that would still accomplish the goal of providing sufficient identification of a certified modular transmitter. For example, the NPRM asked if a modified label should be allowed to be placed on the host device that reads ''contains FCC ID xxxyyy changed from FCC ID aaabbb.''

2. Measurement Procedures

62. The Commission proposed to modify § 2.947(a)(3) to specifically reference the advisory information available in its online KDB publications. The Commission noted that devices increasingly have to demonstrate compliance with service-specific procedures described in other parts of our rules, stated that it intends to consolidate references to measurement procedures into part 2, to the extent practicable, and asked if, until this consolidation can occur, it should further modify § 2.947 to state that other rule parts may specify additional measurement procedures.

63. The Commission made further proposals related to the measurement procedures for RF devices operating under the part 15 rules described in §§ 15.31, 15.32, 15.33, and 15.35; and the part 18 rules as described in § 18.311, with § 18.309. The Commission proposed to revise these sections in a manner that references procedures that will be published by OET as KDB Publications and to provide clarifying text. The Commission asked about further consolidating these rules to simply cross-reference § 2.947.

64. The Commission also sought comment on whether the measurement procedures specified in § 15.31(a)(3) and (4) (referencing ANSI C63.4–2014 and ANSI C63.10–2013) are sufficient to address compliance testing for devices subject to the part 15 requirements, such that it could remove specific measurement procedures in § 15.31–15.35. It proposed to modify § 15.35 to clarify the measurement detector functions and bandwidth requirements and to replace an old reference to CISPR Publication 16 in § 15.35 with an updated reference to the measurement instrumentation procedures in ANSI C63.4–2014. It proposed to eliminate the note associated with § 15.35(a) that affords specific treatment of certain pulse modulated devices and instead rely on the emission measuring instrumentation specifications in ANSI C63.4–2014. It proposed to introduce measurement procedures for the certification of composite systems in the part 2 rules that are similar to those contained in §§ 15.31(h) and 15.31(k), while retaining certain specific requirements in the part 15 rules. The Commission asked whether there are alternatives to its proposed rules for measurement procedures that would better promote clarity and accommodate future technological developments and sought comment on the relative costs and benefits its proposals and any alternatives.

65. The Commission noted the ongoing development of a new standard, ANSI C63.26, by ANSI–ASC C63, and asked whether references to the applicable measurement procedures in ANSI C63.26 could potentially replace measurement procedures in part 2 for RF power output, modulation characteristics, occupied bandwidth, spurious emissions at antenna terminals, field strength of spurious radiation, frequency stability, and frequency spectrum. It asked if references to part 2 (and, by extension, ANSI C63.26) could replace the specific measurement procedures and details that are presently contained in many of the individual service rules and whether the measurement procedures in part 2 would need to be changed in order to clarify these procedures. It asked parties to take the ANSI C63.26 standards development into account when drafting their comments and asked if there are any other actions that will help it reference the best and most up-to-date standards for making measurements on equipment used in the Commission's licensed radio services.

3. Rule Consolidation and Modification

66. The Commission proposed to delete § 2.1043(g) through (l) because these provisions address changes to previously approved broadcast equipment that are no longer necessary because such equipment is now subject to verification. It proposed to add a new paragraph to § 2.1043 advising that parties may modify previously-approved broadcast transmitters, provided the modified transmitter complies with our authorization procedures or is otherwise shown to comply with the part 73 rules. It proposed to state that a previously approved broadcast transmitter that was later modified must either be labeled with a statement indicating that it was modified after approval, or the original FCC ID number must be permanently covered or removed. The Commission proposed to retain these provisions in § 2.1043(e) (re-designated as § 2.1043(h)) because they provide a means for non-manufacturer amateur radio users to modify equipment that had previously been certified or type accepted, and sought comment on whether the rule should be amended for clarity or consistency between parts 2 and 97 of the rules.

67. The Commission proposed to delete § 2.813 of the rules, because there are no provisions in part 27 comparable to the former part 74 rules that this rule was written to govern. It also proposed to delete § 15.239(d) of the rules, which permits an educational institution to conduct experimentation in the 88–108 MHz band using a custom-built telemetry intentional radiator after submission of an operational description. It observed that the Commission's general experimental licensing rules provide an effective means for such experimentation.

C. Importation Rules

68. Subpart K of part 2 of the rules sets out the conditions under which RF devices that are capable of causing harmful interference to radio communications may be imported into the United States. The Commission identified several proposals to lessen or eliminate the filing burdens associated with the importation rules, as described.

1. Importation Declaration

69. The Commission proposed to eliminate §§ 2.1205 and 2.1203(b) to remove filing requirements that are now associated with FCC Form 740, and to discontinue that form. Section 2.1203 of the Commission's rules states that no RF device may be imported unless the importer or ultimate consignee (or their

designated customs broker) declares that the device meets the conditions of entry set forth in our importation rules subpart. Section 2.1205 provides two ways to make this declaration: An electronic FCC declaration submitted to CBP in addition to the electronic entry summary required by CBP; and FCC Form 740, attached to the CBP-required entry papers. The NPRM discussed how compliance with the importation rules is implicitly addressed by the information already required by CBP, and how the Commission believes that by modifying its importation rules and procedures in this manner it will be able to reduce substantial administrative burdens while retaining sufficient enforcement tools to ensure that parties continue to comply with the Commission's equipment authorization and importation requirements. It sought comment on these proposals, as well as on additional rule modifications that would support its goals.

70. The Commission asked commenters to consider its proposals in light of the potential use of provisional grants. It asked whether there are there additional steps, such as self-certification or required recordkeeping that would be necessary to ensure that parties continue to comply with the Commission's overall part 2 importation, and how such considerations would be affected if the Commission were to require the identification of a domestic responsible party.

2. Modification of Customs Bonded Warehouse Requirement

71. The Commission proposed to remove the explicit bonded warehouse requirement in § 2.1201(c). It discussed how the issuance of provisional grants of certification (as discussed above) could reduce or eliminate the need for using bonded warehouses and, if so, whether it would effectively meet manufacturers' importation and marketing needs. The Commission asked whether it should retain the option to use a bonded warehouse for any imported devices which are unauthorized and that have not received such provisional approval; and, if not, what it should do to ensure that unauthorized devices are not widely distributed.

3. Increasing the Number of Trade Show Devices

72. The Commission proposed to modify § 2.1204(a)(4) by increasing the number of devices that can be imported for demonstration purposes at a trade show from 200 to 400 for devices that are used in licensed services and from 10 to 400 for other products, thus applying a single limit to all types of devices for trade show demonstration purposes. It stated that it believes the current limit is insufficient to accommodate the needs of modern trade shows and conventions, and that the increased limit will reduce the administrative burden on both manufacturers and importers. It sought comment on the proposal, and the relative costs and benefits.

4. Excluded Devices

73. The Commission proposed to remove the list of battery-powered unintentional radiators that are exempt from complying with the importation conditions contained in § 2.1202(a), based on its belief that the examples are outdated and that such devices are now significantly more sophisticated and often contain circuitry that increases the risk of harmful interference.

5. Devices Imported for Personal Use

74. The Commission proposed to expand its exception on devices imported for personal use by modifying its existing personal use exception for up to three devices to encompass devices that use both licensed and unlicensed frequencies. It asked if there are targeted exceptions within the Commission's existing rules that should also be updated or removed. It asked whether the three-device limit is still appropriate, and if a different limit would provide adequate protection against harmful interference without unduly restricting individuals' personal use importation.

D. Updating and Modifying Rule Sections

75. The Commission proposed to comprehensively reorganize and simplify part 2, Subpart J of the rules as shown in the proposed rule section, and to make modifications to other related rule sections, to account for the proposals in the NPRM. It recognized that there are many additional references to the equipment authorization procedures throughout the Commission's rules, and proposed to make the necessary conforming revisions, such as updating specific rule section cross-references, modifying outdated terminology. The Commission listed in a separate appendix of the NPRM, these rule sections by number, and invited commenters to identify any additional rules that would require such revisions.

E. Transition Period

76. The Commission proposed to make any rule changes adopted as a result of the NPRM effective immediately upon their publication in the **Federal Register**, but to permit manufacturers to continue to self-approve products using the existing DoC or verification procedures for up to one year from the effective date of the rules if they so choose.

Incorporation by Reference

77. The OFR recently revised the regulations to require that agencies must discuss in the preamble of the rule ways that the materials the agency incorporates by reference are reasonably available to interested persons and how interested parties can obtain the materials. In addition, the preamble of the rule must summarize the material. 1 CFR 51.5(b). In accordance with OFR's requirements, the discussion in this section summarizes ANSI standards. Copies of the standards are also available for purchase from these organizations: The Institute of Electrical and Electronic Engineers (IEEE), 3916 Ranchero Drive, Ann Arbor, MI 48108, 1–800–699–9277, *http://www.techstreet.com/ieee;* and the American National Standards Institute (ANSI), 25 West 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, *http://webstore.ansi.org/ansidocstore.*

78. (1) ANSI C63.4–2014: ''American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz,'' ANSI approved June 13, 2014, Section 4 IBR proposed for § 15.35(a).

79. This standard, ANSI C63.4–2014, contains methods, instrumentation, and facilities for measurement of radiofrequency (RF) signals and noise emitted from electrical and electronic devices in the frequency range of 9 kHz to 40 GHz, as usable, for example, for compliance testing to U.S. (47 CFR part 15) and Industry Canada (ICES–003) regulatory requirements.

80. (2) ANSI C63.10–2013, ''American National Standard of Procedures for Compliance Testing of Unlicensed Wireless Devices,'' ANSI approved June 27, 2013, Section 5.7 IBR proposed for § 15.31(m) and Section 5.5 IBR proposed for § 15.33(a).

81. This standard, ANSI C63.10–2013, contains standard methods and instrumentation and test facilities requirements for measurement of radio frequency (RF) signals and noise emitted from unlicensed wireless devices (also called unlicensed transmitters, intentional radiators, and license-exempt transmitters) operating in the frequency range 9 kHz to 231 GHz.

Section 15.38 of the Commission's rules, 47 CFR 15.38, would likewise be updated to reflect these incorporations by reference.

Procedural Matters

F. Ex Parte Rules—Permit-But-Disclose

82. The proceeding this NPRM initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b). In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

G. Paperwork Reduction Act

83. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Initial Regulatory Flexibility Analysis

84. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* (*NPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in the item. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

A. Need for, and Objectives of, the Proposed Rules

85. The purpose of this Notice of Proposed Rulemaking (NPRM) is to update the rules that govern the evaluation and approval of radiofrequency (RF) devices. The Commission ensures compliance with its technical rules through the equipment authorization program for RF devices; the technical rules are the means by which the Commission carries out its responsibilities under section 302 of the Communications Act of 1934, as amended, which permits the Commission to make reasonable regulations governing the interference potential of devices that emit RF energy and can cause harmful interference to radio communications. By updating our rules, we can continue to ensure that hundreds of millions of radio transmitters, consumer products, and other electronic devices will continue to share the airwaves successfully. Our objective is to enable innovation and growth in the development and use of RF devices by providing a clear path for products to demonstrate compliance with the FCC rules so that they may be brought to the market expeditiously.

86. The NPRM addressed the types of authorization procedures used to approve equipment, the effect of changes to authorized equipment, and the responsibilities of parties for complying with our rules. It also addresses the importation of radio devices. The Commission last comprehensively reviewed its equipment authorization procedures more than fifteen years ago.[3] The changes in the way today's equipment is designed, manufactured, and marketed—as well as the sheer number of such devices that need to be authorized—warrant modifications to the rules that specify the equipment subject to our equipment authorization procedures and responsibilities of the various stakeholders. Our proposals complement the recent actions taken by the Commission to modify the equipment authorization rules that address the obligations of Telecommunication Certification Bodies (TCBs) that certify RF equipment and the laboratories that test equipment subject to the certification process.[4]

Legal Basis

87. The proposed action is taken pursuant to sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307(e), 332, and 622 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307(e), 332, and 622; and §§ 0.31(g), 0.31(i), and 0.31(j) of the Commission's rules, 47 CFR 0.31(g), 0.31(i), and 0.31(j).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

88. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[5] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. 603(a).

[3] *See Amendment of Parts 2, 15, 18 and Other Parts of the Commission's Rules to Simplify and Streamline the Equipment Authorization Process for Radio Frequency Equipment, ET Docket No. 97–94, Report and Order (Equipment Authorization Procedures Order*), 13 FCC Rcd 11415 (1998).

[4] *See Amendment of Parts 0, 1, 2, and 15 of the Commission's Rules regarding Authorization of Radiofrequency Equipment and Amendment of Part 68 regarding Approval of Terminal Equipment by Telecommunications Certification Bodies, Report and Order* (*TCB Order*), ET Docket No. 13–44, FCC 14–208, 29 FCC Rcd 16335 (2014). The *TCB Order* largely addressed the processes by which certification applications are to be evaluated.

[5] *See* 5 U.S.C. 603(b)(3).

jurisdiction.'' [6] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[7] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[8] The Commission has not developed a definition of small entities applicable to RF Equipment manufacturers. The most analogous definition of small entity is that which is contained in the rules applicable to manufacturers of ''Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.'' This NPRM addresses the repair of devices that are subject to the Commission's equipment authorization rules. For this, we also include small entities associated with an additional category, ''Communication Equipment Repair and Maintenance,'' in our analysis.

89. *Radio and Television and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [9] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 912 had less than 500 employees and 17 had more than 1000 employees.[10] Thus, under that size standard, the majority of firms can be considered small.

90. *Communication Equipment Repair and Maintenance.* This industry comprises establishments primarily engaged in repairing and maintaining communications without retailing new communication equipment, such as telephones, fax machines, communications transmission equipment, and two-way radios.[11] The SBA has developed a size standard for this industry which is that any firm whose annual receipts are $11 million or less is defined as a small business.[12] Census Bureau data for 2007 indicated that in this industry, 1,415 firms operated for the entire year. Of these firms, 1,273 operated with annual receipts of less than $10 million dollars. Based on this date, the Commission concludes that the majority of firms operating in this industry is small.[13]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

91. Currently, the Commission ensures that RF equipment complies with its technical requirements by specifying that devices must be authorized in accordance with one of three procedures specified in subpart J of part 2 of the rules—certification, Declaration of Conformity (DoC), and verification. The NPRM proposes to update the certification process and replace the DoC and verification processes with a single process.

92. Certification is typically applied to RF equipment employing new technology for which the testing methodology is relatively complex or not well defined, or that otherwise is considered to have the highest risk of interference.[14] TCBs approve equipment under the certification procedure based on review of an application that provides test reports and all of the other information specified in the Commission's rules. Certified devices are uniquely identified by an FCC Identifier (FCC ID), which must be included on the device label.[15] All certified equipment is listed in a Commission database that includes the application for certification, test report and other material.[16]

93. DoC and verification are self-approval procedures in which the responsible party is required to take specific actions to ensure that its equipment complies with our rules. DoC and verification procedures are permitted for certain types RF devices that operate under part 15 or part 18 of our rules. DoC requires the responsible party, in addition to taking the necessary steps to ensure that the equipment complies with the appropriate technical standards, to use a recognized accredited test laboratory when testing devices.[17] The responsible party also must include a compliance information statement with the product that identifies the product and a responsible party within the United States.[18] Under verification, the responsible party must also take the necessary steps to ensure that the equipment complies with the appropriate technical standards, but there are no requirements to use recognized test laboratories and supply a compliance information statement with the product.[19] Unlike certification, the DoC and verification procedures do not require submittal of an application to the FCC or a TCB, the explicit grant of approval, or submission of a test device (unless specifically requested by the Commission). Also, unlike certified devices, this equipment does not have an FCC ID, and is not listed in an FCC database.

94. The Commission notes that the current state of RF equipment production makes the existing distinctions between the two self-

[6] *See* 5 U.S.C. 601(6).

[7] *See* 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[8] 15 U.S.C. 632.

[9] The NAICS Code for this service 334220. *See* 13 CFR 121.201. *See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731SG2&-_lang=en.*

[10] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=4500&-ds_name=EC0731SG3&-_lang=en.*

[11] *http://wwww.census.gov/cgi-bin/sssd/naics/naicsrch.*

[12] 13 CFR 121.201, NAICS Code 811213.

[13] *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_81SSSZ4&prodType=table.*

[14] *See* 47 CFR 2.907.

[15] *See* 47 CFR 2.925 and 2.926. The FCC ID consists of two elements—a grantee code and an equipment product code.

[16] The Commission's Equipment Authorization System (EAS) can be accessed at *https://apps.fcc.gov/oetcf/eas/reports/GenericSearch.cfm.*

[17] *See* 47 CFR 2.906. The party responsible for compliance is defined in 47 CFR 2.909.

[18] *See* 47 CFR 2.1077, 15.19(a)(3), and 18.209(b). Only parts 15 and 18 equipment is currently covered by DoC. For example, part 15 devices subject to the DoC rules must be labeled with the following statement: ''This device complies with part 15 of the FCC Rules. Operation is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received, including interference that may cause undesired operation.'' *See also* 47 CFR 2.1075 and 2.946 (describing circumstances in which the responsible party must submit to the Commission records of the original design drawings and specifications, the procedures used for production inspection and testing, a report of RF emission measurements, the compliance information statement, and a sample of the device).

[19] *See* 47 CFR 2.909(b), 2.946, 2.953, 2.955, and 2.956.

approval processes less meaningful, and, thus, the NPRM proposes to combine elements of DoC and verification into a single self-approval process for equipment that has a strong record of compliance and for which there is minimal risk of causing harmful interference (tentatively identified as a ''Supplier's Declaration of Compliance'' or ''SDoC''). Our objective is to recognize our increased comfort with self-approval procedures by streamlining the procedures and eliminating those elements that serve to increase the costs of complying with our rules and that provide benefits that are of only marginal utility.

95. The Commission believes that our actions will minimize the compliance costs borne by small entities by, for example, eliminating the mandate to use accredited laboratories that is currently associated with the DoC rules, removing the requirement to display the FCC logo on the equipment identification label, and, potentially, allowing devices that are currently subject to certification to be authorized under the new SDoC procedures. The Commission recognizes that manufacturers of devices currently subject to verification may be subject to some minimal additional requirements under SDoC, most notably that the manufacturers include a written compliance statement with the literature furnished to the user that serves to identify the party responsible for the device's compliance with the Commission's regulations. The Commission nevertheless believes that, on the whole, the use the SDoC process will also make it easier for manufacturers to comply with recordkeeping and reporting requirements because we will for the first time adopt a single, streamlined self-approval process that is easy to understand, simple to apply, and that is better aligned with existing international processes. We anticipate minimal costs associated with modifying existing processes and procedures to comply with the proposed rule, and that any such costs will be quickly recouped by the savings realized under use of the new SDoC procedures.

96. The NPRM also proposes amendments to the certification rules that are intended to provide RF equipment manufacturers with a clear understanding of the application requirements and their compliance responsibilities for a variety of design scenarios. Among other things, we propose to permit certification of modular transmitters for licensed services, and to clearly specify the rules for integration of certified modular transmitters and for when the host devices may be subject to certification. We propose to clearly codify requirements related to an RF device's capabilities for software configuration and upgradeability in the application for certification. We further propose that an applicant for certification must specify which parties will be authorized to make software changes (*e.g.,* the grantee, wireless service provider, other authorized parties) and the software controls that are provided to prevent unauthorized parties from enabling different modes of operation. We do not anticipate that these changes will introduce new costs and, in many cases, will allow device manufacturers greater flexibility in how they comply with our rules and more certainty that their applications will not be returned or rejected.

97. We are also proposing to streamline certain application procedures which we believe will reduce the need to file new applications in many cases. In this regard, the NPRM includes proposals to revise and clarify the rules that govern equipment certification, including specifying when device changes necessitate a new FCC ID. Such actions will serve to reduce or eliminate existing compliance requirements for device manufacturers. Additionally, we are making proposals that address confidentiality, public notice of grants, the RF device importation rules, and the measurement procedures that are used to demonstrate device compliance. These proposals are designed to reduce overall compliance burdens by better aligning the production, importation and device marketing interests and practices of device manufacturers with our equipment authorization procedures and fundamental interest in ensuring that hundreds of millions of radio transmitters, consumer products, and other electronic devices continue to share the airwaves successfully.

98. Finally, recently adopted legislation (the E–LABEL Act) requires the Commission to, within nine months after the law's passing, ''promulgate regulations or take other appropriate action, as necessary, to allow manufacturers of radiofrequency devices with display the option to use electronic labeling for the equipment in place of affixing physical labels to the equipment.'' [20] We propose to amend our regulations to comply with the provisions of this legislation. In addition, we propose to amend our labeling regulations to address devices that are too small to be legibly labeled with an FCC ID.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

99. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.'' [21]

100. As discussed, the overall approach we have taken is to propose to clarify, consolidate, and simplify our equipment authorization of compliance and reporting requirements where possible. Such proposals include, but are not limited to, eliminating use of accredited labs under the SDoC procedure, streamlining importation requirements by, for example, eliminating the use of FCC Form 740, and providing for confidentiality in some cases without the need to file specific confidentiality requests. Given our interest in evaluating the interference potential of devices that emit RF energy and can cause harmful interference to radio communications, we believe that these steps should apply to all device manufacturers, including small entities. In crafting this regulatory relief, we have not identified any additional steps that we could take with respect to small entities that could not also be applied to all device manufacturers.

101. The NPRM also recognizes that there may be existing processes that we have proposed to streamline or eliminate that certain device manufacturers may still find beneficial. These include, for example, filing for certification of devices that may be approved under the SDoC procedures, and placing the FCC logo on devices that would no longer require such marking. Although one approach would be to retain any requirement that has been identified as having value, we have tentatively rejected that approach. Instead, we propose to allow but not

[20] Enhance Labeling, Accessing, and Branding of Electronic Licenses Act of 2014, Public Law 113–197 (Nov. 26, 2014).

[21] 5 U.S.C. 603(c)(1) through (c)(4).

require parties to engage in such practices if they find them useful. By doing so, we will not unnecessarily burden small entities that no longer wish to retain such practices.

102. As directed by the E–LABEL Act, we proposed to add a new section to our rules to codify electronic labeling procedures.[22] The new rule will generally allow a radiofrequency device with an integrated electronic display to electronically display any labels required by our rules. This will include the FCC ID required by our certification rules as well as any warning statements or other information that our rules require to be placed on a physical label on the device. The rule will require that this electronic labeling information is secured in order to prevent modification by a third-party. While the E–LABEL Act is not directed at small entities, we recognize that the use of electronic labeling can potentially decrease costs for all device manufacturers because it will provide a means by which manufacturers will no longer have to affix permanent labels to devices. We nevertheless recognize that small entities may not wish to incur the costs associated with changing their processes to produce electronic label displays. As such, we are not proposing to require parties to display any information as part of an electronic label not already required by our rules, nor are we proposing to eliminate the ability of manufacturers to continue to physically label devices if they wish to do so.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

103. None.

Ordering Clauses

104. Pursuant to sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307(e), 332, and 622 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307(e), 332, and 622, and §§ 0.31(g), 0.31(i), and 0.31(j) of the Commission's rules, 47 CFR 0.31(g), 0.31(i), 0.31(j), this Notice of Proposed Rulemaking IS ADOPTED.

105. The Petition for Rulemaking filed by the Telecommunications Industry Association (RM–11673) on August 6, 2012 is DISMISSED.

106. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

[22] See proposed amendment of 47 CFR 2.935 in proposed rules.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies), Reporting and recordkeeping requirements.

47 CFR Part 2

Communications equipment, Reporting and recordkeeping requirements.

47 CFR Part 15

Communications equipment, Incorporation by reference, Radio, Reporting and recordkeeping requirements.

47 CFR Part 18

Radio, Reporting and recordkeeping requirements, Scientific equipment.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer.

Proposed Rules

For the reasons set forth in the preamble, the Federal Communications Commission proposes to amend parts 0, 1, 2, 15 and 18 of title 47 of the Code of Federal Regulations as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Section 0.457 is amended by revising paragraph (d)(1)(ii) to read as follows:

§ 0.457 Records not routinely available for public inspection.

* * * * *

(d) * * *

(1) * * *

(ii) Applications for equipment authorizations and materials relating to such applications are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant.

(A) Following the effective date of the equipment authorization, material in the application and related materials (including technical specifications and test measurements) will be made available for public inspection by placement in the Commission's public database except as specified in paragraphs (d)(1)(ii)(B), (C), and (D) of this section.

(B) Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(C) Exhibits from an equipment authorization application that set forth schematics, block diagrams, operational descriptions, or parts lists/tune-up procedures will not be made available for public inspection except upon grant of a request under § 0.461.

(D) Upon requests by the applicant, the following exhibits from an equipment authorization application will not be made available for public inspection for a period of 45 days after the effective date of the equipment authorization except upon grant of a request under § 0.461 external photos, test setup photos, user's manual, and internal photos. The 45-day time period may be extended in 45-day increments up to a maximum of 180 days upon request. These exhibits will immediately be made available to the public if the device is marketed to the public or otherwise publicized by the applicant or by an entity acting on the applicant's behalf prior to the expiration of this period. The applicant must notify the Telecommunication Certification Body (TCB) issuing the equipment authorization prior to the device being marketed to the public or otherwise publicized.

* * * * *

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 3. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 4. Section 2.1(c) is amended by revising the definition of ''Software defined radio'' to read as follows:

§ 2.1 Terms and definitions.

* * * * *

Software defined radio. A radio that includes a transmitter in which the operating parameters of frequency range, modulation type or maximum output power (either radiated or conducted), or the circumstances under which the transmitter operates in accordance with Commission rules, can be altered by making a change in software without making any changes to hardware components that affect the radio frequency emissions.

* * * * *

§ 2.813 [Removed]

■ 5. Remove § 2.813.

■ 6. Section 2.901 is revised to read as follows:

§ 2.901 Basis and purpose.

(a) In order to carry out its responsibilities under the Communications Act and the various treaties and international regulations, and in order to promote efficient use of the radio spectrum, the Commission has developed technical standards for radio frequency equipment and parts or components thereof. The technical standards applicable to individual types of equipment are found in that part of the rules governing the service wherein the equipment is to be operated. In addition to the technical standards provided, the rules governing the service may require that such equipment be authorized under a Supplier's Declaration of Conformity or receive a grant of certification from a Telecommunication Certification Body.

(b) The following sections describe the procedure for a Supplier's Declaration of Conformity and the procedures to be followed in obtaining certification and the conditions attendant to such a grant.

§ 2.902 [Removed]

■ 7. Remove § 2.902.

■ 8. Section 2.906 is revised to read as follows:

§ 2.906 Supplier's Declaration of Conformity.

(a) Supplier's Declaration of Conformity is a procedure where the responsible party, as defined in § 2.909, makes measurements to insure that the equipment complies with the appropriate technical standards. Submittal to the Commission of a sample unit or representative data demonstrating compliance is not required unless specifically requested pursuant to § 2.945.

(b) Supplier's Declaration of Conformity attaches to all items subsequently marketed by the manufacturer, importer, or the responsible party which are identical, as defined in § 2.908, to the sample tested and found acceptable by the manufacturer.

(c) The responsible party may, if it desires, apply for Certification of a device subject to the Supplier's Declaration of Conformity. In such cases, the rules governing certification will apply to that device.

■ 9. Section 2.907 is revised to read as follows:

§ 2.907 Certification.

(a) Certification is an equipment authorization approved by the Commission, or issued by a Telecommunication Certification Body (TCB) and authorized under the authority of the Commission, that is based on representations and test data submitted by the applicant or parties authorized by the applicant.

(b) Certification attaches to all units subsequently marketed by the grantee which are identical, as defined in § 2.908, to the sample tested except for changes or other variations authorized by the Commission or a TCB pursuant to §§ 2.924 and 2.1043.

(c) Certification may be obtained for a device capable of independent operation, a device or a group of devices authorized under a single FCC Identifier, a modular device capable of operation only upon installation into another device, or an end product containing one or more devices that were previously certified.

■ 10. Section 2.909 is revised to read as follows:

§ 2.909 Responsible party.

(a) For radio frequency equipment subject to certification, the party responsible for the compliance of the equipment with the applicable standards is specified as follows:

(1) The party to whom that grant of certification is issued (*i.e.,* the grantee) is the responsible party.

(2) When a new grant of certification is based on an existing grant of certification, the party to whom the new grant of certification is issued is the responsible party for the equipment produced under new certification; the original grantee remains responsible for equipment produced under the original grant of certification.

(3) If the equipment is assembled from components that includes certified modular transmitter(s) authorized pursuant to § 2.1042, then the assembler is responsible for following the installation guidelines provided by the grantee of each modular transmitter and for obtaining additional approvals necessary for the overall compliance of the final end product, and the party who obtained the grant of certification for the modular transmitter(s) remains the responsible party for those transmitters. However, the assembler or integrator may become the new grantee for individual modular transmitters or the assembled product by submitting an application for certification pursuant to § 2.1033. The host device may also be subject to Supplier's Declaration of Conformity procedures as described in paragraph (b) of this section.

(4) Retailers, original equipment manufacturers or assemblers may enter into an agreement with the responsible party designated in paragraph (a)(1) or (2) of this section to assume the responsibilities to ensure compliance of equipment and become the new responsible party by applying for a grant of certification to request a new FCC Identifier.

(5) If the radio frequency equipment is modified by any party not working under the authority of the responsible party, the party performing the modifications, if located within the U.S., or the importer, if the equipment is imported subsequent to the modifications, becomes the new responsible party. The new responsible party must file for a new grant of certification pursuant to § 2.1033.

(b) For equipment subject to Supplier's Declaration of Conformity the party responsible for the compliance of the equipment with the applicable standards is set forth as follows:

(1) The manufacturer or, if the equipment is assembled from individual component parts and the resulting system is subject to authorization under a Supplier's Declaration of Conformity, the assembler. If the resulting system is subject to certification, the assembler becomes responsible party as required in paragraph (a) of this section.

(2) If the equipment, by itself, or a system assembled from individual parts and the resulting system is subject to the Supplier's Declaration of Conformity procedures and that equipment is imported, the importer.

(3) Retailers or original equipment manufacturers may enter into an agreement with the responsible party designated in paragraph (b)(1) or (2) of this section to assume the responsibilities to ensure compliance of equipment and become the new responsible party.

(4) The importer of equipment subject to Supplier's Declaration of Conformity procedures may, upon receiving a written statement from the manufacturer that the equipment complies with the appropriate technical standards, rely on the manufacturer or independent testing agency to verify compliance. The test records required by § 2.938 must be in the English language and made available to the Commission upon a reasonable request, in accordance with § 2.945(c). If the radio frequency equipment is modified by any party not working under the authority of the responsible party, the party performing the modifications, if located within the U.S., or the importer, if the equipment is imported subsequent to the modifications, becomes the new responsible party.

(c) If the end product or equipment is subject to both certification and Supplier's Declaration of Conformity, all

the requirements of paragraphs (a) and (b) of this section apply.

(d) A party that repairs or refurbishes certified equipment with the permission of the grantee is not required to obtain a new grant of certification if the equipment continues to conform to the specifications of its previously approved grant of certification. Repairs or refurbishment of equipment performed by a party not acting under the permission of the grantee are modifications that will make the repairing/refurbishing party responsible for the compliance of the equipment pursuant to paragraph (a)(5) of this section, and will require the party to obtain a new grant of certification for the equipment. Replacement or installation of parts that are commonly changed by users, retailers or refurbishers, such as battery packs, hard drives, memory or enclosures which do not impact device compliance and as permitted in § 2.1043(b)(1), would not be considered modifications to a device.

(e) In the case of transfer of control of equipment, as in the case of sale or merger of the responsible party, the new entity shall bear the responsibility of continued compliance of the equipment.

■ 11. Remove the undesignated center heading preceding § 2.911.

■ 12. Section 2.911 is amended by redesignating paragraphs (d)(3) and (4) as paragraphs (d)(4) and (5) and by adding paragraph (d)(3) to read as follows:

§ 2.911 Application requirements.

* * * * *

(d) * * *

(3) The applicant shall provide the contact information of a party located in the United States that is responsible for compliance.

* * * * *

■ 13. Section 2.924 is revised to read as follows:

§ 2.924 Use of a single FCC Identifier for equipment having multiple trade names, models or type numbers, or functional similarities.

(a) The responsible party may market devices having different model/type numbers or trade names without additional authorization, provided that such devices are identical and the equipment bears an FCC Identifier validated by a grant of certification. For the purposes of this section, a device will be considered to be identical if no changes are made to the authorized device, or if the changes were made to the device pursuant to § 2.1043.

(b) A family of products (a group of devices that are clearly similar, based upon the overall design of the devices, their functions, components and layout, may be viewed as being a single authorized device or a series of similar devices that have been subjected to minor modifications) may be marketed pursuant to one grant of certification under a single FCC Identifier. For a device to be certified as a family of products, the initial application for certification shall contain a declaration of the intent to include and/or to develop a family of products. Each variation of the product shall be evaluated for compliance and include appropriate data (*e.g.* radio frequency exposure or Hearing Aid Compatibility) as required by the Commission's rules for each model variation.

■ 14. Section 2.925 is revised to read as follows:

§ 2.925 Identification of equipment.

(a) Each equipment covered in an application for equipment authorization shall bear a label listing the following:

(1) FCC Identifier consisting of the two elements in the exact order specified in § 2.926. The FCC Identifier shall be preceded by the term FCC ID in capital letters on a single line.

(2) Any other statements or labeling requirements imposed by the rules governing the operation of the specific class of equipment, except that such statement(s) of compliance may appear on a separate label at the option of the applicant/grantee.

(3) The information required may be provided electronically pursuant to § 2.935

(4) Equipment subject only to registration will be identified pursuant to part 68 of this chapter.

(b) Any device subject to more than one equipment authorization procedure may be assigned a single FCC Identifier. However, a single FCC Identifier is required to be assigned to any device consisting of two or more sections assembled in a common enclosure, on a common chassis or circuit board, and with common frequency controlling circuits. Devices to which a single FCC Identifier has been assigned shall be identified pursuant to paragraph (a) of this section.

(1) Separate FCC Identifiers may be assigned to a device consisting of two or more sections assembled in a common enclosure, but constructed on separate sub-units or circuit boards with independent frequency controlling circuits. The FCC Identifier assigned to any transmitter section shall be preceded by the term *TX FCC ID,* the FCC Identifier assigned to any receiver section shall be preceded by the term *RX FCC ID* and the identifier assigned to any remaining section(s) shall be preceded by the term *FCC ID.*

(2) Where terminal equipment subject to part 68 of this chapter, and a radiofrequency device subject to equipment authorization requirements are assembled in a common enclosure, the device shall be labeled in accordance with the requirements published by the Administrative Council for Terminal Attachments and shall also display the FCC Identifier in the format specified in paragraph (a) of this section.

(3) For a transceiver, the receiver portion of which is subject to Supplier's Declaration of Conformity pursuant to § 15.101 of this chapter, and the transmitter portion is subject to certification, the FCC Identifier required for the transmitter portion shall be preceded by the term FCC ID.

(c) In order to validate the grant of certification, the label shall be permanently affixed to the equipment and shall be readily visible to the purchaser at the time of purchase unless the label is in electronic form pursuant to § 2.935.

(1) As used here, *permanently affixed* means that the required information is etched, engraved, stamped, indelibly printed, or otherwise permanently marked on a permanently attached part of the equipment enclosure. Alternatively, the required information may be permanently marked on a nameplate of metal, plastic, or other material fastened to the equipment enclosure by welding, riveting, etc., or with a permanent adhesive. Such a nameplate must be able to last the expected lifetime of the equipment in the environment in which the equipment will be operated and must not be readily detachable.

(2) As used here, *readily visible* means that the required information must be visible from the outside of the equipment enclosure. It is preferable that it be visible at all times during normal installation or use, but this is not a prerequisite for grant of equipment authorization.

(d) Modular transmitters certified pursuant to § 2.1042 must be equipped with either a permanently affixed label or must be capable of electronically displaying its FCC Identifier pursuant to § 2.935.

(1) If using a permanently affixed label, the modular transmitter must be labeled with its own FCC Identifier, and, if the FCC Identifier is not visible when the modular transmitter is installed inside another device, then the outside of the device into which the modular transmitter is installed must also display a label referring to the

enclosed modular transmitter. This exterior label can use wording such as the following: ''Contains certified modular transmitter *FCC ID: XYZMODEL1*'' or ''Contains *FCC ID: XYZMODEL1*.'' Any similar wording that expresses the same meaning may be used. The Grantee may either provide such a label, an example of which must be included in the application for equipment authorization, or, must provide adequate instructions along with the modular transmitter which explain this requirement. In the latter case, a copy of these instructions must be included in the application for equipment certification.

(2) If the modular transmitter uses an electronic display of the FCC Identifier, the information must be readily accessible and visible on the modular transmitter or on the device in which it is installed. If the modular transmitter is installed inside another device, then the outside of the device into which the modular transmitter is installed must display a label referring to the enclosed modular transmitter or provide the information electronically pursuant to § 2.935. This label can use wording such as the following: ''Contains certified modular transmitter(s) *FCC ID: XYZMODEL1*.'' Any similar wording that expresses the same meaning may be used. The user manual must include instructions on how to access the electronic display. A copy of these instructions must be included in the application for equipment authorization.

(3) If a party installing a certified modular transmitter obtains a new grant of certification for the modular transmitter, it can use an exterior label or provide the information electronically pursuant to § 2.935 using wording such as ''Contains certified modular transmitter *FCC ID:XYXMODEL1* changed to *FCC ID:ABCXXXX*''. Any similar wording that expresses the same meaning may be used.

(e) Where it is shown that a permanently affixed label is not desirable or is not feasible, an alternative method of positively identifying the equipment may be used if approved by the Commission. The proposed alternative method of identification and the justification for its use must be included with the application for equipment authorization.

Note to paragraph (e): As an example, it would be possible to show that an alternate method of identification would be necessary for a device intended to be implanted within the body of a test animal or person.

(f) The FCC Identifier including the term *FCC ID* shall be in a size of type large enough to be readily legible, consistent with the dimensions of the equipment and its label. However, the type size for the FCC Identifier is not required to be larger than eight-point. If a device is so small that it is impractical to label it with the FCC Identifier in a font that is four-point or larger, and the device does not have a display that can show electronic labeling, then the FCC Identifier shall be placed in the user manual and must also either be placed on the device packaging or on a removable label attached to the device.

■ 15. Remove the undesignated center heading preceding § 2.927.

■ 16. Section 2.927 is amended by revising paragraph (a) to read as follows:

§ 2.927 Limitations on grants.

(a) A grant of certification is valid only when the device is labeled in accordance with § 2.925 and remains effective until set aside, revoked or withdrawn, rescinded, surrendered, or a termination date is otherwise established by the Commission.

* * * * *

■ 17. Section 2.931 is revised to read as follows:

§ 2.931 Responsibilities.

(a) The responsible party warrants that each unit of equipment marketed under its grant of certification and bearing the identification specified in the grant will conform to the unit that was measured and that the data (design and rated operational characteristics) filed with the application for certification continues to be representative of the equipment being produced under such grant within the variation that can be expected due to quantity production and testing on a statistical basis.

(b) A party integrating and marketing end products by installing or assembling certified modular transmitters into a host device must follow all the instructions that are provided concerning the installation of the modular transmitter, the type and layout of the transmit antenna, and any other steps that must be taken to ensure the compliance of the end product. The installer must ensure that the host device is of a type that is permissible for use under the approved modular transmitter(s) certification. If the installer confirms that the requirements are met, then no further equipment authorization is required except for retention of records pursuant to § 2.938. If the installer cannot show that these requirements are met or end product specific compliance requirements are specified, then the integrator/installer must perform additional testing to demonstrate that the end product complies with all applicable technical requirements, including RF exposure and Hearing Aid Compatibility (HAC), as appropriate, with the installed combination of modular transmitters. When additional testing is required, the installer must obtain a new grant of certification for the end product pursuant to § 2.1033, or alternatively either the installer or the grantee of certification for the modular transmitter must file additional test data to supplement to the original modular transmitter's test data pursuant to § 2.1043(e) or file for an application for a new equipment certification for the modular transmitter pursuant to § 2.1033.

(c) A party marketing a certified modular transmitter(s) to be installed by the end user must demonstrate compliance with all Commission requirements under all the likely installation and use configurations an end-user may deploy pursuant to § 2.1042(b)(6). The evaluation must ensure that the final assembly will comply with all the applicable rules for such assembly.

(d) In determining compliance for devices subject to Supplier's Declaration of Conformity, the responsible party warrants that each unit of equipment marketed under the Supplier's Declaration of Conformity procedure will be identical to the unit tested and found acceptable with the standards and that the records maintained by the responsible party continue to reflect the equipment being produced under such Supplier's Declaration of Conformity within the variation that can be expected due to quantity production and testing on a statistical basis.

(e) For equipment subject to Supplier's Declaration of Conformity, the responsible party must reevaluate the equipment if any modification or change adversely affects the emanation characteristics of the modified equipment. The responsible party bears responsibility for continued compliance of subsequently produced equipment.

§ 2.932 [Removed]

■ 18. Remove § 2.932.

§ 2.933 [Removed]

■ 19. Remove § 2.933.

■ 20. Add § 2.935 to read as follows:

§ 2.935 Electronic labeling of radiofrequency devices.

Any radiofrequency device equipped with an integrated electronic display screen may display on the electronic

display the FCC Identifier, any warning statements, or other information that the Commission's rules would otherwise require to be shown on a physical label attached to the device.

(a) Devices displaying their FCC Identifier, warning statements, or other information electronically must make this information readily accessible on the electronic display. Users must be provided with prominent instructions on how to access the information in the operating instructions, inserts in packaging material, or other easily accessible format at the time of purchase. The access instructions must also be available on the product-related Web site, if such a Web site exists, and a copy of these instructions must be included in the application for equipment certification.

(b) Devices displaying their FCC Identifier, warning statements, or other information electronically must permit access to the information without requiring special codes, accessories or permissions and the access to this information must not require more than three steps in the menu.

(c) The electronically displayed FCC Identifier, warning statements, or other information must be displayed electronically in a manner that is clearly legible without the aid of magnification.

(d) The necessary label information must be programmed by the responsible party and must be secured in such a manner that third-parties cannot modify it.

(e) Devices displaying their FCC Identifier, warning statements, or other information electronically must also display this information on the product packaging or on a physical label placed on the product at the time of importation, marketing, and sales. If a physical label is used, it may be a removable label, or, for devices in protective bags, a label on the protective bag. Any removable label shall be of a type intended to survive normal shipping and handling and must only be removed by the customer after purchase.

■ 21. Section 2.938 is revised to read as follows:

§ 2.938 Retention of records.

(a) For equipment subject to the equipment authorization procedures in this part, the responsible party shall maintain the records listed as follows:

(1) A record of the original design drawings and specifications and all changes that have been made that may affect compliance with the standards and the requirements of § 2.931.

(2) A record of the procedures used for production inspection and testing to ensure conformance with the standards and the requirements of § 2.931.

(3) A record of the test results that demonstrate compliance with the appropriate regulations in this chapter.

(b) For equipment subject to Supplier's Declaration of Conformity procedures, the responsible party shall, in addition to the requirements in paragraph (a) of this section, maintain a record of the measurements made on an appropriate test site that demonstrates compliance with the applicable regulations in this chapter. The record shall:

(1) Indicate the actual date all testing was performed;

(2) State the name of the test laboratory, company, or individual performing the testing. The Commission may request additional information regarding the test site, the test equipment or the qualifications of the company or individual performing the tests;

(3) Contain a description of how the device was actually tested, identifying the measurement procedure and test equipment that was used;

(4) Contain a description of the equipment under test (EUT) and support equipment connected to, or installed within, the EUT;

(5) Identify the EUT and support equipment by trade name and model number and, if appropriate, by FCC Identifier and serial number;

(6) Indicate the types and lengths of connecting cables used and how they were arranged or moved during testing;

(7) Contain at least two drawings or photographs showing the test set-up for the highest line conducted emission and showing the test set-up for the highest radiated emission. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must clearly show the test configuration used;

(8) List all modifications, if any, made to the EUT by the testing company or individual to achieve compliance with the regulations in this chapter;

(9) Include all of the data required to show compliance with the appropriate regulations in this chapter;

(10) Contain, on the test report, the signature of the individual responsible for testing the product along with the name and signature of an official of the responsible party, as designated in § 2.909; and

(11) A copy of the compliance information, as described in § 2.1077, is required to be provided with the equipment.

(c) The provisions of paragraph (a) of this section shall also apply to a manufacturer of equipment produced under an agreement with the original responsible party. The retention of the records by the manufacturer under these circumstances shall satisfy the grantee's responsibility under paragraph (a) of this section.

(d) For equipment subject to more than one equipment authorization procedure, the responsible party must retain the records required under all applicable provisions of this section.

(e) For equipment subject to rules that include a transition period, the records must indicate the particular transition provisions that were in effect when the equipment was determined to be compliant.

(f) For equipment subject to certification, records shall be retained for a one year period after the marketing of the associated equipment has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the responsible party (or, under paragraph (c) of this section, the manufacturer) is officially notified that an investigation or any other administrative proceeding involving its equipment has been instituted. For all other records kept pursuant to this section, a two-year period shall apply.

(g) If radio frequency equipment is modified by any party other than the original responsible party, and that party is not working under the authorization of the original responsible party, the party performing the modifications is not required to obtain the original design drawings specified in paragraph (a)(1) of this section. However, the party performing the modifications must maintain records showing the changes made to the equipment along with the records required in paragraphs (a)(3) of this section. A new equipment authorization may also be required.

■ 21. Section 2.941 is amended by revising paragraph (a) to read as follows:

§ 2.941 Availability of information relating to grants.

(a) Grants of equipment authorization are available in the Commission's public database.

* * * * *

§ 2.944 [Removed]

■ 22. Remove § 2.944.

■ 23. Section 2.947 is amended by revising paragraph (a)(3) and adding paragraph (f) to read as follows:

§ 2.947 Measurement procedure.

(a) * * *

(3) Any measurement procedure acceptable to the Commission may be used to prepare data demonstrating

compliance with the requirements of this chapter. Advisory information regarding measurement procedures can be found in the Commission's Knowledge Database, which is available at *www.fcc.gov/labhelp/.*

* * * * *

(f) A composite system is a system that incorporates different devices contained either in a single enclosure or in separate enclosures connected by wire or cable. If the individual devices in a composite system are subject to different technical standards, each such device must comply with its specific standards. In no event may the measured emissions of the composite system exceed the highest level permitted for an individual component. Testing for compliance with the different standards shall be performed with all of the devices in the system functioning. If the composite system incorporates more than one antenna or other radiating source and these radiating sources are designed to emit at the same time, measurements of conducted and radiated emissions shall be performed with all radiating sources that are to be employed emitting.

■ 25. Remove the undesignated center heading preceding § 2.951.

§ 2.951 [Removed]

■ 26. Remove § 2.951.

§ 2.952 [Removed]

■ 27. Remove § 2.952.

§ 2.953 [Removed]

■ 28. Remove § 2.953.

§ 2.954 [Removed]

■ 29. Remove § 2.954.

§ 2.955 [Removed]

■ 30. Remove § 2.955.

■ 31. Section 2.1033 is revised to read as follows:

§ 2.1033 Application for grant of certification.

(a) An application for certification shall be filed electronically through the Commission's Equipment Authorization System (EAS) with all required information. Items that do not apply shall be so noted. Except as otherwise noted in this section, all applications for certification shall be accompanied by documentation containing the following information:

(1) The full name, mailing address, electronic mail address, and telephone number of the responsible party for certification.

(2) FCC Identifier and label information as required pursuant to § 2.925.

(i) For devices where the FCC Identifier label is presented electronically, the application must include instructions for accessing the information.

(ii) [Reserved]

(3) A copy of the installation and operating instructions. A draft copy of the instructions may be submitted if the actual document is not available. The actual document shall be furnished to the FCC when it becomes available and prior to marketing the end product. The user's manual or instruction manual for an intentional or unintentional radiator shall prominently caution the user that changes or modifications not expressly approved by the party responsible for compliance could void the user's authority to operate the equipment.

(i) If the application is for a modular transmitter, the installation instructions must clearly document the proper procedures for installing the modular transmitter as well as any limitations on the end product necessary to ensure compliance. If the conditions of use require any specific instructions to the end user, this information must also be included in the manual in a conspicuous location.

(ii) In cases where the manual is provided only in a form other than paper, such as on a computer disk or over the Internet, the information required by this section may be included in the manual in that alternative form, provided the user can reasonably be expected to have the capability to access information in that form.

(iii) The manual must include all the necessary advisories and information to be provided to the users as specified in the rules in this chapter.

(4) A brief description of the circuit functions, a functional block diagram of the RF circuitry of the device along with a statement describing how the device operates including software or firmware used to control such functions. This statement should contain a description of the ground system and antenna, if any, used with the device.

(i) For devices including modular transmitters which are software defined radios and use software to control the radio or other parameters subject to the Commission's rules, the description must include details of the equipment's capabilities for software modification and upgradeability, including all frequency bands, power levels, modulation types, or other modes of operation for which the device is designed to operate, whether or not the device will be initially marketed with all modes enabled. The description must state which parties will be authorized to make software changes (*e.g.,* the grantee, wireless service providers, other authorized parties) and the software controls that are provided to prevent unauthorized parties from enabling different modes of operation. Manufacturers must describe the methods used in the device to secure the software in their application for equipment authorization and must include a high level operational description or flow diagram of the software that controls the radio frequency operating parameters. The applicant must provide an attestation that only permissible modes of operation may be selected by a user.

(ii) For modular transmitters that can be placed in a physical platform that will not itself be certified (*i.e.* a form factor), the description must include reference designs for the physical platform and a showing of how the modular transmitter will meet the requirements of such designs.

(5) A schematic diagram showing the frequency of all oscillators in the device. The signal path and frequency shall be indicated at each applicable location. The tuning range(s) and intermediate frequency(ies) shall be indicated.

(6) A report of measurements showing compliance with the pertinent FCC technical requirements. This report shall identify the test procedure used (*e.g.,* specify the FCC test procedure, or industry test procedure that was used), the date the measurements were made, the location where the measurements were made, and the device that was tested (model and serial number, if available). The report shall include sample calculations showing how the measurement results were converted for comparison with the technical requirements.

(i) For devices required to provide radiofrequency exposure evaluation pursuant to the requirements of this chapter, the report must identify the evaluation procedures and include all the necessary measurements or calculations necessary to demonstrate compliance. If the test reports are provided to show compliance of host products incorporating specific certified modular transmitters approved pursuant to § 2.1042, the information must include host-specific testing and appropriate guidance to ensure that the device will operate in a compliant manner.

(ii) For devices operating in licensed radio services the following must be provided:

(A) The data required by §§ 2.1046 through 2.1057, inclusive, measured in accordance with the procedures set out in § 2.1041.

(B) Type or types of emission.

(C) The dc voltages applied to and dc currents into the several elements of the final radio frequency amplifying device for normal operations over the power range.

(D) The tune up procedure over the power range or at specific operating power levels.

(E) Range of operating power values or specific operating power levels, and description of any means provided for variation of operating power.

(7) Frequency or frequency range.

(8) Maximum power rating as defined in the applicable part(s) of this chapter.

(9) A sufficient number of photographs to clearly show the exterior appearance, the construction, the component placement on the chassis, and the chassis assembly. The exterior views shall show the overall appearance, the antenna(s) used with the device (if any), the controls available to the user, and the required identification label in sufficient detail so that the name and FCC Identifier can be read. In lieu of a photograph of the label, a sample label (or facsimile thereof) may be submitted together with a sketch showing where this label will be placed on the equipment.

(i) For devices where the FCC Identifier label is presented electronically, the application must include a screen shot or equivalent representation of the display containing the information and the steps required to access that display.

(ii) [Reserved]

(10) If the equipment is certified as a modular transmitter pursuant to § 2.1042 and can only be certified for a specific host or can be approved for limited types of use, a list of such limitations.

(11) If the equipment for which certification is being sought must be tested with peripheral, accessory devices or host devices connected or installed, a brief description of those peripherals or accessories. The peripheral or accessory devices shall be unmodified, commercially available equipment.

(12) At least one drawing or photograph showing the test set-up for each of the required types of tests applicable to the device for which certification is requested. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must clearly show the test configuration used.

(13) All applications must be accompanied by the anti-drug abuse certification required under § 1.2002 of this chapter.

(b) In addition to the information listed in paragraph (a) of this section, the following information must be submitted for specific categories of devices:

(1) For equipment subject to the provisions of part 15 of this chapter, the application shall indicate if the equipment is being authorized pursuant to the transition provisions in § 15.37 of this chapter.

(2) Applications for the certification of scanning receivers shall include a statement describing the methods used to comply with the design requirements of all parts of § 15.121 of this chapter. The application must specifically include a statement assessing the vulnerability of the equipment to possible modification and describing the design features that prevent the modification of the equipment by the user to receive transmissions from the Cellular Radiotelephone Service. The application must also demonstrate compliance with the signal rejection requirement of § 15.121 of this chapter, including details on the measurement procedures used to demonstrate compliance.

(3) Applications for certification of transmitters operating within the 59.0–64.0 GHz band under part 15 of this chapter shall also be accompanied by an exhibit demonstrating compliance with the provisions of § 15.255(g) of this chapter.

(4) For equipment employing digital modulation techniques, a detailed description of the modulation system to be used, including the response characteristics (frequency, phase and amplitude) of any filters provided, and a description of the modulating wavetrain, shall be submitted for the maximum rated conditions under which the equipment will be operated.

(5) The application for certification of an external radio frequency power amplifier under part 97 of this chapter need not be accompanied by the data required by paragraph (a)(6)(ii)(A) of this section. In lieu thereof, measurements shall be submitted to show compliance with the technical specifications in subpart C of part 97 of this chapter and such information as required by § 2.1060.

(6) An application for certification of an AM broadcast stereophonic exciter-generator intended for interfacing with existing certified, or formerly type accepted or notified transmitters must include measurements made on a complete stereophonic transmitter. The instruction book must include complete specifications and circuit requirements for interconnecting with existing transmitters. The instruction book must also provide a full description of the equipment and measurement procedures to monitor modulation and to verify that the combination of stereo exciter-generator and transmitter meet the emission limitations of § 73.44 of this chapter.

(7) Applications for certification required by § 25.129 of this chapter shall include any additional equipment test data and information required by that section.

(8) Applications for certification of equipment operating under part 20 of this chapter, that a manufacturer is seeking to certify as hearing aid compatible, as set forth in § 20.19 of this chapter, shall include a statement indicating compliance with the test requirements of § 20.19 of this chapter and indicating the appropriate M-rating and T-rating for the equipment. The manufacturer of the equipment shall be responsible for maintaining the test results.

(9) Applications for certification of equipment operating under part 27 of this chapter, that a manufacturer is seeking to certify for operation in the:

(i) 1755–1780 MHz, 2155–2180 MHz, or both bands shall include a statement indicating compliance with the pairing of 1710–1780 and 2110–2180 MHz specified in §§ 27.5(h) and 27.75 of this chapter.

(ii) 1695–1710 MHz, 1755–1780 MHz, or both bands shall include a statement indicating compliance with § 27.77 of this chapter.

(iii) 600 MHz band shall include a statement indicating compliance with § 27.75 of this chapter.

(10) Applications for certification of U–NII devices in the 5.15–5.35 GHz and the 5.47–5.85 GHz bands must include a high level operational description of the security procedures that control the radio frequency operating parameters and ensure that unauthorized modifications cannot be made.

(11) Applications for certification of equipment operating under part 90 of this chapter and capable of operating on the 700 MHz interoperability channels (See § 90.531(b)(1) of this chapter) shall include a Compliance Assessment Program Supplier's Declaration of Conformity and Summary Test Report or, alternatively, shall include a document detailing how the applicant determined that its equipment complies with § 90.548 of this chapter and that the equipment is interoperable across vendors.

(c) A single application for certification may be filed to authorize an end product that incorporates devices subject to certification under multiple rule parts or under multiple sections

within a rule part. The application must include all the information required in this section for each applicable rule parts or sections within a rule part. The end product must be labeled with a single FCC Identifier if a single application is filed. Separate applications must be filed if different FCC Identifiers will be used for each device in the end product.

(d) A single application for certification may be filed to authorize a family of products, as described in § 2.929(b), under a single FCC Identifier. The devices must be clearly similar, based upon their overall design of the devices, their functions, components and layout. The applicant for certification must provide a clear description of the devices that would be included in the family of products and the differences between them.

(e) A grant of certification must be modified by a new application whenever there is a change in the design, circuitry, construction or other characteristics of a device reported at the time of previous certification (including the original application and any subsequent updates as permitted by the provisions of § 2.1043). The application must include:

(1) A description of the changes;

(2) Documentation pursuant to paragraph (a) or (h) of this section to update any of the originally submitted information that was affected by the modification of the device; and

(3) If the application includes a request to change the FCC Identifier, an applicant that is not the original grantee must provide documentation that the original grantee has given the new applicant permission to reference the original filing, if applicable.

(f) A grant of certification must be modified by a new application whenever there is a change in the FCC Identifier without changes in design, circuitry or construction of the certified device(s). The application is not required to include the measurement or test data specified in paragraph (a) of this section, although such data may be later requested by the TCB or the Commission. The following information shall be filed with such application:

(1) An application that is not from the original grantee must provide with its application documentation confirming the grantee's consent to reference the original filing.

(2) The original identification used on the equipment prior to the change in identification.

(3) The date of the original grant of the equipment authorization.

(4) How the equipment bearing the modified identification differs from the original equipment.

(5) Whether the original test results continue to be representative of and applicable to the equipment bearing the changed identification.

(6) The photographs required by paragraph (a)(9) of this section showing the exterior appearance of the equipment, including the operating controls available to the user and the identification label. Photographs of the construction, the component placement on the chassis, and the chassis assembly are not required to be submitted unless specifically requested by the Commission.

(g) A grant of certification must be modified by a new application whenever an assembler or integrator incorporates one or more certified modular transmitters into a new host device where additional testing and a new FCC Identifier is requested. In such cases, the requirements of paragraph (e) of this section apply.

(h) For certified modular transmitters that are incorporated in additional devices authorized under new FCC Identifier(s), the following applies: If the original grantee of certification receives approval for a change pursuant to § 2.1043(c) subsequent to the grant of an application for a new FCC Identifier, and the change will be incorporated into the equipment bearing the new FCC Identifier, then the grantee that received approval for a new FCC Identifier must also file for change in its equipment pursuant to § 2.1043(c).

■ 32. Add § 2.1042 to read as follows:

§ 2.1042 Certified modular transmitters.

(a) A certified modular transmitter consists of a radiofrequency transmitter device that is incorporated or attached to another product, host, or a device for data and power and that satisfies the requirements to obtain a modular transmitter certification. A certified modular transmitter may also consist of a single chip package, provided it is authorized in accordance with all the requirements of this subpart.

(b) Modular transmitters must meet the following requirements to obtain a modular transmitter certification:

(1) The radio elements of the modular transmitter must have their own shielding. The physical crystal and tuning capacitors may be located external to the shielded radio elements.

(2) The modular transmitter must have buffered modulation/data inputs (if such inputs are provided) to ensure that it will comply with the requirements of the rules under conditions of excessive data rates or over-modulation.

(3) The modular transmitter must have its own power supply regulation.

(4) The modular transmitter must be tested in a stand-alone configuration, *i.e.,* it must not be inside another device during testing for compliance with the rules.

(5) The modular transmitter must comply with any specific rules or operating requirements that ordinarily apply to a complete transmitter and the manufacturer must provide adequate instructions along with the modular transmitter to explain any such requirements. A copy of these instructions must be included in the application for equipment authorization.

(6) If a modular transmitter is to be installed by the end-user, compliance with all Commission requirements must be demonstrated by the responsible party under all the likely installation and use configurations an end-user may deploy. Any RF exposure evaluation must include various likely user configurations, including those expected to create the greatest RF exposure.

(7) A modular transmitter operating under part 15 of this chapter must comply with the antenna and transmission system requirements of §§ 15.203, 15.204(b) and 15.204(c) of this chapter. The antenna must either be permanently attached or employ a ''unique'' antenna coupler (at all connections between the modular transmitter and the antenna, including the cable). An antenna can be a trace on circuit board when all the characteristics are properly defined. The ''professional installation'' provision of § 15.203 of this chapter is not applicable to modular transmitters but can apply to limited modular approvals under paragraph (b) of this section.

(8) A modular transmitter operating under part 15 of this chapter must comply with the AC line conducted requirements found in § 15.207 of this chapter unless it is battery powered. AC or DC power lines and data input/output lines connected to the module must not contain ferrites, unless they will be marketed with the module (see § 15.27(a) of this chapter). The length of these lines shall be the length typical of actual use or, if that length is unknown, at least 10 centimeters to insure that there is no coupling between the case of the module and supporting equipment. Any accessories, peripherals, or support equipment connected to the module during testing shall be unmodified and commercially available (see § 15.31(i) of this chapter).

(c) A limited certification may be granted for a modular transmitter that does not comply with all of the requirements listed in paragraph (b) of this section, *e.g.,* shielding/enclosures, minimum signaling amplitude, buffered modulation/data inputs, or power supply regulation, if the manufacturer can demonstrate by alternative means in the application for equipment certification that the modular transmitter meets all the applicable requirements under the operating conditions in which the transmitter will be used. A limited certification may also be granted in those instances where compliance with RF exposure rules is demonstrated only for limited applications or specific product configurations and installation or user requirements. The applicant for certification must state how control of the end product into which the modular transmitter will be installed will be maintained such that full compliance of the end product is always ensured. Applications for certification for either a new device or changes to an existing device must be filed pursuant to § 2.1033 or 2.1043 if there are changes in the applicable conditions or limitations.

(d) Multiple certified modular transmitters when integrated into an end product and the end product itself must comply with all Commission requirements, including RF exposure requirements pursuant to §§ 1.1307 of this chapter, 2.1091, and 2.1093. The end product manufacturer must perform additional compliance testing with all certified modular transmitters installed and operating in anticipated configurations to ensure the end product's compliance. The party integrating the modular transmitters into an end product will be responsible for the compliance of the end product pursuant to § 2.909(a).

(e) Manufacturers of any radio including certified modular transmitters which includes a software defined radio must take steps to ensure that only software that has been approved with a particular radio can be loaded into that radio. The software must not allow the installers or end-user to operate the transmitter with operating frequencies, output power, modulation types or other radio frequency parameters outside those that were approved. Manufacturers may use means including, but not limited to the use of a private network that allows only authenticated users to download software, electronic signatures in software or coding in hardware that is decoded by software to verify that new software can be legally loaded into a device to meet these requirements.

■ 33. Section 2.1043 is revised to read as follows:

§ 2.1043 Changes in certified equipment.

(a) Changes may be made to certified equipment in accordance with the provisions of this section.

(b) *New FCC Identifier Not Required.* Two classes of permissive changes are permitted; in both cases, the responsible party must continue to use the original FCC Identifier when it makes changes.

(1) *Class I permissive changes.* A grantee may make minor variations in a device's enclosure or component layout without obtaining an updated grant of certification from a TCB as long as the grantee ensures that the device continues to comply with all applicable rules. A grantee of certification does not need to obtain an updated grant of certification from a TCB for changes to a certified device that do not cause the fundamental emissions to increase, the spurious emissions to deteriorate (*i.e.* increase in amplitude), RF exposure to increase, changes any other characteristics to be reported to the Commission or that do not add new capabilities such as new frequency bands or transmission formats.

(2) *Class II permissive changes.* A grantee of certification must submit an application to obtain an updated grant of certification from a TCB for changes that increase the fundamental emissions (*e.g.,* the power level or radiated field strength), cause the spurious emissions to deteriorate (*i.e.,* increase in amplitude), affect a device's compliance with the RF exposure, change the hearing aid compatibility (HAC) ratings or change any characteristics to be reported to the Commission. A grantee must obtain an updated grant of certification for the addition of new device capabilities through software changes, such as the addition of new frequency bands or transmission formats, and must demonstrate the controls it will use to prevent unauthorized software modifications. All requests for changes pursuant to this paragraph (a) must be accompanied by the anti-drug abuse certification required under § 1.2002 of this chapter.

(c) *New FCC Identifier Required.* An application for grant of certification with a new FCC Identifier must be submitted when significant changes in the design, layout or functionality of a previously certified device are made. In addition, a party requesting a new FCC Identifier for a previously certified device or that modifies and becomes the responsible party for a previously certified device must submit a new application for certification using a new FCC Identifier.

(d) Changes to certified equipment described in paragraph (b) of this section may be made by the original grantee of certification or a party acting under the authority of the grantee of certification. When a party other than the grantee of certification applies for a change pursuant to paragraph (b)(2) of this section, it must include documentation with its request confirming the grantee's consent.

(e) When a grantee applies for an updated grant of certification pursuant to paragraph (b)(2) of this section and TCB approves such application, the TCB issuing the update shall supply the Commission, through the EAS, a description of the changes, complete information showing changes from that originally submitted to the Commission, and the results of tests of the characteristics affected by such change. The modified equipment shall not be marketed under the existing grant of certification prior to acknowledgement by the Commission on the Commission's public database that the change is acceptable.

(f) For modular devices that are incorporated in additional devices authorized as permissive changes under the original FCC Identifier(s), if the original grant of certification has prior permissive change approvals pursuant to paragraph (b)(2) of this section all configurations used and marketed must be tested.

(g) For assemblers or integrators incorporating one or multiple certified modular transmitters into a new host device, authorized under the original grant of certification where an additional certification filing is required, the requirements of § 2.1033(e) apply.

(h) Equipment that has been certified or formerly type accepted for use in the Amateur Radio Service pursuant to the requirements of part 97 of this chapter may be modified without regard to the conditions specified in paragraph (b)(1) of this section, provided the following conditions are met:

(1) Any person performing such modifications on equipment used under part 97 of this chapter must possess a valid amateur radio operator license of the class required for the use of the equipment being modified.

(2) Modifications made pursuant to this paragraph (h) are limited to equipment used at licensed amateur radio stations.

(3) Modifications specified or performed by equipment manufacturers or suppliers must be in accordance with

the requirements set forth in paragraph (b)(1) of this section.

(4) Modifications specified or performed by licensees in the Amateur Radio Service on equipment other than that at specific licensed amateur radio stations must be in accordance with the requirements set forth in paragraph (b)(1) of this section.

(5) The station licensee shall be responsible for ensuring that modified equipment used at his station will comply with the applicable technical standards in part 97 of this chapter.

(i) Transmitters that have been certified or formerly type accepted for use in the Broadcast services may be modified without regard to the conditions specified in paragraphs (b) and (c) of this section, provided that the modified equipment continues to comply with all other equipment authorization and part 73 of this chapter. If a previously approved broadcast transmitter is modified, it must either be labeled with a statement indicating that it was modified after approval or the original FCC Identifier must be permanently covered or removed.

■ 34. The undesignated heading preceding § 2.1071 is revised as follows:

Supplier's Declaration of Conformity

■ 35. Section 2.1071 is revised to read as follows:

§ 2.1071 Cross reference.

The general provisions of this subpart shall apply to equipment subject to a Supplier's Declaration of Conformity.

■ 36. Section 2.1072 is revised to read as follows:

§ 2.1072 Limitation on Supplier's Declaration of Conformity.

(a) The Supplier's Declaration of Conformity signifies that the responsible party, as defined in § 2.909, has determined that the equipment has been shown to comply with the applicable technical standards if no unauthorized change is made in the equipment and if the equipment is properly maintained and operated. Compliance with these standards shall not be construed to be a finding by the responsible party with respect to matters not encompassed by the Commission's rules.

(b) A Supplier's Declaration of Conformity by responsible party, as defined in § 2.909, is effective until a termination date is otherwise established by the Commission.

(c) No person shall, in any advertising matter, brochure, etc., use or make reference to a Supplier's Declaration of Conformity in a deceptive or misleading manner or convey the impression that such a Supplier's Declaration of Conformity reflects more than a determination by the manufacturer, importer, integrator, or responsible party, as defined in § 2.909, that the device or product has been shown to be capable of complying with the applicable technical standards of the Commission's rules.

§ 2.1073 [Removed]

■ 37. Remove § 2.1073.

■ 38. Section 2.1074 is revised to read as follows:

§ 2.1074 Identification.

Devices subject only to Supplier's Declaration of Conformity must be uniquely identified by the party responsible for marketing or importing the equipment within the United States. However, the identification shall not be of a format which could be confused with the FCC Identifier required on certified equipment. The responsible party must maintain adequate identification records to facilitate positive identification for each device.

§ 21075 [Removed]

■ 39. Remove § 2.1075.

■ 40. Section 2.1077 is revised to read as follows:

§ 2.1077 Compliance information.

(a) If a product must be tested and authorized under a Supplier's Declaration of Conformity, a compliance information statement shall be supplied with the product at the time of marketing or importation, containing the following information:

(1) Identification of the product, *e.g.,* name and model number;

(2) A compliance statement as applicable, *e.g.* for devices subject to part 15 of this chapter, as specified in § 15.19(a)(3) of this chapter, that the product complies with the rules; and

(3) The identification, by name, address and telephone number, of the responsible party, as defined in § 2.909. The responsible party for a Supplier's Declaration of Conformity must be located within the United States.

(b) If a product is assembled from modular components (*e.g.* enclosures, power supplies and CPU boards) that, by themselves, are authorized under a Supplier's Declaration of Conformity and/or a grant of certification, and the assembled product is also subject to authorization under a Supplier's Declaration of Conformity but, in accordance with the applicable regulations, does not require additional testing, the product shall be supplied, at the time of marketing or importation, with a compliance information statement containing the following information:

(1) Identification of the assembled product, *e.g.,* name and model number.

(2) Identification of the modular components used in the assembly. A modular component authorized under a Supplier's Declaration of Conformity shall be identified as specified in paragraph (a)(1) of this section. A modular component authorized under a grant of certification shall be identified by name and model number (if applicable) along with the FCC Identifier number.

(3) A statement that the product complies with part 15 of this chapter.

(4) The identification, by name, address and telephone number, of the responsible party who assembled the product from modular components, as defined in § 2.909. The responsible party for a Supplier's Declaration of Conformity must be located within the United States.

(5) Copies of the compliance information statements for each modular component used in the system that is authorized under a Supplier's Declaration of Conformity.

(c) The compliance information statement shall be included in the user's manual or as a separate sheet. In cases where the manual is provided only in a form other than paper, such as on a computer disk or over the Internet, the information required by this section may be included in the manual in that alternative form, provided the user can reasonably be expected to have the capability to access information in that form. The information may be provided electronically as permitted in § 2.935.

■ 41. Section 2.1201 is amended by revising paragraph (b) and removing paragraph (c) to read as follows:

§ 2.1201 Purpose.

* * * * *

(b) The rules in this subpart set out the conditions under which radio frequency devices as defined in § 2.801 that are capable of causing harmful interference to radio communications may be imported into the U.S.A.

■ 42. Section 2.1202 is revised to read as follows:

§ 2.1202 Exclusions.

The provisions of this section do not apply to the importation of:

(a) Unintentional radiators which are exempted from technical standards and other requirements as specified in § 15.103 of this chapter.

(b) Radio frequency devices manufactured and assembled in the U.S.A. that meet applicable FCC technical standards and which have not

been modified or received further assembly.

(c) Radio frequency devices previously properly imported that have been exported for repair and re-imported for use.

(d) Subassemblies, parts, or components of radio frequency devices unless they constitute an essentially completed device which requires only the addition of cabinets, knobs, speakers, or similar minor attachments before marketing or use. This exclusion does not apply to computer circuit boards that are actually peripheral devices as defined in § 15.3(r) of this chapter and all devices that, by themselves, are subject to FCC marketing rules.

■ 43. Section 2.1203 is revised to read as follows

§ 2.1203 General requirement for entry into the U.S.A.

(a) No radio frequency device may be imported into the Customs territory of the United States unless the importer or ultimate consignee, or their designated customs broker, determines that the device meets one of the conditions for entry set out in this section.

(b) Failure to satisfy at least one of the entry conditions for importation of radio frequency devices may result in refused entry, refused withdrawal for consumption, required redelivery to the Customs port, and other administrative, civil and criminal remedies provided by law.

(c) Whoever makes a determination pursuant to paragraph (a) of this section must provide, upon request made within one year of the date of entry, documentation on how an imported radio frequency device was determined to be in compliance with Commission requirements.

■ 44. Section 2.1204 is amended by revising paragraphs (a)(1), (a)(4)(i), and (a)(7) to read as follows:

§ 2.1204 Import conditions.

(a) * * *

(1) The radio frequency device is compliant and has either received a grant of certification or the responsible party has performed a Supplier's Declaration of Conformity. However, a radio frequency device that has been issued *a provisional grant of certification* may be imported prior to the issuance of a grant of certification provided that the importer maintains sufficient control over the device to ensure that it is not marketed as defined in § 2.803(a) prior to the receipt of the grant of certification.

* * * * *

(4) * * *

(i) 400 or fewer units, provided the product is designed solely for operation within one of the Commission's authorized radio services for which an operating license is required to be issued by the Commission; or

* * * * *

(7) Three or fewer devices are being imported for the individual's personal use and are not intended for sale.

* * * * *

§ 2.1205 [Removed]

■ 45. Remove § 2.1205.

PART 15—RADIO FREQUENCY DEVICES

■ 46. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 304, 307, 336, 544a, and 549.

■ 47. Section 15.1 is amended by revising paragraph (c) to read as follows:

§ 15.1 Scope of this part.

* * * * *

(c) Unless specifically exempted, the operation or marketing of an intentional or unintentional radiator that is not in compliance with the administrative and technical provisions in this part, including prior equipment authorization, as appropriate, is prohibited under section 302 of the Communications Act of 1934, as amended, and subpart I of part 2 of this chapter. The equipment authorization procedures are detailed in subpart J of part 2 of this chapter.

■ 48. Section 15.19 is amended by revising paragraph (a) and by removing and reserving paragraph (b) to read as follows:

§ 15.19 Labeling requirements.

(a) In addition to the requirements in part 2 of this chapter, a device subject to certification, or Supplier's Declaration of Conformity shall be labeled as follows:

(1) Receivers associated with the operation of a licensed radio service, *e.g.,* FM broadcast under part 73 of this chapter, land mobile operation under part 90 of this chapter, etc., shall bear the following statement in a conspicuous location on the device:

This device complies with part 15 of the FCC Rules. Operation is subject to the condition that this device does not cause harmful interference.

(2) A stand-alone cable input selector switch, shall bear the following statement in a conspicuous location on the device:

This device complies with part 15 of the FCC Rules for use with cable television service.

(3) All other devices shall bear the following statement in a conspicuous location on the device:

This device complies with part 15 of the FCC Rules. Operation is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received, including interference that may cause undesired operation.

(4) Where a device is constructed in two or more sections connected by wires and marketed together, the statement specified under paragraph (a) of this section is required to be affixed only to the main control unit.

(5) When the device is so small or for such use that it is impracticable to label it with the statement specified under paragraph (a) of this section in a font that is four-point or larger, and the device does not have a display that can show electronic labeling, then the information required by this paragraph (a) shall be placed in the user manual and must also either be placed on the device packaging or on a removable label attached to the device.

* * * * *

■ 49. Section 15.25 is amended by revising paragraphs (b) and (c) to read as follows:

§ 15.25 Kits.

* * * * *

(b) At least two units of the kit shall be assembled in exact accordance with the instructions supplied with the product to be marketed. If all components required to fully complete the kit (other than those specified in paragraph (a) of this section which are needed for compliance with the technical provisions and must be included with the kit) are not normally furnished with the kit, assembly shall be made using the recommended components. The assembled units shall be certified or authorized under the Supplier's Declaration of Conformity procedure, as appropriate, pursuant to the requirements of this part.

(1) The measurement data required for a TV interface device subject to certification shall be obtained for each of the two units and submitted with an application for certification pursuant to subpart J of part 2 of this chapter.

(2) The measurement data required for a TV interface device subject to Supplier's Declaration of Conformity shall be obtained for the units tested and retained on file pursuant to the provisions of subpart J of part 2 of this chapter.

(c) A copy of the exact instructions that will be provided for assembly of the device shall be submitted with an

application for certification. Those parts which are not normally furnished shall be detailed in the application for certification.

* * * * *

■ 50. Section 15.27 is amended by revising paragraph (a) to read as follows:

§ 15.27 Special accessories.

(a) Equipment marketed to a consumer must be capable of complying with the necessary regulations in the configuration in which the equipment is marketed. Where special accessories, such as shielded cables and/or special connectors, are required to enable an unintentional or intentional radiator to comply with the emission limits in this part, the equipment must be marketed with, *i.e.,* shipped and sold with, those special accessories. However, in lieu of shipping or packaging the special accessories with the unintentional or intentional radiator, the responsible party may employ other methods of ensuring that the special accessories are provided to the consumer, without additional charge, at the time of purchase. Information detailing any alternative method used to supply the special accessories shall be included in the application for a grant of equipment authorization or retained in the Supplier's Declaration of Conformity records, as appropriate. The party responsible for the equipment, as detailed in § 2.909 of this chapter, shall ensure that these special accessories are provided with the equipment. The instruction manual for such devices shall include appropriate instructions on the first page of the text concerned with the installation of the device that these special accessories must be used with the device. It is the responsibility of the user to use the needed special accessories supplied with the equipment. In cases where the manual is provided only in a form other than paper, such as on a computer disk or over the Internet, the information required by this section may be included in the manual in that alternative form, provided the user can reasonably be expected to have the capability to access information in that form.

* * * * *

■ 51. Section 15.31 is amended by adding a note to paragraph (a)(4) and revising paragraphs (b), (d), (f)(4), (h), (j), (k), (l), and (m) to read as follows:

§ 15.31 Measurement standards.

* * * * *

(a) * * *

(4) * * *

Note to paragraph (a)(4): Digital devices tested to show compliance with the provisions of § 15.109(g) must be tested following the ANSI C63.4 procedure described in paragraph (a)(4) of this section.

(b) All parties making compliance measurements on equipment subject to the requirements of this part are urged to use these measurement procedures. Any party using other procedures should ensure that such other procedures can be relied on to produce measurement results compatible with the FCC measurement procedures. The description of the measurement procedure used in testing the equipment for compliance and a list of the test equipment actually employed shall be made part of an application for certification or included with the data required to be retained by the party responsible for devices authorized pursuant to a Supplier's Declaration of Conformity.

* * * * *

(d) Field strength measurements shall be made, to the extent possible, on an open area test site. Test sites other than open area test sites may be employed if they are properly calibrated so that the measurement results correspond to what would be obtained from an open area test site. In the case of equipment for which measurements can be performed only at the installation site, such as perimeter protection systems, carrier current systems, and systems employing a ''leaky'' coaxial cable as an antenna, measurements for Supplier's Declaration of Conformity or for obtaining a grant of equipment authorization shall be performed at a minimum of three installations that can be demonstrated to be representative of typical installation sites.

* * * * *

(f) * * *

(4) The applicant for a grant of certification shall specify the extrapolation method used in the application filed with the Commission. For equipment subject to Supplier's Declaration of Conformity, this information shall be retained with the measurement data.

* * * * *

(h) A device which incorporates a carrier current system shall be tested as if the carrier current system were incorporated in a separate device; that is, the device shall be tested for compliance with whatever rules would apply to the device were the carrier current system not incorporated, and the carrier current system shall be tested for compliance with the rules applicable to carrier current systems.

* * * * *

(j) If the equipment under test consists of a central control unit (host device) and an external or internal accessory(ies) (peripheral, sleeve, etc.) and the party declaring compliance of the equipment or applying for a grant of equipment authorization manufactures or assembles the central control unit and at least one of the accessory devices that can be used with that control unit, testing of the control unit and/or the accessory(ies) must be performed using the devices manufactured or assembled by that party, in addition to any other needed devices which the party does not manufacture or assemble. If the party declaring compliance of the equipment or applying for a grant of equipment authorization does not manufacture or assemble the central control unit and at least one of the accessory devices that can be used with that control unit or the party can demonstrate that the central control unit or accessory(ies) normally would be marketed or used with equipment from a different entity, testing of the central control unit and/or the accessory(ies) must be performed using the specific combination of equipment which is intended to be marketed or used together. Only one test using peripherals or accessories that are representative of the devices that will be employed with the equipment under test is required. All possible equipment combinations are not required to be tested. The accessories or peripherals connected to the device being tested shall be unmodified, commercially available equipment.

(k) Composite systems (*i.e.* systems that incorporate different devices contained in a single enclosure or in separate enclosures connected by wire or cable) shall be measured for compliance with the technical standards of this part in accordance with the procedures in § 2.947(f) of this chapter. For digital devices which consist of a combination of Class A and Class B devices, the total combination of which results in a Class A digital device, it is only necessary to demonstrate that the equipment combination complies with the limits for a Class A device. This equipment combination may not be employed for obtaining a grant of equipment authorization or declaring compliance a Class B digital device. However, if the digital device combination consists of a Class B central control unit, *e.g.,* a personal computer, and a Class A internal peripheral(s), it must be demonstrated that the Class B central control unit continues to comply with the limits for a Class B digital device with the Class

A internal peripheral(s) installed but not active.

(l) Measurements of radio frequency emissions conducted to the public utility power lines shall be performed using a 50 ohm/50 μH line-impedance stabilization network (LISN).

(m) Measurements on intentional radiators or receivers, other than TV broadcast receivers, shall be performed and, if required, reported for each band in which the device can be operated with the device operating. The number of fundamental frequencies shall be investigated as specified in ANSI C63.10–2013, clause 5.7 (incorporated by reference, see § 15.38).

* * * * *

■ 52. Section 15.32 is revised to read as follows:

§ 15.32 Test procedures for CPU boards and computer power supplies.

Power supplies and CPU boards used with personal computers and for which separate authorizations are required to be obtained shall be tested in accordance with the specific procedures published or otherwise authorized by the Commission.

■ 53. Section 15.33 is amended by revising paragraph (a) to read as follows:

§ 15.33 Frequency range of radiated measurements.

(a) For an intentional radiator, the spectrum shall be investigated as specified in ANSI C63.10–2013, clause 5.5 (incorporated by reference, see § 15.38).

* * * * *

■ 54. Section 15.35 is revised to read as follows:

§ 15.35 Measurement detector functions and bandwidths.

The conducted and radiated emission limits shown in this part are based on the following, unless otherwise specified in this part:

(a) On any frequency or frequencies below or equal to 1000 MHz, the limits shown are based on measuring equipment employing a CISPR quasi-peak detector function and related measurement bandwidths, unless otherwise specified. The specifications for the measuring instrumentation using the CISPR quasi-peak detector can be found in ANSI C63.4–2014, clause 4 (incorporated by reference, see § 15.38). As an alternative to CISPR quasi-peak measurements, the responsible party, at its option, may demonstrate compliance with the emission limits using measuring equipment employing a peak detector function as long at the same bandwidth as indicated for CISPR quasi-peak measurements are employed.

(b) Unless otherwise specified, on any frequency or frequencies above 1000 MHz, the radiated emission limits are based on the use of measurement instrumentation employing an average detector function. Unless otherwise specified, measurements above 1000 MHz shall be performed using a minimum resolution bandwidth of 1 MHz. When average radiated emission measurements are specified in this part, including average emission measurements below 1000 MHz, there also is also a limit on the peak level of radio frequency emissions. Unless otherwise specified, the limit on peak radio frequency emissions is 20 dB above the maximum permitted average emission limit applicable to the equipment under test. This peak limit applies to the total peak emission level radiated by the device, *e.g.,* the total peak power level. Note that the use of a pulse desensitization correction factor may be needed to determine the total peak emission level. The instruction manual or application note for the measurement instrument should be consulted for determining pulse desensitization factors, as necessary.

(c) Unless otherwise specified, when the radiated emission limits are expressed in terms of the average value of the emission, and pulsed operation is employed, the measurement field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative (provided the transmitter operates for longer than 0.1 seconds) or in cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the average absolute voltage during a 0.1 second interval during which the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for certification or shall be retained in the measurement data file for equipment subject to Supplier's Declaration of Conformity.

■ 55. Section 15.101 is revised to read as follows:

§ 15.101 Equipment authorization of unintentional radiators.

(a) Except as otherwise exempted in §§ 15.23, 15.103, and 15.113, unintentional radiators shall be authorized prior to the initiation of marketing, as follows:

Type of device	Equipment authorization required
TV Broadcast Receiver	SDoC or Certification.
FM Broadcast Receiver	SDoC or Certification.
CB Receiver	SDoC or Certification.
Superregenerative Receiver	SDoC or Certification.
Scanning Receiver	Certification.
Radar Detector	Certification.
All other receivers subject to Part 15	SDoC or Certification.
TV Interface Device	SDoC or Certification.
Cable System Terminal Device	SDoC or Certification.
Stand-alone Cable input selector switch	SDoC or Certification.
Class B personal computers and peripherals	SDoC or Certification.
CPU boards and internal power supplies used with Class B personal computers	SDoC or Certification.
Class B personal computers assembled using authorized CPU boards or power supplies	SDoC or Certification.
Class B external switching power supplies	SDoC or Certification.
Other Class B digital devices & peripherals	SDoC or Certification.
Class A digital devices, peripherals & external switching power supplies	SDoC or Certification.
Access Broadband over Power Line (Access BPL)	Certification.
All other devices	SDoC or Certification.

(b) Only those receivers that operate (tune) within the frequency range of 30–960 MHz, CB receivers and radar detectors are subject to the authorizations shown in paragraph (a) of this section. However, receivers indicated as being subject to Supplier's Declaration of Conformity that are contained within a transceiver, the transmitter portion of which is subject to certification, shall be authorized under the Supplier's Declaration of Conformity procedure. Receivers operating above 960 MHz or below 30 MHz, except for radar detectors and CB receivers, are exempt from complying with the technical provisions of this part but are subject to § 15.5.

(c) Personal computers shall be authorized in accordance with one of the following methods:

(1) The specific combination of CPU board, power supply and enclosure is tested together and authorized under a Supplier's Declaration of Conformity or a grant of certification;

(2) The personal computer is authorized under a Supplier's Declaration of Conformity or a grant of certification, and the CPU board or power supply in that computer is replaced with a CPU board or power supply that has been separately authorized under a Supplier's Declaration of Conformity or a grant of certification; or

(3) The CPU board and power supply used in the assembly of a personal computer have been separately authorized under a Supplier's Declaration of Conformity or a grant of certification; and

(4) Personal computers assembled using either of the methods specified in paragraph (c)(2) or (3) of this section must, by themselves, also be authorized under a Supplier's Declaration of Conformity if they are marketed. However, additional testing is not required for this Supplier's Declaration of Conformity, provided the procedures in § 15.102(b) are followed.

(d) Peripheral devices, as defined in § 15.3(r), shall be authorized under a Supplier's Declaration of Conformity, or a grant of certification, as appropriate, prior to marketing. Regardless of the provisions of paragraph (a) or (c) of this section, if a CPU board, power supply, or peripheral device will always be marketed with a specific personal computer, it is not necessary to obtain a separate authorization for that product provided the specific combination of personal computer, peripheral device, CPU board and power supply has been authorized under a Supplier's Declaration of Conformity or a grant of certification as a personal computer.

(1) No authorization is required for a peripheral device or a subassembly that is sold to an equipment manufacturer for further fabrication; that manufacturer is responsible for obtaining the necessary authorization prior to further marketing to a vendor or to a user.

(2) Power supplies and CPU boards that have not been separately authorized and are designed for use with personal computers may be imported and marketed only to a personal computer equipment manufacturer that has indicated, in writing, to the seller or importer that they will obtain a Supplier's Declaration of Conformity or a grant of certification for the personal computer employing these components.

(e) Subassemblies to digital devices are not subject to the technical standards in this part unless they are marketed as part of a system in which case the resulting system must comply with the applicable regulations. Subassemblies include:

(1) Devices that are enclosed solely within the enclosure housing the digital device, except for: Power supplies used in personal computers; devices included under the definition of a peripheral device in § 15.3(r); and personal computer CPU boards, as defined in § 15.3(bb);

(2) CPU boards, as defined in § 15.3(bb), other than those used in personal computers, that are marketed without an enclosure or power supply; and

(3) Switching power supplies that are separately marketed and are solely for use internal to a device other than a personal computer.

(f) The procedures for obtaining a grant of certification or a Supplier's Declaration of Conformity are contained in subpart J of part 2 of this chapter.

■ 56. Section 15.102 is amended by revising paragraph (b)(4) to read as follows:

§ 15.102 CPU boards and power supplies used in personal computers.

* * * * *

(b) * * *

(4) If the system is marketed, the resulting equipment combination is authorized under a Supplier's Declaration of Conformity pursuant to § 15.101(c)(4) and a compliance information statement, as described in § 2.1077(b) of this chapter, is supplied with the system. Marketed systems shall also comply with the labeling requirements in § 15.19 and must be supplied with the information required under §§ 15.21, 15.27, and 15.105; and

* * * * *

■ 57. Section 15.123 is amended by revising paragraphs (c)(3) and (c)(5)(iii) to read as follows:

§ 15.123 Labeling of digital cable ready products.

* * * * *

(c) * * *

(3) Subsequent to the testing of its initial unidirectional digital cable product model, a manufacturer or importer is not required to have other models of unidirectional digital cable products tested at a qualified test facility for compliance with the procedures of Uni–Dir–PICS–I01–030903 (incorporated by reference, see § 15.38) unless the first model tested was not a television, in which event the first television shall be tested as provided in § 15.123(c)(1). The manufacturer or importer shall ensure that all subsequent models of unidirectional digital cable products comply with the procedures in the Uni–Dir–PICS–I01–03090 (incorporated by reference, see § 15.38) and all other applicable rules and standards. The manufacturer or importer shall maintain records indicating such compliance in accordance with the Supplier's Declaration of Conformity procedure requirements in part 2, subpart J of this chapter. The manufacturer or importer shall further submit documentation verifying compliance with the procedures in the Uni–Dir–PICS–I01–030903: (incorporated by reference, see § 15.38) to the qualified test facility.

* * * * *

(c) * * *

(5) * * *

(iii) Subsequent to the successful testing of its initial M–UDCP, a manufacturer or importer is not required to have other M–UDCP models tested at a qualified test facility for compliance with M–UDCPPICS–I04–080225, (incorporated by reference, see § 15.38) unless the first model tested was not a television, in which event the first television shall be tested as provided in § 15.123(c)(5)(i). The manufacturer or importer shall ensure that all subsequent models of M–UDCPs comply with M–UDCP–PICS–I04–080225, (incorporated by reference, see § 15.38) and all other applicable rules and standards. The manufacturer or importer shall maintain records indicating such compliance in accordance with the Supplier's Declaration of Conformity procedure requirements in part 2, subpart J of this chapter. For each M–UDCP model, the manufacturer or importer shall further submit documentation demonstrating compliance with M–UDCP–PICS–I04–

080225, (incorporated by reference, see § 15.38) to the qualified test facility.

* * * * *

■ 58. Section 15.201 is amended by revising paragraphs (a) through (c) to read as follows:

§ 15.201 Equipment authorization requirement.

(a) Intentional radiators operated as carrier current systems, devices operated under the provisions of §§ 15.211, 15.213, and 15.221, and devices operating below 490 kHz in which all emissions are at least 40 dB below the limits in § 15.209 shall comply with the Suppliers Declaration of Conformity procedures in subpart J of part 2 of this chapter prior to marketing.

(b) Except as otherwise exempted in paragraph (c) of this section and in § 15.23, all intentional radiators operating under the provisions of this part shall be certified by the Commission pursuant to the procedures in subpart J of part 2 of this chapter prior to marketing.

(c) For devices such as perimeter protection systems which, in accordance with § 15.31(d), are required to be measured at the installation site, each application for certification must be accompanied by a statement indicating that the system has been tested at three installations and found to comply at each installation. Until such time as certification is granted, a given installation of a system that was measured for the submission for certification will be considered to be in compliance with the provisions of this chapter, including the marketing regulations in subpart I of part 2 of this chapter, if tests at that installation show the system to be in compliance with the relevant technical requirements. Similarly, where measurements must be performed on site for equipment subject to Supplier's Declaration of Conformity, a given installation that has been found compliant with the applicable standards will be considered to be in compliance with the provisions of this chapter, including the marketing regulations in subpart I of part 2 of this chapter.

* * * * *

§ 15.212 [Removed]

■ 59. Remove § 15.212.

§ 15.239 [Amended]

■ 60. In § 15.239, remove paragraph (d).

■ 61. Section 15.615 is amended by revising paragraph (a)(4) to read as follows:

§ 15.615 General administrative requirements.

(a) * * *

(4) The manufacturer and type of Access BPL equipment and its associated FCC ID number, or, in the case of Access BPL equipment that has been subject to Supplier's Declaration of Conformity, the Trade Name and Model Number, as specified on the equipment label.

* * * * *

PART 18—INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

■ 62. The authority citation for part 18 continues to read as follows:

Authority: 47 U.S.C. 4, 301, 302, 303, 304, 307.

■ 63. Section 18.203 is revised to read as follows:

§ 18.203 Equipment authorization.

(a) Consumer ISM equipment, unless otherwise specified, must be authorized under either the Supplier's Declaration of Conformity or certification procedure prior to use or marketing. An application for certification shall be filed with a TCB, pursuant to the relevant sections in part 2, subpart J of this chapter.

(b) Consumer ultrasonic equipment generating less than 500 watts and operating below 90 kHz, and non-consumer ISM equipment shall be subject to Supplier's Declaration of Conformity, in accordance with the relevant sections of part 2, subpart J of this chapter.

(c) Grants of equipment authorization issued, as well as on-site certifications performed, before March 1, 1986, remain in effect and no further action is required.

■ 64. Section 18.209 is revised to read as follows:

§ 18.209 Identification of authorized equipment.

Each device for which a grant of equipment authorization is issued under this part shall be identified pursuant to the applicable provisions of subpart J of part 2 of this chapter. Changes in the identification of authorized equipment may be made pursuant to § 2.1033 of this chapter. FCC Identifiers as described in §§ 2.925 and 2.926 of this chapter shall not be used on equipment subject to Supplier's Declaration of Conformity.

■ 65. Section 18.212 is revised to read as follows:

§ 18.212 Compliance information.

(a) Equipment authorized under the Supplier's Declaration of Conformity procedure shall include the following compliance information in lieu of the information required by § 2.1077 of this chapter.

(1) Identification of the product, *e.g.,* name and model number.

(2) A statement similar to the following:

This device complies with part 18 of the FCC Rules.

(3) The name and address of the responsible party as defined in § 2.909 of this chapter. This party must be located within the United States.

(b) The compliance information may be placed in the instruction manual, on a separate sheet, or on the packaging. There is no specific format for this information.

■ 66. Section 18.311 is revised to read as follows:

§ 18.311 Methods of measurement.

The measurement techniques which will be used by the FCC to determine compliance with the technical requirements of this part are set out in FCC Measurement Procedure MP–5, ''Methods of Measurements of Radio Noise Emissions from ISM equipment'' or compliance measurements shall be made in accordance with the specific procedures published or other procedures otherwise authorized by the Commission.

[FR Doc. 2015–18402 Filed 8–5–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WP Docket No. 15–32; DA 15–844]

Creation of Interstitial 12.5 kHz Channels in the 800 MHz Band Between 809–817/854–862 MHz

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission seeks comment on the Land Mobile Communication Counsel's (LMCC) proposed interference contours for interstitial channels, submitted on May 26, 2015, during the reply comments stage in the pending rule making proceeding. This action is necessary because the Commission desires the benefit of public comment on the proposed interference contours which were not advanced by LMCC until the reply stage of the Interstitial NPRM. The intended effect of this action is to give interested parties a sufficient opportunity to comment on LMCC's May 26, 2015 proposed interference contours.

DATES: Submit comments on or before September 8, 2015.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for comment addresses.

FOR FURTHER INFORMATION CONTACT: For further information, contact: John A. Evanoff, Attorney-Advisor, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–0848 or *john.evanoff@fcc.gov* or Rodney P. Conway, Engineer, Mobility Division, Wireless Telecommunications Bureau, (202) 418–2904 or *rodney.conway@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 15–844, released on July 24, 2015. The document is available for download at *http://fjallfoss.fcc.gov/edocs-public/*. The complete text of this document is also available for 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. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

In the Notice of Proposed Rulemaking (NPRM) in WP Docket No. 15–32, the Commission initiated a new proceeding to seek comment on proposals to amend the Commission's rules governing 800 MHz Mid-Band operations (809–817 MHz/854–862 MHz) 80 FR 15723 (Mar. 25, 2015). The Commission sought comment on appropriate interference protection criteria for interstitial channels, including a proposal from the Land Mobile Communications Council (LMCC) to amend the rules to adopt new ''Interstitial 800 MHz Coordination Procedures.'' On May 26, 2015, the LMCC filed its reply comments in the pending rule making proceeding. Therein, LMCC advanced proposed interference contours to apply when stations of various modulation types are operated on interstitial channels (12.5 kHz spacing) adjacent to ''standard'' (25 kHz spacing) stations operating with various modulation types. In order to develop a full and complete record, the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau issue this public notice seeking comment on LMCC's proposed interference contours. The Commission will accept comments on the LMCC proposed interference contours on or before September 8, 2015.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Commenters who file information that they believe should be withheld from public inspection may request confidential treatment pursuant to § 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. See 47 CFR 0.461; 5 U.S.C. 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b). In proceedings governed by section 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,*doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize

themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Michael J. Wilhelm,

Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau.

[FR Doc. 2015–19341 Filed 8–5–15; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191, 192, and 195

[Docket No. PHMSA–2010–0026]

RIN 2137–AE59

Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations; Administrative Significance: Petitions for Reconsideration

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Petitions for reconsideration.

SUMMARY: On March 11, 2015, PHMSA published a final rule amending the pipeline safety regulations to make miscellaneous changes that updated and clarified certain regulatory requirements. These amendments address several subject matter areas including the performance of post-construction inspections, leak surveys of Type B onshore gas gathering lines, qualifying plastic pipe joiners, regulation of ethanol, transportation of pipe, filing of offshore pipeline condition reports, and calculation of pressure reductions for hazardous liquid pipeline anomalies. PHMSA has since received three petitions for reconsideration submitted by persons affected by the final rule.

DATES: PHMSA received these petitions on April 10, 2015.

FOR FURTHER INFORMATION CONTACT: Kay McIver, Transportation Specialist, by telephone at 202–366–0113, or by electronic mail at *kay.mciver@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On March 11, 2015, PHMSA published a final rule amending the pipeline safety regulations to make miscellaneous changes that updated and clarified certain regulatory requirements (80 FR 12762). These amendments addressed several subject matter areas including the performance of post-construction inspections, leak surveys of Type B onshore gas gathering lines, qualifying plastic pipe joiners, regulation of ethanol, transportation of pipe, filing of offshore pipeline condition reports, and calculation of pressure reductions for hazardous liquid pipeline anomalies. PHMSA has since received three petitions for reconsideration submitted by persons affected by the final rule.

Dates: On April 10, 2015, the American Gas Association (AGA), the American Public Gas Association, (APGA) and the Interstate Natural Gas Association of America (INGAA) petitioned PHMSA for re-consideration to certain parts of the Miscellaneous Rule.

II. Petitions for Reconsideration

In accordance with 49 CFR 190.335, PHMSA received three petitions from the APGA, the AGA and the INGAA asking for reconsideration to some portions of the Final Rule. APGA and AGA expressed concerns about the provisions of the Final Rule applicable to construction inspections. INGAA and AGA expressed concerns regarding provisions in the Final Rule applicable to components fabricated by welding.

Section 190.337(b) states that it is the policy of the Associate Administrator for Pipeline Safety to issue notice of the action on a petition for reconsideration within 90 days after the date on which the regulation in question is published in the **Federal Register**, unless it is found impracticable to take action within that time. Section 190.337(b) goes on to state that when it is impractical to take action within that time, that PHMSA will give notice of that fact and the date by which action is expected to be taken. Due to the complexities of the petitions, PHMSA is unable to complete the analyses and render a decision within the 90-day time frame. Therefore, in accordance with § 190.337(b), PHMSA anticipates acting on these three petitions by October 1, 2015.

Issued in Washington, DC, on July 31, 2015, under authority delegated in 49 CFR 1.97.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2015–19227 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 541

[Docket No. NHTSA–2015–0067]

Preliminary Theft Data; Motor Vehicle Theft Prevention Standard

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Publication of preliminary theft data; request for comments.

SUMMARY: This document requests comments on data about passenger motor vehicle thefts that occurred in calendar year (CY) 2013, including theft rates for existing passenger motor vehicle lines manufactured in model year (MY) 2013.

DATES: Comments must be submitted on or before October 5, 2015.

ADDRESSES: You may submit comments identified by Docket No. NHTSA–2015–0067 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. 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.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For access to the docket to read background documents or

comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–5222. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: NHTSA administers a program for reducing motor vehicle theft. The central feature of this program is the Federal Motor Vehicle Theft Prevention Standard, 49 CFR part 541. The standard specifies performance requirements for inscribing or affixing vehicle identification numbers (VINs) onto certain major original equipment and replacement parts of high-theft lines of passenger motor vehicles.

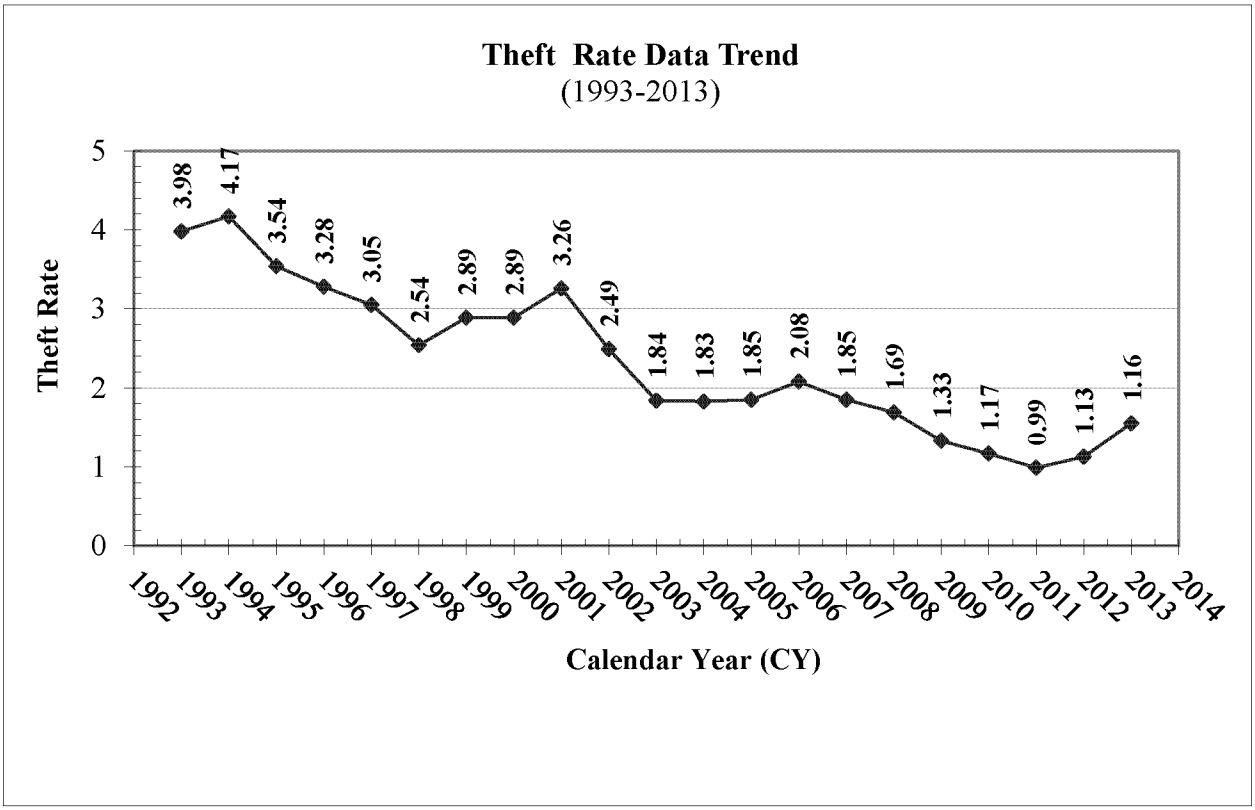
NHTSA obtains, from the most reliable source, accurate and timely theft data, and publishes the data for review and comment in accordance with 49 U.S.C. 33104(b)(4). This document reports the preliminary theft data for CY 2013 the most recent calendar year for which data are available.

In calculating the 2013 theft rates, NHTSA followed the same procedures it has used since publication of the 1983/1984 theft rate data (50 FR 46669, November 12, 1985). The 2013 theft rate for each vehicle line was calculated by dividing the number of reported thefts of MY 2013 vehicles of that line stolen during calendar year 2013 by the total number of vehicles in that line manufactured for MY 2013, as reported to the Environmental Protection Agency (EPA). As in all previous reports, NHTSA's data were based on information provided to NHTSA by the National Crime Information Center (NCIC) of the Federal Bureau of Investigation. The NCIC is a government system that receives vehicle theft information from approximately 23,000 criminal justice agencies and other law enforcement authorities throughout the United States. The NCIC data also include reported thefts of self-insured and uninsured vehicles, not all of which are reported to other data sources.

The preliminary 2013 theft data show an increase in the vehicle theft rate when compared to the theft rate experienced in CY/MY 2012 (For 2012 theft data, see 79 FR 70115, November 25, 2014). The preliminary theft rate for MY 2013 passenger vehicles stolen in calendar year 2013 increased to 1.1562 thefts per thousand vehicles produced, an increase of 2.37 percent from the rate of 1.1294 thefts per thousand vehicles experienced by MY 2012 vehicles in CY 2012. For MY 2013 vehicles, out of a total of 211 vehicle lines, ten lines had a theft rate higher than 3.5826 per thousand vehicles, the established median theft rate for MYs 1990/1991 (See 59 FR 12400, March 16, 1994). Of the ten vehicle lines with a theft rate higher than 3.5826, nine are passenger car lines, one is a multipurpose passenger vehicle line, and none are light-duty truck lines.

The data presented in this publication reflect an increase in the overall vehicle theft rate for CY/MY 2013, which is slightly inconsistent with the general theft rate trend over the past several years. Historically, the data have shown an overall decreasing trend, with periods of increase from one year to the next (Figure 1). While the theft rate data show only a slight increase in the overall theft rate for CY/MY 2013, the agency welcomes any comments on the increase in the overall theft rate for this period.

Figure 1. Theft Rate Data Trend (1993-2013)



Theft rate per thousand vehicles produced

In Table 1, NHTSA has tentatively ranked each of the MY 2013 vehicle lines in descending order of theft rate. Public comment is sought on the accuracy of the data, including the data for the production volumes of individual vehicle lines.

Comments must not exceed 15 pages in length (49 CFR 553.21). Attachments may be appended to these submissions without regard to the 15 page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to the Chief Counsel, NHTSA, at the street address given in the **FOR FURTHER INFORMATION CONTACT** section, and two copies from which the purportedly confidential information has been deleted should be submitted to the docket. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation. 49 CFR part 512.

All comments received before the close of business on the comment closing date indicated above for this document will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Comments on this document will be available for inspection in the docket. NHTSA will continue to file relevant information as it becomes available for inspection in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Table 1. Preliminary Report of Theft Rates for Model Year 2013 Passenger Motor Vehicles Stolen in Calendar Year 2013

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
1	MERCEDES-BENZ	CL-CLASS	3	583	5.1458
2	CHRYSLER	DODGE CHARGER	399	78,134	5.1066
3	TOYOTA	YARIS	97	20,951	4.6299
4	GENERAL MOTORS	CHEVROLET IMPALA	577	127,237	4.5348
5	CHRYSLER	DODGE CHALLENGER	224	50,824	4.4074
6	MASERATI	QUATTROPORTE	1	227	4.4053
7	BMW	M6	5	1,290	3.8760
8	GENERAL MOTORS	CHEVROLET CAPTIVA	134	35,894	3.7332
9	NISSAN	MAXIMA	166	44,854	3.7009
10	BMW	M5	12	3,261	3.6799
11	CHRYSLER	DODGE AVENGER	396	112,843	3.5093
12	CHRYSLER	300	210	62,182	3.3772
13	PORSCHE	PANAMERA	20	5,957	3.3574
14	MERCEDES-BENZ	S-CLASS	42	12,782	3.2859
15	GENERAL MOTORS	CHEVROLET CAMARO	258	85,584	3.0146
16	NISSAN	INFINITI FX37/FX50	41	13,669	2.9995
17	AUDI	AUDI S8	3	1,015	2.9557
18	HONDA	ACURA ZDX	1	354	2.8249
19	FORD MOTOR CO	MUSTANG	214	75,914	2.8190
20	NISSAN	VERSA	151	56,410	2.6768
21	CHRYSLER	200	340	133,344	2.5498
22	AUDI	AUDI A4/A5	36	14,521	2.4792
23	MAZDA	MAZDA 2	37	14,926	2.4789
24	MERCEDES-BENZ	CLS-CLASS	14	5,821	2.4051
25	BMW	6	16	7,196	2.2235
26	NISSAN	GT-R	3	1,410	2.1277
27	GENERAL MOTORS	CHEVROLET CRUZE	433	207,657	2.0852
28	KIA	FORTE	108	53,267	2.0275
29	BMW	Z4	4	1,982	2.0182
30	KIA	OPTIMA	346	172,977	2.0003
31	MAZDA	MAZDA 6	23	11,568	1.9882
32	AUDI	AUDI A7	13	6,626	1.9620
33	HYUNDAI	ACCENT	174	90,149	1.9301
34	MAZDA	MAZDA 5	27	14,196	1.9019

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
35	NISSAN	INFINITI G37	109	57,330	1.9013
36	MAZDA	MAZDA 3	196	103,558	1.8927
37	MITSUBISHI	LANCER	32	16,958	1.8870
38	AUDI	AUDI S7	2	1,106	1.8083
39	TOYOTA	COROLLA	566	313,314	1.8065
40	GENERAL MOTORS	CHEVROLET MALIBU	373	211,357	1.7648
41	NISSAN	ALTIMA	693	393,800	1.7598
42	FORD MOTOR CO	TAURUS	159	90,753	1.7520
43	KIA	RIO	117	68,364	1.7114
44	GENERAL MOTORS	CHEVROLET SPARK	65	38,612	1.6834
45	VOLKSWAGEN	CC	54	32,257	1.6741
46	BMW	7	20	12,059	1.6585
47	AUDI	AUDI S6	3	1,809	1.6584
48	AUDI	AUDI A8	9	5,635	1.5972
49	FORD MOTOR CO	LINCOLN MKS	26	17,203	1.5114
50	GENERAL MOTORS	BUICK LACROSSE	82	54,416	1.5069
51	GENERAL MOTORS	CHEVROLET SONIC	141	94,250	1.4960
52	HYUNDAI	GENESIS	70	49,177	1.4234
53	FORD MOTOR CO	FOCUS	332	234,537	1.4156
54	MERCEDES-BENZ	E-CLASS	70	50,159	1.3956
55	GENERAL MOTORS	CHEVROLET CORVETTE	18	12,917	1.3935
56	VOLKSWAGEN	PASSAT	176	128,931	1.3651
57	FORD MOTOR CO	FUSION	342	256,170	1.3351
58	VOLKSWAGEN	JETTA	222	176,130	1.2604
59	TOYOTA	CAMRY	353	280,399	1.2589
60	GENERAL MOTORS	CADILLAC ATS	49	39,386	1.2441
61	HYUNDAI	SONATA	388	313,346	1.2382
62	NISSAN	370 Z	8	6,485	1.2336
63	GENERAL MOTORS	CADILLAC CTS	41	33,340	1.2298
64	HONDA	PILOT	53	43,762	1.2111
65	CHRYSLER	JEEP PATRIOT	43	35,620	1.2072
66	TOYOTA	SCION TC	24	19,927	1.2044
67	MERCEDES-BENZ	SL-CLASS	12	10,053	1.1937
68	MITSUBISHI	OUTLANDER	35	29,764	1.1759
69	MERCEDES-BENZ	C-CLASS	113	96,191	1.1747

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
70	SUZUKI	SX4	8	6,897	1.1599
71	HYUNDAI	ELANTRA	469	411,249	1.1404
72	CHRYSLER	DODGE JOURNEY	96	84,725	1.1331
73	BMW	5	65	58,063	1.1195
74	FORD MOTOR CO	FIESTA	73	67,095	1.0880
75	GENERAL MOTORS	BUICK REGAL	21	19,437	1.0804
76	NISSAN	NV 200 VAN	6	5,650	1.0619
77	SUZUKI	GRAND VITARA	3	2,841	1.0560
78	NISSAN	SENTRA	160	155,196	1.0310
79	KIA	SOUL	153	150,943	1.0136
80	AUDI	AUDI S4/S5	12	12,087	0.9928
81	MERCEDES-BENZ	GLK-CLASS	30	32,138	0.9335
82	VOLKSWAGEN	TIGUAN	31	33,475	0.9261
83	GENERAL MOTORS	CADILLAC XTS	38	41,913	0.9066
84	FORD MOTOR CO	LINCOLN MKZ	24	26,677	0.8997
85	TOYOTA	SCION IQ	3	3,397	0.8831
86	FORD MOTOR CO	ESCAPE	265	310,054	0.8547
87	TOYOTA	VENZA	44	51,487	0.8546
88	KIA	SPORTAGE	37	43,754	0.8456
89	HONDA	ACURA TSX	13	15,474	0.8401
90	NISSAN	XTERRA	11	13,167	0.8354
91	KIA	SORENTO	84	101,314	0.8291
92	SUBARU	LEGACY	37	45,052	0.8213
93	HONDA	ILX	21	25,790	0.8143
94	TOYOTA	AVALON	63	77,779	0.8100
95	PORSCHE	BOXSTER	5	6,259	0.7988
96	NISSAN	FRONTIER PICKUP TRUCK	42	53,113	0.7908
97	CHRYSLER	DODGE DART	95	120,478	0.7885
98	JAGUAR LAND ROVER	XF	7	8,983	0.7792
99	TOYOTA	LEXUS IS	10	13,082	0.7644
100	FIAT	500	38	51,721	0.7347
101	MAZDA	CX-9	16	21,923	0.7298
102	PORSCHE	911	7	9,805	0.7139
103	CHRYSLER	JEEP COMPASS	15	21,037	0.7130
104	FORD MOTOR CO	EDGE	162	230,853	0.7017

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
105	BMW	3	81	115,498	0.7013
106	VOLKSWAGEN	GOLF	15	21,455	0.6991
107	GENERAL MOTORS	CADILLAC SRX	35	50,569	0.6921
108	NISSAN	PATHFINDER	56	81,205	0.6896
109	FORD MOTOR CO	FLEX	22	32,053	0.6864
110	NISSAN	ROGUE	131	192,204	0.6816
111	JAGUAR LAND ROVER	XJ	4	5,880	0.6803
112	BMW	X3	24	35,324	0.6794
113	GENERAL MOTORS	GMC TERRAIN	73	108,263	0.6743
114	HONDA	CROSSTOUR	11	16,818	0.6541
115	NISSAN	CUBE	4	6,181	0.6471
116	VOLVO	XC60	13	20,618	0.6305
117	TOYOTA	TACOMA PICKUP TRUCK	108	172,009	0.6279
118	HYUNDAI	EQUUS	2	3,187	0.6275
119	HONDA	ACCORD	231	372,134	0.6207
120	MERCEDES-BENZ	SLK-CLASS	3	4,842	0.6196
121	VOLKSWAGEN	BEETLE	29	47,776	0.6070
122	CHRYSLER	JEEP WRANGLER	93	154,513	0.6019
123	HONDA	ACURA MDX	15	25,269	0.5936
124	VOLVO	S60	15	25,583	0.5863
125	TOYOTA	SIENNA	77	131,431	0.5859
126	VOLKSWAGEN	GTI	10	17,173	0.5823
127	AUDI	AUDI ALLROAD	4	6,966	0.5742
128	GENERAL MOTORS	BUICK VERANO	29	50,556	0.5736
129	FORD MOTOR CO	LINCOLN MKX	23	40,203	0.5721
130	SUBARU	BRZ	7	12,358	0.5664
131	SUBARU	IMPREZA	50	88,295	0.5663
132	AUDI	AUDI Q5	16	28,566	0.5601
133	SUZUKI	KIZASHI	1	1,805	0.5540
134	SUBARU	XV CROSSTREK	26	48,547	0.5356
135	HYUNDAI	TUCSON	30	56,509	0.5309
136	HONDA	CIVIC	189	361,723	0.5225
137	MAZDA	CX-5	28	54,087	0.5177
138	SUBARU	OUTBACK	60	118,349	0.5070
139	NISSAN	MURANO	18	35,506	0.5070

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
140	HONDA	CR-Z	2	4,032	0.4960
141	SUBARU	FORESTER	21	42,779	0.4909
142	HYUNDAI	VELOSTER	25	51,682	0.4837
143	HONDA	ACURA TL	11	24,361	0.4515
144	FORD MOTOR CO	C-MAX	25	55,763	0.4483
145	GENERAL MOTORS	CHEVROLET EQUINOX	115	259,361	0.4434
146	TOYOTA	HIGHLANDER	74	170,215	0.4347
147	VOLVO	C30	1	2,331	0.4290
148	MERCEDES-BENZ	SMART FORTWO	6	14,179	0.4232
149	AUDI	AUDI A6	8	19,268	0.4152
150	TOYOTA	LEXUS RX	56	136,263	0.4110
151	HYUNDAI	SANTA FE	45	110,159	0.4085
152	MASERATI	GRANTURISMO	1	2,553	0.3917
153	BENTLEY MOTORS	CONTINENTAL	1	2,713	0.3686
154	HONDA	CR-V	102	278,583	0.3661
155	JAGUAR LAND ROVER	LAND ROVER EVOQUE	5	14,367	0.3480
156	BMW	1	3	8,704	0.3447
157	TOYOTA	FJ CRUISER	4	12,066	0.3315
158	GENERAL MOTORS	CHEVROLET VOLT	9	27,484	0.3275
159	BMW	MINI COOPER	24	73,871	0.3249
160	TOYOTA	RAV4	71	224,601	0.3161
161	HONDA	FIT	25	80,291	0.3114
162	TOYOTA	SCION XD	3	10,112	0.2967
163	TOYOTA	SCION XB	5	17,136	0.2918
164	HONDA	INSIGHT	2	6,882	0.2906
165	BMW	M3	1	3,560	0.2809
166	TOYOTA	LEXUS LS	3	10,967	0.2735
167	TOYOTA	PRIUS	64	236,411	0.2707
168	NISSAN	JUKE	13	49,105	0.2647
169	NISSAN	QUEST VAN	3	11,559	0.2595
170	BMW	X1	4	16,976	0.2356
171	TOYOTA	LEXUS ES	21	90,063	0.2332
172	TOYOTA	LEXUS CT	4	17,423	0.2296
173	VOLVO	C70	1	4,380	0.2283
174	VOLKSWAGEN	EOS	1	4,775	0.2094

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
175	HONDA	ACURA RDX	8	44,480	0.1799
176	GENERAL MOTORS	BUICK ENCORE	5	28,615	0.1747
177	FORD MOTOR CO	TRANSIT CONNECT	7	49,064	0.1427
178	AUDI	AUDI A3	5	37,137	0.1346
179	TESLA	MODEL S	2	17,813	0.1123
180	HYUNDAI	AZERA	1	13,556	0.0738
181	NISSAN	LEAF	1	26,167	0.0382
182	ASTON MARTIN	DB9	0	128	0.0000
183	ASTON MARTIN	VANTAGE	0	236	0.0000
184	AUDI	AUDI RS5	0	1,545	0.0000
185	AUDI	AUDI TT	0	2,192	0.0000
186	BENTLEY MOTORS	MULSANNE	0	234	0.0000
187	BUGATTI	VEYRON	0	6	0.0000
188	BYD MOTORS	E6	0	32	0.0000
189	CHRYSLER	DODGE VIPER	0	852	0.0000
190	CODA AUTOMOTIVE	CODA	0	37	0.0000
191	FERRARI	458	0	1,239	0.0000
192	FERRARI	CALIFORNIA	0	504	0.0000
193	FERRARI	FF	0	103	0.0000
194	FERRARI	F12BERLINETTA	0	56	0.0000
195	JAGUAR LAND ROVER	LAND ROVER LR2	0	3,689	0.0000
196	JAGUAR LAND ROVER	XK	0	1,461	0.0000
197	LAMBORGHINI	AVENTADOR	0	155	0.0000
198	LAMBORGHINI	GALLARDO	0	449	0.0000
199	LOTUS	EVORA	0	170	0.0000
200	MAZDA	MX-5 MIATA	0	5,697	0.0000
201	MCLAREN	MP4-12C	0	412	0.0000
202	MERCEDES-BENZ	SLS-CLASS	0	228	0.0000
203	MITSUBISHI	I-MIEV	0	1,435	0.0000
204	NISSAN	INFINITI EX37	0	1,894	0.0000
205	NISSAN	INFINITI M35H/M37/M56	0	9,494	0.0000
206	ROLLS ROYCE	GHOST	0	605	0.0000
207	ROLLS ROYCE	PHANTOM	0	254	0.0000
208	SUBARU	TRIBECA	0	1,651	0.0000
209	TOYOTA	SCION FR-S	0	31,458	0.0000

	Manufacturer	Make/Model (line)	Thefts 2013	Production (Mfr's) 2013	2013 Theft Rate (per 1,000 Vehicles produced)
210	VOLVO	S80	0	2,300	0.0000
211	VOLVO	XC70	0	4,962	0.0000
	Theft rate per 1,000 vehicles produced =	$\left(\frac{\textbf{Total theft}}{\textbf{Total production}}\right)\textbf{x1000}$	**14,009**	**12,116,328**	**1.1562**

Issued in Washington, DC, under authority delegated in 49 CFR 1.95.

Raymond R. Posten,

Associate Administrator for Rulemaking.

[FR Doc. 2015–19118 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 219

[Docket No. 150413360–5636–02]

RIN 0648–BF02

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries Research; Correction

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

ACTION: Proposed rule; correction; extension of public comment period.

SUMMARY: This document contains corrections to the preamble to the proposed regulations published on July 9, 2015, that would establish a framework for authorizing the take of marine mammals incidental to the NEFSC's fisheries research activities in the Atlantic coast region for a five-year period, 2015–2020. This action is necessary to correct errors in the estimates presented for Level B harassment of northern bottlenose whales (*Hyperoodon ampullatus*), dwarf sperm/pygmy sperm whales (*Kogia spp.*), bottlenose dolphins (*Tursiops truncatus*), and harbor seals (*Phoca vitulina*). This action also corrects errors in the mortality estimates presented for gray seals (*Haliochoerus grypus*) and harbor seals.

The **Federal Register** proposed rule indicated that written comments were due by August 10, 2015, which allowed 30 calendar days for public input. NMFS has decided to extend the public comment period by 7 calendar days, to August 17, 2015, which allows a total of 37 days for public input.

DATES: NMFS has extended the public comment period for this action from August 10, 2015, to August 17, 2015. NMFS must receive written comments and information no later than August 17, 2015.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2015–0078, by any of the following methods:

- *Electronic submission:* Submit all electronic public comments via the federal e-Rulemaking Portal. Go to *www.regulations.gov,* enter 0648–BF02 in the ''Search'' box, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. To help NMFS process and review comments more efficiently, please use only one method to submit comments. All comments received are a part of the public record. NMFS will generally post the comments on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule on July 9, 2015 (80 FR 39542) to establish a framework for authorizing the take of marine mammals incidental to the NEFSC's fisheries research activities in the Atlantic coast region for a five-year period, 2015–2020. NMFS refers the reader to the July 9, 2015, **Federal Register** notice (80 FR 39542) for background information concerning the proposed regulations. The information in the notice of proposed rulemaking is not repeated here.

This correction revises the description contained in the preamble of the estimates of five species of marine mammals to be taken by Level B harassment and the estimates of gray and harbor seals to be taken by mortality.

Need for Correction

As published, the preamble to the final regulations contains errors or typos which may prove to be misleading and need to be clarified. These errors and omissions were also incorrectly recorded within the regulatory text and should be clarified there as well.

1. On page 39588, in Table 11, the entries for harbor seal, gray seal, and unidentified pinniped are corrected to read as follows:

TABLE 11—TOTAL ESTIMATED M/SI + LEVEL A DUE TO GEAR INTERACTION IN THE ATLANTIC COAST REGION, 2015–2020

Species	Est. 5-year total, trawl [1]	Est. 5-year total, gillnet [1]	Est. 5-year total, longline [1]	Est. 5-year total, fyke net [1]	Total, all gears
* * *	*	*	*	*	*
Harbor seal	5	5	0	5	15
* * *	*	*	*	*	*
Gray seal	5	5	0	5	15
* * *	*	*	*	*	*
Unidentified pinniped	1	1	1	1	4
* * *	*	*	*	*	*

[1] Please see preceding text for derivation of take estimates.

* * * * * * *

2. On page 39595, in Table 20, the entries for *Kogia* spp., gray seal, and harbor seal are corrected to read as follows:

TABLE 20—SUMMARY INFORMATION RELATED TO PROPOSED ANNUAL TAKE AUTHORIZATION IN THE ATLANTIC COAST REGION, 2015–2020.

Species [1]	Proposed total annual Level B harassment authorization	Percent of estimated population	Proposed total M/SI + Level A authorization, 2015–2020	Estimated maximum annual M/SI + Level A [2]	PBR [3]	% PBR [4]	Stock trend [5]
* * *	*	*	*	*	*	*	*
Kogia spp.	24	0.63	0	0	n/a	.....	?
* * *	*	*	*	*	*	*	*
Gray seal	[7] 10; 8,000	2.42	15	3.6	1,469	0.25	↑
* * *	*	*	*	*	*	*	*
Harbor seal	[7] 1,678; 20,000	2.48	15	3.6	1,662	0.22	?
* * *	*	*	*	*	*	*	*

[1] For species with multiple stocks in the Atlantic coast regions or for species groups (*Kogia spp.* and Mesoplodont beaked whales), indicated level of take could occur to individuals from any stock or species (not including coastal and estuarine stocks of bottlenose dolphins).

[2] This column represents the total number of incidents of M/SI + Level A that could potentially accrue to the specified species or stock and is the number carried forward for evaluation in the negligible impact analysis (later in this document). To reach this total, we add one to the total for each pinniped or delphinid that may be captured in longline or gillnet gear, one to the total for each delphinid that may be captured in trawl gear, and one pinniped that may be captured in fyke net gear. This represents the potential that the take of an unidentified pinniped or delphinid could accrue to any given stock captured in that gear. The proposed take authorization is formulated as a five-year total; the annual average is used only for purposes of negligible impact analysis. We recognize that portions of an animal may not be taken in a given year.

[3] See Table 3 and following discussion for more detail regarding PBR.

[4] Estimated maximum annual M/SI + Level A expressed as a percentage of PBR.

[5] See relevant SARs for more information regarding stock status and trends. Interannual increases may not be interpreted as evidence of a trend.

* * * * * * *

[7] The first number represents estimated annual Level B take by acoustic sources. The second number represents estimated annual Level B take by the physical disturbance during surveys in Penobscot Bay.

3. On page 39595, in Table 20, add a new entry for the northern bottlenose whale to read as follows:

TABLE 20—SUMMARY INFORMATION RELATED TO PROPOSED ANNUAL TAKE AUTHORIZATION IN THE ATLANTIC COAST REGION, 2015–2020

Species [1]	Proposed total annual Level B harassment authorization	Percent of estimated population	Proposed total M/SI + Level A authorization, 2015–2020	Estimated maximum annual M/SI + Level A [2]	PBR [3]	% PBR [4]	Stock trend [5]
* *	*	*	*	*	*	*	
Harbor seal	[7] 1,678; 20,000	2.48	15	3.6	1,662	0.22	?
* *	*	*	*	*	*	*	
Northern bottlenose whale	10	n/a	0	0	n/a	.....	?
* *	*	*	*	*	*	*	
Unidentified delphinids.							
* *	*	*	*	*	*	*	
* *	*	*	*	*	*	*	

[1] For species with multiple stocks in the Atlantic coast regions or for species groups (*Kogia spp.* and Mesoplodont beaked whales), indicated level of take could occur to individuals from any stock or species (not including coastal and estuarine stocks of bottlenose dolphins).

[2] This column represents the total number of incidents of M/SI + Level A that could potentially accrue to the specified species or stock and is the number carried forward for evaluation in the negligible impact analysis (later in this document). To reach this total, we add one to the total for each pinniped or delphinid that may be captured in longline or gillnet gear, one to the total for each delphinid that may be captured in trawl gear, and one pinniped that may be captured in fyke net gear. This represents the potential that the take of an unidentified pinniped or delphinid could accrue to any given stock captured in that gear. The proposed take authorization is formulated as a five-year total; the annual average is used only for purposes of negligible impact analysis. We recognize that portions of an animal may not be taken in a given year.

[3] See Table 3 and following discussion for more detail regarding PBR.

[4] Estimated maximum annual M/SI + Level A expressed as a percentage of PBR.

[5] See relevant SARs for more information regarding stock status and trends. Interannual increases may not be interpreted as evidence of a trend.

* * * * * * *

[7] The first number represents estimated annual Level B take by acoustic sources. The second number represents estimated annual Level B take by the physical disturbance during surveys in Penobscot Bay.

List of Subjects in 50 CFR Part 219

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Accordingly, 50 CFR part 219 is corrected as follows:

PART 219—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Subpart D—Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries Research in the Atlantic Coast Region

■ 1. The authority citation for part 219 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. In § 219.33:
■ A. Revise paragraph (b)(1)(i)(H).
■ B. Revise paragraph (b)(1)(i)(K).
■ C. Add paragraph (b)(1)(i)(Z).
■ D. Revise paragraph (b)(1)(ii)(A).
■ E. Revise paragraph (b)(1)(ii)(C).
■ F. Revise paragraphs (b)(2)(ii)(A) and (b)(2)(ii)(B).
■ G. Revise paragraph (b)(4)(ii)(A).

The revisions and addition are set out below:

§ 219.33 Permissible methods of taking.

* * * * *

(b) * * *
(1) * * *
(i) * * *
(H) Pygmy or dwarf sperm whale (*Kogia spp.*)—24;

* * * * *

(K) Bottlenose dolphin (*Tursiops truncatus*)—1,294;

* * * * *

(Z) Northern bottlenose whale (*Hyperoodon ampullatus*)—10;

* * * * *

(ii) * * *
(A) Gray seal (*Halichoerus grypus*)—8,010;

* * * * *

(C) Harbor seal (*Phoca vitulina*)—21,678.

* * * * *

(2) * * *
(ii) * * *
(A) Gray seal—5;
(B) Harbor seal—5;

* * * * *

(4) * * *
(ii) * * *
(A) Gray seal—5;

* * * * *

Dated: July 29, 2015.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2015–19310 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 150227192–5192–01]

RIN 0648–BE90

Magnuson-Stevens Act Provisions; Refinance of the Pacific Coast Groundfish Fishing Capacity Reduction Loan; Pacific Coast Groundfish Federal Limited-Entry Trawl, Washington Coastal Dungeness Crab and California Pink Shrimp Fisheries; Refinanced Reduction Loan Terms and Industry Fee System

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing regulations that would refinance the 30-year voluntary fishing capacity reduction loan implemented in 2004 into three separate loans, if approved through referenda, in the Pacific Coast Groundfish federal limited-entry trawl, Washington coastal Dungeness crab, and California pink shrimp fisheries (collectively known hereafter as the refinanced reduction fisheries). The refinanced loan, of up to $30 million, would establish a new industry fee system for future landings of the refinanced reduction fisheries. The 2015 National Defense Authorization Act authorized NMFS to refinance the loan and modify certain terms to extend the 30 year term to maturity to 45 years, change the interest rate to the current Treasury interest rate and, reduce the maximum repayment fee from five to three percent of ex-vessel value. If finalized, and with the receipt of an appropriation, NMFS proposes to refinance the single existing debt, which has been divided into seven loan subamounts, into three separate loans. NMFS would conduct three referenda as soon as practicable after publication of the final rule in each of the Pacific Coast Groundfish federal limited-entry trawl, Washington coastal Dungeness crab and California pink shrimp fisheries. If a referendum in one, two, or all three of the fisheries is successful, that fishery's current loan would be repaid in full and new loans in the amount of the principal and interest balance as of the date of funding would be issued per the terms in the 2015 National Defense Authorization Act. These terms include a new 45-year term to maturity, interest charged at a current Treasury interest rate, and a maximum repayment fee of 3 percent of ex-vessel value.

DATES: NMFS must receive comments by September 8, 2015.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2015–0033, by either of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0033,*

2. Click the ''Comment Now!'' icon, complete the required fields

3. Enter or attach your comments.

—OR—

Mail: Submit written comments to Paul Marx, Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282.

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 NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Copies of the Regulatory Impact Review and Initial Regulatory Flexibility Analysis (RIR/IFRA) prepared for this action are available from NMFS upon request (see **FOR FURTHER INFORMATION CONTACT**). NMFS has preliminarily determined that this action qualifies for a Categorical Exclusion from NEPA.

FOR FURTHER INFORMATION CONTACT: Paul Marx, Chief, Financial Services Division, National Marine Fisheries Service, (301) 427–8771.

SUPPLEMENTARY INFORMATION:

I. Background

On February 20, 2003, Section 212 of Division B, Title II, of Public Law 108–7 (section 212) authorized a fishing capacity reduction program (program) for permits endorsed in seven fisheries: the limited-entry trawl fishery under the Pacific Coast Groundfish Fishery Management Plan, excluding those registered to whiting catcher-processors, and corollary fisheries in California, Oregon, and Washington for coastal Dungeness crab and pink shrimp. On May 28, 2003, NMFS published a proposed notice outlining the terms and conditions of the buyback program. Bid offers totaling $46 million were accepted for 91 vessels, encompassing 239 fishing permits and licenses. Ten million dollars was appropriated by Congress toward funding the buyback program, the balance was funded through a loan of $36 million. The combined amount was issued to tender payment to the accepted bidders. NMFS published a final notice on July 18, 2003. A successful referendum in October 2003 accepted the fee system. On November 16, 2004, NMFS published a proposed rule to implement the industry fee system to repay the loan portion of the buyback program. On April 8, 2005, NMFS published a revised proposed rule. NMFS collected comments and on July 13, 2005, NMFS responded to the comments and published a final rule establishing the industry fee system rule. As a result, seven loan subamounts were created for each of the permitted fisheries. NMFS began collecting buyback fee payments to repay the debt obligation of $36 million at an interest rate of 6.97 percent over a term of 30 years on September 8, 2005. Four of the seven fisheries have repaid their loan subamounts in full.

Congress enacted Public Law 113–291 Section 3095 (2015 National Defense Authorization Act), which was signed into law on December 19, 2014, to refinance the existing debt obligation funding the fishing capacity reduction program for the Pacific Coast Groundfish fishery implemented under Section 212.

II. Refinance Cost

The amount paid to refinance the existing Pacific Coast Groundfish loan may not exceed $30 million and will not exceed the amount of the outstanding debt for the Pacific Coast Groundfish federal limited-entry trawl, Washington coastal Dungeness crab, and California pink shrimp fishery loan subamounts which are, as of March 30, 2015, $26M, $0.3M, and $0.1M, respectively. The Office of Management and Budget has determined that a $10 million appropriation will be necessary to fund the reduced income to the U.S. Treasury over the next 10 years due to the reduction in the annual loan repayment amount under the refinanced terms. A $300,000 appropriation will also be necessary to provide the subsidy amount for the new loan, pursuant to the Federal Credit Reform Act. NMFS will not implement the refinance unless these necessary funds are appropriated. A final rule would not be effective until appropriations are approved.

III. Program Overview

NMFS is implementing this refinancing process pursuant to 2015 National Defense Authorization Act. A refinancing would reduce the maximum buyback fee payment amount from 5 percent of ex-vessel value to 3 percent of ex-vessel value. The current loan term of 30 years is 10 years into repayment. Under the refinancing terms, a new loan with a 45-year term would be initiated, effectively providing the original reduction program a 55-year repayment term for permit holders in these fisheries. The interest rate on the refinanced loan will be the rate that the Secretary pays to the Treasury to borrow

the funds, which may be lower than the current interest rate of 6.97 percent on the original loan.

IV. Referendum

As part of the refinancing process, NMFS will conduct referenda to approve or reject the refinancing of the current capacity reduction loan as soon as practicable after publication of the final rule. The original loan authorizing legislation required that NMFS conduct a referendum to approve repaying the loan. The 2015 National Defense Authorization Act authorized refinancing of that reduction loan. NMFS has determined that to implement the 2015 Act properly, a referendum will also be conducted to ensure that a majority of permit holders consent to the new terms. The referendum process will take 30 days and will not significantly increase the time to complete the refinancing process. Even if another method to determine permit holder support for the refinancing were permitted by statute, the time to develop that method would likely take longer than conducting a referendum.

NMFS will conduct three separate referenda to allow participants in each fishery to indicate their interest in refinancing the loan subamount for their particular fishery. This is to ensure that if one fishery does not approve a refinancing, it does not prevent participants in other fisheries from approving a refinancing in their own fishery.

Permit holders will have 30 days from the date of notice to cast their vote. A successful referendum means permit holders in that particular fishery authorize the fee required to repay the refinanced reduction loan.

NMFS will mail referendum information, voting instructions, and a referendum ballot to the permit owner of each groundfish permit in the Pacific Coast Groundfish Federal limited-entry trawl fishery and to the person who is the holder of record of each state-issued California pink shrimp or Washington coastal Dungeness crab permit (collectively, eligible voters). NMFS will include the following information about the refinancing:

- The program's cost,
- The three reduction loan subamounts,
- Current terms and conditions of the capacity reduction loan, and
- The changes that will occur should the referendum be successful.

NMFS will mail eligible voters a separate referendum ballot for each groundfish permit he/she owns and each California pink shrimp or Washington coastal Dungeness crab permit he/she holds. In other words, eligible voters will have one ballot for every such permit they hold. Permit holders will only vote for the refinancing of the loan subamount(s) for fisheries in which they hold permits.

Immediately after the deadline for NMFS' receipt of ballots, NMFS will tally votes for each fishery separately.

For a referendum to be successful, a majority of the total eligible permit holders in that fishery must vote in favor of the refinancing. NMFS will mail each eligible voter a notice about his/her respective referendum's outcome.

If a referendum is unsuccessful, the refinancing fee for that fishery will not be approved and the fee system rule at § 600.1102 will remain in effect for that fishery.

If a referendum for a fishery loan is successful, NMFS will repay the original fishery's loan subamount in full and issue a new loan per the terms in this rule. NMFS will rescind the loan repayment terms at § 600.1102 and those terms will be superseded with the fee system in this rule reflecting the new loan's refinanced terms for that fishery.

V. Refinanced Loan

Any refinanced loan will mature 45 years from the date of the issuance of the new loan. The principal amount will be the current balance of principal and interest on the fishery's loan subamount as of the date of funding of the new refinanced loan. Fishery finance program loans, including buyback loans, have historically been issued at the Treasury interest rate plus two percentage points. The refinancing terms in the 2015 National Defense Authorization Act did not include additional percentage points above the Treasury interest rate. On the date of issuance of any new loan, NMFS will determine the reduction loan's interest rate in accordance with the 2015 National Defense Authorization Act, Sec. 3095, and the framework regulations at § 600.1012 to the extent they do not conflict with Section 3095.

VI. Fee Payment Rate

NMFS will establish the fee rates necessary to repay refinanced loan amounts applicable to each fishery for which there is a successful referendum. The amount of the fee will be calculated by NMFS on an annual basis as the principal and interest payment amount necessary to amortize the loan over a 45-year term, not to exceed 3 percent of ex-vessel value. The fee shall be expressed as a percentage of the ex-vessel value of all fish harvested and landed in the respective fisheries. In the event that payments are insufficient to repay the refinanced loan within the 45-year term, NMFS will extend the term of the repayment until the refinanced loan is paid in full.

To verify that the fees collected do not exceed three percent of the fishery revenues, NMFS will compare the annual total of principal and interest due with the latest available annual revenues in the fisheries. In the event that any of the components necessary to calculate the next year's fee are not available, or postponed, the fee will remain at the previous year's amount until such time as new calculations are made and communicated to the post-refinancing fishery participants.

If a refinanced fishery does not open during a year, interest will continue to accrue on the principal balance even though no fee revenue will be generated. If this happens, when the fishery opens, NMFS shall increase the fee to the maximum three percent, apply all subsequent fee revenue first to the payment of accrued interest, and continue the maximum fee rates until the principal and interest payments become current. Once all principal and interest payments are current, NMFS will make a determination about adjusting the fee rate.

VII. Fee Payment and Collection

Fish sellers will pay the fees and fish buyers will collect, deposit, disburse, record, and report on the fees in accordance with the applicable portions of the framework regulations (§ 600.1014), the 2015 National Defense Authorization Act, Section 3095, § 600.1102, and this final rule. This process would not change from the current fishing capacity reduction loan program.

NMFS entered into agreements with California, Oregon, and Washington to provide necessary information on fish tickets, buyers, and harvesters to collect the fees that repay the current reduction loan, and these agreements will not change as a result of any refinancing. The three states will be notified of this proposed rule, a final rule and, if there is a successful referendum, that a refinancing has occurred.

VIII. Enforcement/Prohibitions and Penalties

All requirements and penalties set forth in the provisions of § 600.1013 (Fee payment and collection), § 600.1014 (Fee collection deposits, disbursements, records, and reports), § 600.1015 (Late charges), and § 600.1017 (Prohibitions and penalties) shall apply to any dealer who purchases fish in the refinanced reduction

fisheries, and to any fee collection under this section, to the extent they do not conflict with this section or with subpart M of this part.

The provisions and requirements of § 600.1016 (Enforcement) shall also apply to fish sellers and fish buyers subject to this fishery.

Additionally, fish buyers are prohibited from buying fish from reduction fishery participants who do not pay the required landing fee and prohibits reduction fishery participants from selling fish to buyers who do not collect the fees.

Classification

The Assistant Administrator for Fisheries, NMFS, determined that this action is consistent with Public Law 113–291, Public Law 107–206, Public Law 108–7, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws. NMFS has preliminarily determined that the proposed action would qualify as a Categorical Exclusion under the National Environmental Policy Act. The Office of Management and Budget has determined that this proposed rule is not significant under Executive Order 12866.

RIR/IRFA

NMFS has prepared a Regulatory Impact Review (RIR) and an Initial Regulatory Flexibility Analysis (IRFA) for this action (see **ADDRESSES**). NMFS believes any Federalism implications arising from this notice are highly unlikely. Consultations with the States of Washington, Oregon, and California were previously conducted regarding the Pacific Coast Groundfish Fishing Capacity Reduction Program and those states will have additional opportunity to comment on this proposed rule. In 2014, NMFS implemented the cost recovery program to recover the associated costs with management, data collection and enforcement of the Pacific Coast Groundfish trawl rationalization program, which added another cost to harvesters in this fishery of up to 3 percent of value of fish sold. This additional fee has reduced their income so the request to refinance is in part to obtain fee relief for harvesters in that fishery.

Impact to Small Businesses

The Small Business Administration (SBA) has defined small entities as all fish harvesting businesses that are independently owned and operated, not dominant in their field of operation, and with annual receipts of less than $20.5 million for finfish harvesters or $7.5 million for shellfish harvesters. In addition, processors with 500 or fewer employees for related industries involved in canned and cured fish and seafood, or preparing fresh fish and seafood, are also considered small entities. According to the SBA's definition of a small entity, most of the vessels would be considered small entities. However, there are no disproportionate impacts between large and small entities. This proposed action would not result in changes to allocation percentages and would not change the number of vessels participating in the fishery. As such, net effects on small businesses of this action are expected to be minimal relative to the status quo.

Paperwork Reduction Act (PRA)

This document contains collection of information requirements subject to the Paperwork Reduction Act (PRA). The Office of Management and Budget (OMB) has approved these information collections under OMB control number 0648–0376. NMFS estimates that the public reporting burden for these requirements will average 4 hours for voting in a referendum. Persons affected by this action would also be subject to other collection-of-information requirements referred to in this action and also approved under 0648–0376. These requirements and their associated response times are 10 minutes for completing and filing a fish ticket, 2 hours for submitting a monthly fish buyer report, and 4 hours for making a fish seller/buyer report when one party fails to either pay or collect the fee. These response estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**). Notwithstanding any other provision of law, no person is required to respond to, and no person is subject to a penalty for failure to comply with, an information collection subject to the requirements of the PRA unless that information collection displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing capacity reduction, Fishing permits, Fishing vessels, Intergovernmental relations, Loan programs-business, Reporting and recordkeeping requirements.

Dated: July 31, 2015

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 600, subpart M, is proposed to be amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

Subpart M—Specific Fishery or Program Fishing Capacity Reduction Regulations

■ 1. The authority citation for 50 CFR part 600, subpart M, is revised to read as follows:

Authority: 5 U.S.C. 561, 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 1861a(b) through (e), section 212 of Pub. L. 107–206, section 501 of Pub. L. 108–7, section 3095 Pub. L. 113–291, and 46 U.S.C. 53701 *et seq.*

■ 2. Section 600.1109 is added to subpart M to read as follows:

§ 600.1109 Refinance of the Pacific Coast Groundfish Fishing Capacity Reduction Program, including fee payment and collection system.

(a) *Purpose.* Upon successful referenda, this section implements the refinancing of three of the fishing capacity reduction loan subamounts for the Pacific Coast Groundfish Fishing Capacity Reduction Program enacted by Section 212 of Public Law 107–206 and Section 501 of Public Law 108–7, as amended by Section 3095 of Public Law 113–291 (the Act). The intent of the program is to refinance, through an industry-financed loan, the current debt obligation for the reduction of permits previously purchased in the Pacific Coast Groundfish Buyback Program. Fishery participants will finance this program through federal loans that will be repaid over 45 years through a fee collection system. The intent of the fee collection system is to establish the permit holders' obligation to repay the Refinanced Loans' principal and accrued interest over the repayment term, and to ensure repayment of the new loans.

(b) *Definitions.* Unless otherwise defined in this section, the terms defined in §§ 600.1000 and 600.1102 expressly apply to this section. The following terms have the following meanings for the purpose of this section:

Refinanced loans means the loans used to refinance the original reduction loan under Section 3095 of Public Law 113–291.

Refinancing plan means the implementation of the changes in terms and conditions authorized by Section 3095 of Public Law 113–291.

Refinanced reduction fisheries means the Pacific Coast Groundfish federal limited-entry trawl fishery (excluding those permits which are endorsed for catch-processors), Washington coastal Dungeness crab and California pink shrimp fisheries.

(c) *Refinanced fishing capacity reduction loan.* In the event of successful referenda, the fishing capacity reduction loan implemented in 2004 in the Pacific Coast Groundfish federal limited-entry trawl, Washington coastal Dungeness crab, or California pink shrimp fisheries would be refinanced into one, two, or three loans modifying certain terms to extend the 30 year term to maturity to 45 years, change the interest rate to the current Treasury interest rate, and reduce the maximum repayment fee from five to three percent of ex-vessel value.

(1) *Referenda.* Subsequent to the publication of a final rule resulting from this proposed rule, NMFS will conduct three separate referenda to allow each participant in each fishery to vote his/her interest in his/her particular fishery. This is to ensure that if one fishery does not approve the refinancing of its loan subamount, it does not prevent participants in the other fisheries from approving the refinancing in their respective fisheries. NMFS shall publish a notice in the **Federal Register** requesting votes by permit holders on whether to accept or reject the refinancing plan. The notice shall state the starting and ending dates and times of the voting period. The end date shall be thirty (30) days from the start date.

(i) Such notice shall state the name and address of record of each eligible voter, as well as the basis for having determined the eligibility of those voters. This shall constitute notice and opportunity to respond about adding eligible voters, deleting ineligible voters, and/or correcting any voter's name and address of record. If, in NMFS' discretion, the comments received in response to such notice warrants it, or for other good cause, NMFS may modify such list by publishing another notice in the **Federal Register**. NMFS shall issue ballots to eligible voters, tally votes, and notify voters whether the referendum was successful or unsuccessful in approving the Refinancing Plan consistent with the provisions of § 600.1010.

(ii) A successful referendum by a majority of the permit holders in their respective fishery shall bind all parties and complete the refinancing. NMFS shall publish a notice in the **Federal Register** advising the public that the referendum was successful. Thereafter the Refinancing Plan shall be implemented.

(iii) The provisions of §§ 600.1010 and 600.1017(a)(1)–(4) shall apply to any referendum of a Refinancing Loan conducted under this section to the extent that they are not inconsistent with and do not conflict with this section or with subpart M of this part.

(2) *Refinanced loan repayment.* Permit holders operating in the refinanced reduction fishery shall be obligated to pay the fee in accordance with this section. In the event that payments made are insufficient to pay a Refinanced Loan within the 45-year term, NMFS shall extend the term of the repayment until the Refinanced Loan is paid in full.

(i) *Refinanced loan amount.* The amount paid to refinance the existing Pacific Coast Groundfish loan may not exceed $30 million and will not exceed the amount of the outstanding debt for the Pacific Coast Groundfish federal limited-entry trawl, Washington coastal Dungeness crab, and California pink shrimp fishery loan subamounts.

(ii) *Repayment term.* As authorized by the Act, a Refinanced Loan shall be amortized over a forty-five (45) year term. A final Refinanced Loan periodic payment amount will be determined by NMFS' analysis of the ability of the post-reduction fishery to service debt, up to a maximum of 3 percent of ex-vessel value. The provisions of §§ 600.1012–600.1017 shall apply to any reduction loan, fee payment and collection under this section to the extent they do not conflict with this section or with subpart M of this part.

(iii) *Interest.* NMFS will determine a Reduction Loan's initial interest rate when NMFS borrows from the U.S. Treasury the funds with which to refinance the reduction loan. Interest will begin accruing on a Refinanced Loan from the date on which NMFS refinances the reduction loan. The initial interest rate will change to a final interest rate at the end of the Federal fiscal year in which NMFS borrows the funds from the U.S. Treasury. The final interest rate will be a weighted average, throughout that fiscal year, of the U.S. Treasury's cost of borrowing equivalent maturity funds. The final interest rate will be fixed and will not vary over the remainder of the refinanced reduction loan's 45-year term. Refinanced Loans will be subject to a level debt amortization. There is no prepayment penalty.

(iv) *Fees.* Fees will be collected, deposited, disbursed, and recorded in accordance with § 600.1109(d).

(d) *Fee system.* Post-refinancing permit holders operating in the fishery shall be obligated to pay the fee in accordance with the following: The amount of such fee will be calculated by NMFS on an annual basis as the principal and interest payment amount necessary to amortize a loan over a 45-year term, not to exceed 3 percent of ex-vessel value. The fee shall be expressed as a percentage of the ex-vessel value of all fee fish harvested and landed in the respective fisheries. In the event that payments made under the Refinanced Reduction Plan are insufficient to repay a Refinanced Loan within the 45-year term, NMFS shall extend the term of the repayment until the Refinanced Loan is paid in full.

(1) *Collection.* The buyer who first purchases the fee fish landed in a fishery shall be responsible for collecting and submitting the repayment fees to NMFS monthly. The fees shall be submitted to NMFS no later than fourteen (14) calendar days following the end of each calendar month. Fees must be assessed and collected on all fee fish harvested in the fisheries.

(2) *Fee amount.* Although the fee could be up to three percent of the ex-vessel price of all post-refinancing landings, the fee will be less than three percent if NMFS projects that a lesser rate can amortize the Refinanced Loan over the 45-year term. To verify that the fees collected do not exceed 3 percent of the fishery revenues, NMFS will compare the annual total of principal and interest due with the latest available annual revenues in the fisheries to ensure that it is equal to or less than three percent of the total ex-vessel production revenues. In the event that any of the components necessary to calculate the next year's fee are not available, or postponed, the fee will remain at the previous year's amount until such time as new calculations are made and communicated to the post-refinancing fishery participants.

(i) If a refinanced fishery does not open during a year, interest will continue to accrue on the principal balance even though no fee revenue will be generated. If this happens, when the fishery opens, NMFS shall increase the fee to the maximum three percent, apply all subsequent fee revenue first to the payment of accrued interest, and continue the maximum fee rates until the principal and interest payments become current. Once all principal and interest payments are current, NMFS will make a determination about adjusting the fee rate.

(ii) [Reserved]

(3) *Recordkeeping and reporting.* The dealer who first purchases the fee fish landed in the fishery shall be responsible for compliance with the

applicable recordkeeping and reporting requirements.

(4) All requirements and penalties set forth in the provisions of § 600.1013 (Fee payment and collection), § 600.1014 (Fee collection deposits, disbursements, records, and reports), § 600.1015 (Late charges), and § 600.1017 (Prohibitions and penalties) shall apply to any dealer who purchases fish in the refinanced reduction fisheries, and to any fee collection under this section, to the extent they do not conflict with this section or with subpart M of this part.

(e) *Enforcement for failure to pay fees.* The provisions and requirements of § 600.1016 (Enforcement) shall also apply to fish sellers and fish buyers subject to this fishery.

(f) *Prohibitions and penalties.* The provisions and requirements of § 600.1017 shall also apply to fish sellers and fish buyers subject to this fishery. In addition, fish buyers are prohibited from purchasing fish from fish sellers who do not pay the required landing fees. Fish sellers are prohibited from selling to fish buyers who do not pay the required landing fees.

(g) The provisions of § 600.1102 shall apply to any fee collection as implemented by the Refinancing Plan to the extent that they do not conflict with this section or with subpart M of this part.

[FR Doc. 2015–19261 Filed 8–5–15; 8:45 am]

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Notices

Federal Register

Vol. 80, No. 151

Thursday, August 6, 2015

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

Agricultural Marketing Service

[Doc. No. AMS–FV–15–0019; FV15–944/980/999–2]

International Trade Data System Test Concerning the Electronic Submission Through the Automated Commercial Environment of Notification of Importation of Fruits, Vegetables, and Specialty Crops Required by the Agricultural Marketing Service Using the Partner Government Agency Message Set

AGENCY: Agricultural Marketing Service, USDA.

ACTION: General notice and request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) announces a pilot test of the International Trade Data System (ITDS) involving the electronic submission of data related to importations of fruits, vegetables, and specialty crops regulated by AMS, using the Partner Government Agency (PGA) Message Set component of the Automated Commercial Environment (ACE). The submission of this information is required under § 608e (section 8e) of the Agricultural Marketing Agreement Act of 1937. The pilot program will test the electronic transmission of AMS data through the U.S. Customs and Border Protection's (CBP's) Automated Commercial Environment (ACE) program known as the Partner Government Agency (PGA) Message Set. This data will be transmitted for review by AMS' Compliance and Enforcement Management System (CEMS). CBP's PGA Message Set enables importers and brokers to electronically transmit data required by AMS directly to ACE. This electronic process will replace the paper-based process currently used. This notice also invites importers and brokers who are importing commodities subject to section 8e regulations to request participation in this AMS pilot and invites public comment on any aspects of the pilot.

DATES: The test will commence no earlier than July 13, 2015, and will continue until concluded by publication of a notice in the **Federal Register** ending the test. Any party seeking to participate in the AMS PGA Message Set test should contact their CBP client representative. Interested parties without an assigned CBP client representative should submit an email to Richard Lower at *Richard.Lower@ams.usda.gov* with the subject heading ''AMS PGA Message Set Test FRN-Request to Participate.'' Interested parties may submit comments about the pilot at any time as explained in the **ADDRESSES** section below.

ADDRESSES: Interested parties without an assigned CBP client representative should submit an email to Richard Lower at *Richard.Lower@ams.usda.gov* with the subject heading ''AMS PGA Message Set Test FRN-Request to Participate.''

Comments about the pilot should be made to either the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or on the Internet at *http://www.regulations.gov.* All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Richard Lower, Senior Compliance and Enforcement Specialist, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938; Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

International Trade Data System (ITDS)

This test is in furtherance of the ITDS, which is statutorily authorized by section 405 of the Security and Accountability for Every (SAFE) Port Act of 2006, Public Law 109–347. The purpose of ITDS, as defined by section 4 of the SAFE Port Act of 2006, is to eliminate redundant information filing requirements, efficiently regulate the flow of commerce, and effectively enforce laws and regulations relating to international trade, by establishing a single portal system, operated by CBP, for the collection and distribution of standard electronic import and export data required by all participating Federal agencies.

The pilot program announced in this notice also supports Executive Order 13659, *Streamlining the Export/Import Process for America's Businesses,* signed by President Obama on February 19, 2014, which is a key White House economic initiative that has been under development for over ten years and is mandated for completion by December 31, 2016. Under ITDS, importers and exporters will file commodity and transportation data through an electronic ''single window,'' instead of completing multiple paper-based forms to report the same information to different government agencies. ITDS will greatly reduce the burden on America's international trade community while still providing information necessary to ensure compliance with U.S. law.

By the end of 2016, the ITDS ''single window'' will be presented to the import and export trade through CBP's Automated Commercial Environment (ACE). ACE is an automated and electronic system for processing commercial trade data that is intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while ensuring compliance with U.S. laws and regulations and reducing costs for CBP and all of its communities of interest. ACE will be the primary system through which the global trade community will file information about imports and exports so that admissibility into the United States may be determined and government agencies, including AMS, may ensure compliance.

Partner Government Agency Message Set

The PGA Message Set is the data needed to satisfy the PGA reporting requirements. ACE enables the message set by acting as the ''single window'' for the submission of trade-related data required by the PGAs only once to CBP. This data must be submitted prior to the arrival of the merchandise on the conveyance transporting the cargo to the United States as part of an ACE Entry/Cargo Release or Entry Summary. The data will be validated and made available to the relevant PGAs involved in import, export, and transportation-related decision making. The data will be used to fulfill merchandise entry and entry summary requirements and will allow for earlier release decisions and more certainty for the importer in determining the logistics of cargo delivery. Also, by virtue of being electronic, the PGA Message Set will eliminate the necessity for the submission and subsequent handling of paper documents. All PGA Message Set participants are required to use a software program that has completed ACE certification testing for the PGA Message Set.

Further details about the AMS PGA Message Set being tested in this pilot program are provided below in the PGA Message Set/ACE Filing section.

Compliance and Enforcement Management System (CEMS)

In support of ITDS and the use of CBP's PGA Message Sets, AMS' Marketing Order and Agreement Division (MOAD) is developing a new automated system called the Compliance and Enforcement Management System (CEMS) that will replace and automate many of the systems MOAD has used in the past to ensure compliance with import and export regulations. CEMS will electronically link with the CBP ACE platform to create a ''pipeline'' through which data will be transmitted between CBP and MOAD. In this pilot, ACE will transmit PGA Message Set data to AMS via CEMS, which will streamline processes by eliminating the use of existing paper-based systems and expediting the conditional release of shipments for the purpose of inspection, prior to final release into the commerce of the United States.

Inspection Requirements for Imported Commodities

Section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (AMAA), provides that whenever certain commodities are regulated under Federal marketing orders, imports of those commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, and/or maturity requirements as those in effect for the domestically produced commodities. The AMAA also authorizes AMS to perform inspections on those imported commodities and certify whether these requirements have been met. Parts 944, 980, and 999 of title 7 of the Code of Federal Regulations contain the grade, size, quality, and/or maturity requirements for fruits, vegetables, and specialty crops that are subject to section 8e regulations.

Prior to the entry of imported commodities that are subject to section 8e regulations, as listed on CBP Directive No. 3250–007B, importers are required to notify AMS inspection service personnel at the port of entry of the arrival of said commodities.

Current Paper-based Notification of Entry (''Stamp and Fax'')

As noted above, an importer of a commodity listed on CBP Directive No. 3250–007B must now present AMS inspection service personnel who are stationed at the port of entry with a paper form that notifies AMS of the incoming shipment and to request conditional release of the shipment from the port for inspection at another location. The paper form presented to AMS may be a CBP Form 3461 (Entry/Immediate Release), CBP Form 7501 (Entry Summary), or an invoice for the shipment. This paper-based process is commonly known in the trade, at CBP, and at AMS as the ''stamp and fax'' procedure.

Upon receipt of the paper form, AMS personnel determine whether an inspection is required (there may be situations when an import commodity is listed on CBP Directive 3250–007B, but it may be exempt from section 8e regulations and inspection; for example, some varieties of a commodity are exempt, or the regulations are not in effect during certain times of the year).

If inspection is not required, AMS personnel affix a stamp to the paper form indicating that the product is not subject to section 8e regulations. When inspection is required, AMS personnel affix a different stamp to the paper form, indicating the product is subject to section 8e regulations and will require AMS inspection at a location other than the port of entry, shortly after CBP conditionally releases the shipment. AMS returns the form to the importer via fax, and the importer presents the stamped form to CBP.

Once the shipment arrives at the inspection destination, the importer must contact AMS to arrange for inspection of the product, which must be certified as meeting section 8e requirements before final release into the commerce of the United States.

PGA Message Set/ACE Filing

Under ITDS, the paper-based ''stamp and fax'' procedure described above is being replaced by an electronic process that will enable importers to transmit data required by AMS to CBP's ACE system using a PGA Message Set. This PGA Message Set contains data elements that correspond to information on AMS' form FV–357 (Notification of Entry, 8e Products and Fresh Fruits, Vegetables, Nuts and Specialty Crops). The use of the PGA Message Set will enable importers and brokers to enter information required by AMS directly into ACE, and ACE's integration with MOAD's CEMS will simplify and expedite the process of determining whether regulated products are admissible.

ACE will analyze the PGA Message Set data entered by an importer or broker to determine if inspection of a shipment is required and will transmit the data to MOAD's CEMS. For those shipments that will require inspection, CEMS will automatically provide shipment information via email to the appropriate AMS inspection office. The data in ACE will also enable CBP to make the determination that a shipment may be conditionally released for inspection.

Once a shipment has arrived at the location where inspection will occur, the importer will contact the AMS inspection office to finalize arrangements for inspection.

Pilot Program Details

AMS will initially conduct the pilot at certain ports of entry. Participants should consult the following Web site to determine which ports are operational for the test and the date that they become operational: *http://www.cbp.gov/document/guidance/list-aceitds-pga-message-set-pilot-ports.*

This initial pilot may also be expanded to include additional AMS PGA Message Sets, some of which have Document Imaging System (DIS) components. DIS allows participants to transmit required PGA data to ACE through the use of electronic copies of AMS forms. For information regarding the use of DIS and a list of PGA forms and documents that may be transmitted to ACE using DIS, please see *http://www.cbp.gov/trade/ace/features.*

Importers and brokers who participate in this pilot will transmit PGA Message Set data to ACE using the electronic data interchange known as the Automated Broker Interface, or ABI. The AMS data is required to determine whether inspection of the shipment is required, to send an email notification to AMS inspection offices about those shipments that will require inspection, and to provide CBP with information to determine whether to conditionally release the merchandise. The transmission of this PGA Message Set data will be done in lieu of importers and brokers filing CBP Forms 3461 and 7501 or a shipment invoice to AMS inspection service personnel at the port of entry prior to the arrival of shipments. AMS anticipates that this pilot program will help prepare for a successful transition from the paper-based ''stamp and fax'' process to the electronic entry and transmission of data to ACE/CEMS.

The data elements in the PGA Message Set are generally those found on the AMS Specialty Crops Inspection (SCI) Division form FV–357 (Notification of Entry, 8e Products and Fresh Fruits, Vegetables, Nuts and Specialty Crops). These data elements are set forth in the Customs and Trade Automated Interface Requirements (CATAIR) guidelines for AMS, which can be found at the following Internet link: *http://www.cbp.gov/sites/default/files/documents/AMS%20CATAIR%20Guidelines%20MARCH%202015.pdf.*

Pilot Program Participant Responsibilities

Importers and brokers who participate in this PGA Message Set pilot will be required to:

- File, when applicable, data elements contained in AMS form FV–357 for fruits, vegetables, and specialty crops listed in CBP Directive No. 3250–0078 and regulated under section 8e of the AMAA. All modes of transportation will be included in this pilot;
- Include PGA Message Set import filings only as part of an ACE Entry Summary certified for cargo release;
- Use a software program that has completed ACE certification testing for the PGA Message Set;
- Transmit import filings to CBP via ACE in response to a request for documentation or in response to a request for release information for certified ACE Entry Summaries; and
- Only transmit information to CBP that has been requested by CBP or AMS.

Waiver of Requirements and Regulation Under the Pilot Program

For purposes of this pilot program, requirements under CBP Directive No. 3250–007B, Section 5.2 (*''Stamp and Fax procedure''*), will be waived for participants only insofar as eliminating the requirement to present paper CBP Forms 3461 or 7501 or invoices and instead requiring the electronic submission of data elements generally contained in AMS form FV–357.

This notice does not waive any other requirements under CBP Directive No. 3250–007B nor does it waive any requirements under section 8e of the AMAA (7 U.S.C. 601–674, § 608e) or under parts 944, 980, and 999 of title 7 of the Code of Federal Regulations (7 CFR 944, 7 CFR 980, and 7 CFR 999), which contain the section 8e import regulations for fruits, vegetables, and specialty crops, respectively.

Misconduct Under the Test

A test participant may be subject to fines, civil penalties, and/or administrative sanctions as provided under the AMAA and/or may be removed from participation in the pilot for failing to follow the terms and conditions of this pilot or for failing to abide by applicable laws and regulations that have not been waived by this notice.

Pilot Program Participant Eligibility and Application

AMS is initiating the pilot at certain ports as indicated on the following Web site: *http://www.cbp.gov/document/guidance/list-aceitds-pga-message-set-pilot-ports.* AMS may expand the pilot to include other U.S. ports and, therefore, invites importers and brokers at any U.S. port to request to participate in the pilot. To be eligible to apply for and participate in the pilot, an applicant must:

- Be a self-filing importer or broker who has the ability to file ACE Entry Summaries certified for cargo release; and
- File entries for AMS commodities that are the subject of this pilot.

Any party seeking to participate in the AMS PGA Message Set test should contact their CBP client representative. Interested parties without an assigned CBP client representative should submit an email to Richard Lower at *Richard.Lower@ams.usda.gov* with the subject heading ''AMS PGA Message Set Test FRN—Request to Participate.''

AMS will accept and consider requests to participate in the pilot starting on the date of this publication and will accept requests to participate for the duration of the test. AMS will notify the selected parties by email of their selection and the starting date of their participation (selected participants may have different starting dates). Any applicant who provides incomplete information or otherwise does not meet participation requirements will be notified by email and given an opportunity to resubmit a request to participate.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the PGA Message Set data that will be collected in this pilot has been previously submitted by AMS for OMB approval as a new information collection under OMB No. 0581–NEW. The new information collection (FV–NEW, ''Notification of Entry, 8e Products and Fresh Fruits, Vegetables, Nuts and Specialty Crops'') contains data elements that will be collected by CBP in ACE through the use of the PGA Message Set being tested in this pilot. The use of the PGA Message Set will enable importers and brokers to enter information required by AMS directly into ACE, and ACE's integration with MOAD's CEMS will simplify and expedite the process of conditionally releasing shipments for inspection. Upon approval of this new information collection by OMB, a request will be made to merge the new form with the forms currently approved for use under OMB No. 0581–0125, ''Regulations Governing Inspection Certification of Fresh and Processed Fruits, Vegetables, and Other Products.''

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

Dated:

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2015–19326 Filed 8–5–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 31, 2015.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments

regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and other forms of information technology.

Comments regarding this information collection received by September 8, 2015 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725—17th Street NW., Washington, DC, 20503. Commentors are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Community Forest and Open Space Conservation Program.

OMB Control Number: 0596–0227.

Summary of Collection: The Forest Service (FS) is authorized to implement the Community Forest and Open Space Program (CFP) under Section 8003 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234; 122 Stat. 2043), which amends the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103d). The purpose of the CFP is to achieve community benefits through grants to local governments, Indian Tribes, and nonprofit organizations to establish community forests by acquiring and protecting private forestlands.

Need and Use of the Information: The applicant will need to provide information as outlined in the rule and the request for proposal. Applicants representing local governments or non-profits will submit CFP applications to their State Foresters. Indian Tribes submit applications directly to the Forest Service. The State Forester or the equivalent Indian Tribe official, per section § 230.03 of the rule, will forward all applications to the FS. The FS would not be able to implement the program effectively or at all if the collection was conducted less frequently or not at all.

Description of Respondents: Non-profit Organizations; State, Local and Tribal Governments.

Number of Respondents: 75.

Frequency of Responses: Annually; Quarterly; Reporting and Record Keeping.

Total Burden Hours: 5,343.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2015–19275 Filed 8–5–15; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Office of Tribal Relations; Council for Native American Farming and Ranching

AGENCY: Office of Tribal Relations, USDA.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a forthcoming meeting of The Council for Native American Farming and Ranching (CNAFR), a public advisory committee of the Office of Tribal Relations (OTR). Notice of the meetings are provided in accordance with section 10(a)(2) of the Federal Advisory Committee Act, as amended, (5 U.S.C. Appendix 2). This will be the fourth meeting of the 2014–2016 CNAFR and will consist of, but not limited to: Hearing public comments, update of USDA programs and activities, and discussion of committee priorities. This meeting will be open to the public.

DATES: The meeting will be held on September 21th, 2014 from 9:30 a.m. to 5:00 p.m. and September 22th, 2014 from 8:30 a.m. to 5 p.m. The meeting will be open to the public on both days. Note that a period for public comment will be held on September 22th, from 1:30 p.m. to 2:30 p.m.

ADDRESSES: The meeting will be held at the U.S. Department of Agriculture, Whitten Building; 1400 Independence Avenue SW.; Washington, DC 20250. The public comment period and CNAFR meeting will take place within Room 107–A, Whitten Building.

Written Comments: Written comments may be submitted to: Dana Richey, Designated Federal Officer, Senior Policy Advisor, Office of the Administrator Farm Service Agency, 1400 Independence Ave. SW., Whitten Bldg., 501–A, Washington, DC 20250; by Fax: (202) 720–1058; or by email: *Dana.Richey@wdc.usda .gov*.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Dana Richey, Senior Policy Advisor, Office of the Administrator, FSA, 1400 Independence Ave. SW., Whitten Bldg., 501–A, Washington, DC 20250; by Fax: (202) 720–1058 or email: *Dana.Richey@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App. 2), USDA established an advisory council for Native American farmers and ranchers. The CNAFR is a discretionary advisory committee established under the authority of the Secretary of Agriculture, in furtherance of the *Keepseagle* v. *Vilsack* settlement agreement that was granted final approval by the District Court for the District of Columbia on April 28, 2011.

The CNAFR will operate under the provisions of the FACA and report to the Secretary of Agriculture. The purpose of the CNAFR is (1) to advise the Secretary of Agriculture on issues related to the participation of Native American farmers and ranchers in USDA farm loan programs; (2) to transmit recommendations concerning any changes to FSA regulations or internal guidance or other measures that would eliminate barriers to program participation for Native American farmers and ranchers; (3) to examine methods of maximizing the number of new farming and ranching opportunities created by USDA farm loan programs through enhanced extension and financial literacy services; (4) to examine methods of encouraging intergovernmental cooperation to mitigate the effects of land tenure and probate issues on the delivery of USDA farm loan programs; (5) to evaluate other methods of creating new farming or ranching opportunities for Native American producers; and (6) to address other related issues as deemed appropriate.

The Secretary of Agriculture selected a diverse group of members representing a broad spectrum of persons interested in providing solutions to the challenges of the aforementioned purposes. Equal opportunity practices were considered in all appointments to the CNAFR in accordance with USDA policies. The

Secretary selected the members in August 2014. Interested persons may present views, orally or in writing, on issues relating to agenda topics before the CNAFR.

Written submissions may be submitted to the contact person on or before September 15th, 2015. Oral presentations from the public will be heard between approximately 1:30 p.m. to 2:30 p.m. on September 22th, 2015. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the issue they wish to present and the names and addresses of proposed participants by September 15th, 2015. All oral presentations will be given three (3) to five (5) minutes depending on the number of participants.

The OTR will also make all agenda topics available to the public via the OTR Web site: *http://www.usda.gov/tribalrelations* no later than 10 business days before the meeting and at the meeting. In addition, the minutes from the meeting will be posted on the OTR Web site. OTR welcomes the attendance of the public at the CNAFR meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Dana Richey, at least 10 business days in advance of the meeting.

Leslie Wheelock,

Director, Office of Tribal Relations.

[FR Doc. 2015–19276 Filed 8–5–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0056]

International Trade Data System Test Concerning the Electronic Submission to the Automated Commercial Environment of the Lacey Act Import Declaration Form Using the Partner Government Agency Message Set

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are announcing that U.S. Customs and Border Protection and the Animal and Plant Health Inspection Service (APHIS) have developed a pilot plan to test and assess the International Trade Data System for the electronic submission of Lacey Act import declaration data. The pilot test will use the APHIS Partner Government Agency (PGA) Message Set and the Automated Broker Interface to transmit, and the Automated Commercial Environment to process, trade data required by the Lacey Act for the importation of plant and paper products. Under this test, PGA Message Set data may be submitted only for Lacey Act import declarations filed at certain ports.

DATES: Comments will be accepted through the duration of the test. The test will commence no earlier than August 6, 2015, and will continue until concluded by publication of a notice ending the test. Participants should consult *http://www.cbp.gov/document/guidance/list-aceitds-pga-message-set-pilot-ports* to determine which ports are operational and the date they become operational.

ADDRESSES: You may submit comments by the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0056.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2015–0056, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.
- *Email:* Send your comment to Ms. Josephine Baiamonte, ACE Business Office, Office of International Trade, U.S. Customs and Border Protection, DHS, 1400 L Street NW., 2nd floor, Washington, DC 20229–1225 at *josephine.baiamonte@cbp.dhs.gov.* In the subject line of the email, please indicate, ''Comment on PGA Message Set Test FRN.''

FOR FURTHER INFORMATION CONTACT: For technical questions related to the Automated Commercial Environment or Automated Broker Interface transmissions, contact your assigned CBP client representative. Interested parties without an assigned client representative should direct their questions to Mr. Steven Zaccaro U.S. Customs and Border Protection, DHS, 1400 L Street NW., 2nd floor, Washington, DC 20229–1225; *steven.j.zaccaro@cbp.dhs.gov.*

For PGA-related questions, contact Ms. Emi Wallace (CBP), U.S. Customs and Border Protection, DHS, 1400 L Street NW., 2nd floor, Washington, DC 20229–1225; *emi.r.wallace@cbp.dhs.gov.*

For Lacey Act-related questions, contact Ms. Parul Patel, Senior Agriculturalist, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737–1231; 301–851–2351; *Parul.R.Patel@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

I. The National Customs Automation Program

The National Customs Automation Program (NCAP) was established in Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993; see 19 U.S.C. 1411). Through NCAP, the initial thrust of customs modernization was on trade compliance and the development of the Automated Commercial Environment (ACE), the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while ensuring compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions.

CBP's modernization efforts are accomplished through phased releases of ACE component functionality designed to replace specific legacy ACS functions or test new automated procedures. Each release will begin with a test and will end with mandatory use of the new ACE feature and, where applicable, the retirement of the corresponding legacy ACS function. Each release builds on previous releases and sets the foundation for subsequent releases.

The Automated Broker Interface (ABI) allows participants to electronically file required import data with CBP and transfers that data into ACE.

International Trade Data System

This test is in furtherance of the International Trade Data System (ITDS), which is authorized by section 405 of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act, Pub. L. 109–347). The purpose of ITDS, as defined by section 405 of the SAFE Port Act, is to eliminate redundant information filing requirements, efficiently regulate the flow of commerce, and effectively enforce laws and regulations relating to international trade, by establishing a single portal system, operated by CBP, for the collection and distribution of standard electronic import and export data

required by all participating Federal agencies.

II. Partner Government Agency Message Set

The Partner Government Agency (PGA) Message Set is the data needed to satisfy the PGA reporting requirements. For purposes of this test, the subject PGA is the Animal and Plant Health Inspection Service (APHIS). ACE enables the message set by acting as the ''single window'' for the submission of trade-related data required by the PGAs only once to CBP. This data must be submitted at any time prior to the arrival of the merchandise on the conveyance transporting the cargo to the United States as part of an ACE Entry/Cargo Release or Entry Summary. The data will be validated and made available to the relevant PGAs involved in import, export, and transportation-related decisionmaking. The data will be used to fulfill merchandise entry and entry summary requirements. Also, by virtue of being electronic, the PGA Message Set will eliminate the necessity for the submission and subsequent handling of paper documents. All PGA Message Set participants are required to use a software program that has completed ACE certification testing for the PGA Message Set.

Test participants may not use the Document Imaging System (DIS) to transmit Lacey Act Plant and Plant Product Declaration (PPQ Form 505 and 505B Supplemental Form) data required by APHIS. For information regarding the use of DIS and for a list of PGA forms and documents which may be transmitted to ACE using DIS, please visit the DIS tab at: *http://www.cbp.gov/trade/ace/features.*

Upon initiation of this test, CBP will accept electronically for ACE processing Lacey Act import declarations filed at specified ports through the ABI. These data elements are those submitted in ACS or with APHIS using the Lacey Act Web Governance System (LAWGS) or via the PPQ 505 Plant and Plant Product Declaration Form and 505B Supplemental Form, which are currently handled as paper communication with APHIS. These data elements are set forth in the supplemental Customs and Trade Automated Interface Requirements (CATAIR) guidelines for APHIS. These technical specifications, including the CATAIR chapters can be found online at *http://www.cbp.gov/trade/ace/catair.*

CBP intends to expand ACE to cover all entry types. CBP will publish a notice in the **Federal Register** announcing the expansion. In addition, CBP will make the announcement on its Web site and will reach out to entry filers via the Cargo Systems Messaging Service (CSMS). Trade members may subscribe to CSMS to receive email notifications from CBP regarding important information. For information about subscribing to CSMS, please go to: *http://apps.cbp.gov/csms/csms.asp?display_page=1.*

Once CBP announces that ACE is required for all import entry types, parties in this test may transmit PGA data to ACE using the PGA data message set for all entry types. The entry filing at the pilot project ports will continue until the pilot project is completed or when participation is ended.

Participants should consult the CBP Web site to determine which ports are operational for the test and the date that they become operational: *http://www.cbp.gov/document/guidance/list-aceitds-pga-message-set-pilot-ports.* Test participants and interested parties should continue to consult the CBP Web site for changes to the list of ports where APHIS data may be submitted. Test participants must use a software program that has completed ACE certification testing for the PGA Message Set.

III. The APHIS Test

APHIS participation in this test is currently limited to the import declaration required for plants and plant products under Section 3 of the Lacey Act (16 U.S.C. 3371 *et seq.*). Expansion of this test to include other APHIS programs will be announced in future notices. Under this test, APHIS required data will be transmitted electronically to ACE using the PGA Message Set for any commodities that must be declared under the 2008 amendments to the Lacey Act. The Lacey Act Plant and Plant Product Declaration (PPQ Form 505 and 505B Supplemental Form) may not be submitted through DIS. Information about submission of the forms can be found on the APHIS Web site at *https://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.*

This test will cover all modes of transport at the selected port(s), and all plants and products subject to the Lacey Act import declaration when imported at one of the selected ports. When the plant or plant product is not on the enforcement schedule, participants must use the appropriate Lacey Act disclaimer code in place of the import declaration.

The import filing process for APHIS will require the submission of specifically designated information. The designated PGA Message Set will be used to collect the specified information that is required by APHIS. The PGA Message Set data will be submitted to ACE system through the use of the ABI at the time of the entry filing in addition to the CBP required import Entry or Entry Summary data. Examples of the kind of data that will be submitted as part of the PGA Message set are: The scientific name of the plant, value of the importation, quantity of the plant, and name of the country from which the plant was harvested.

The test is scheduled to commence on August 6, 2015, or later. Any party seeking to participate in this test must provide to APHIS, in its request to participate, the name of its organization, its point of contact for the pilot, and contact information (phone number and email address). Submit your request to participate in this test by sending an email to the Lacey Act Program at *lacey.act.declaration@aphis.usda.gov.* In the subject line, please indicate, ''Request to Participate in PGA Message Set Test.'' At this time, PGA Message Set data may be submitted only for entries filed at certain ports. A current listing of those ports may be found on the CBP Web site at *http://www.cbp.gov/document/guidance/list-aceitds-pga-message-set-pilot-ports.*

For information regarding merchandise regulated by APHIS and data, information, forms, and comments required by APHIS, see the implementation guidelines for the 2008 amendments to the Lacey Act at: *https://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.*

This test covers communication and coordination among the agencies and the filers of data through the PGA Message Set for the importation of these plants and plant products. Entry data submissions will be subject to validation edits and any applicable PGA business rules programmed into ACE. Once all of the PGAs have concluded their review of the shipment, issued a ''May Proceed'' and have unset any remaining holds, CBP will send a single U.S. Government release message to the filer indicating that CBP has conditionally released the goods.

IV. Confidentiality

All data submitted and entered into ACE is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except to the extent as otherwise provided by law. Participation in this test is not confidential and upon a written Freedom of Information Act request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

Done in Washington, DC, this 3rd day of August 2015.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2015–19343 Filed 8–5–15; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Hood-Willamette Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hood-Willamette Resource Advisory Committee (RAC) will meet in Salem 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. Additional RAC information, including the meeting agenda and the meeting summary/minutes can be found at the following Web site: *http://www.fs.usda.gov/detail/willamette/workingtogether/advisorycommittees/?cid=STELPRDB504843.*

DATES: The meeting will be held on August 27, 2015, beginning at 10 a.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 Salem Bureau of Land Management Office, 1717 Fabry Road Southeast, Salem, Oregon. The meeting will be held in the lobby level conference room to the left of the front desk.

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 Salem Oregon. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Kent Wellner, RAC Designated Federal Offcier, by phone at 541–225–6301 or via email at *kwellner@fe.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. Reintroduce all the RAC members to one another;

2. Review the rules and regulations surrounding the Secure Rural School Title II process; and

3. Make decisions on proposals submitted for FY2015 Title II funds.

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 August 20th, 2015, 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 Kent Wellner, Designated Federal Officer, 3106 Pierce Parkway, Suite D, Springfield, Oregon, 97477; by email to *kwellner@fs.fed.us,* or via facsimile to 541–225–6228.

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: July 31, 2015.

Tracy Beck,

Forest Supervisor.

[FR Doc. 2015–19315 Filed 8–5–15; 8:45 am]

BILLING CODE 3411–15P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

7/8/2015 through 7/30/2015

Firm name	Firm address	Date accepted for investigation	Product(s)
Tacony Manufacturing	#3 Industrial Drive, St. James, MO 65559.	7/21/2015	The firm manufactures home floor care product vacuum cleaners.
Peripheral Visions, Inc	500 26th Street Northeast, Auburn, WA 98002.	7/21/2015	The firm manufactures parts for clinical analyzer instruments.
PDI Communication Systems, Inc.	40 Greenwood Lane, Springboro, OH 45066.	7/22/2015	The firm manufactures hospital television (TV) and liquid crystal display TV monitors.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no

later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: July 30, 2015.

Michael S. DeVillo,

Eligibility Examiner.

[FR Doc. 2015–19283 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–49–2015]

Foreign-Trade Zone 84—Houston, Texas, Application for Subzone Expansion, Subzone 84P, Houston Refining LP, Houston and Pasadena, Texas

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Houston Authority, grantee of FTZ 84, requesting additional acreage within Subzone 84P on behalf of Houston Refining LP, located in Houston and Pasadena, Texas. 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 August 3, 2015.

Subzone 84P was approved on March 6, 1998 (Board Order 961, 63 FR 13170, 3/19/1998) and currently consists of four sites totaling 645 acres: *Site 1* (500 acres)—refinery complex located at 12000 Lawndale Road, on the Houston Ship Channel, within the city limits of both Houston and Pasadena; *Site 2* (20 acres)—Allendale Tank Farm located south of the refinery, across Lawndale Road; *Site 3* (65 acres)—South Tank Farm located south of the refinery, across Lawndale Road, east of Site 2; and, *Site 4* (60 acres)—225 Tank Farm located south of Sites 1–3, across State Highway 225. The applicant is requesting authority to expand existing Site 1 to include an additional 5.05 acres (new site total—505.05 acres). 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 September 15, 2015. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to September 30, 2015.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: August 3, 2015.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2015–19372 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–895]

Certain Crepe Paper Products From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On April 1, 2015, the Department of Commerce (the ''Department'') initiated the second five-year (''sunset'') review of the antidumping duty order on certain crepe paper products (''crepe paper'') from the People's Republic of China (''PRC'') pursuant to section 751(c) of the Tariff Act of 1930, as amended (the ''Act'').[1] As a result of this sunset review, the Department finds that revocation of the antidumping duty order on crepe paper from the PRC would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Effective date: August 6, 2015.

FOR FURTHER INFORMATION CONTACT: Javier Barrientos, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2243.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2015, the Department published the notice of initiation of the sunset review of the antidumping duty order on crepe paper from the PRC. In accordance with 19 CFR 351.218(d)(1)(i), the Department received notices of intent to participate in these sunset reviews from Seaman Paper Company of Massachusetts, Inc. (''Seaman Paper'') within 15 days after the date of publication of the *Initiation Notice* and the effective date of the initiation of this sunset review.[2] Seaman Paper claimed interested party status under section 771(9)(C) of the Act.

On April 30, 2015, the Department received an adequate substantive response from Seaman Paper within the deadline specified in 19 CFR 351.218(d)(3)(i).[3] We received no responses from respondent interested parties. As a result, the Department conducted an expedited (120-day) sunset review of the order, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2).

Analysis of Comments Received

All issues raised in this sunset review are addressed in the ''Issues and Decision Memorandum for the Expedited Sunset Review of the Antidumping Duty Order on Certain Crepe Paper Products from the People's Republic of China'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with, and hereby adopted by, this notice (''Decision Memorandum''). The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the order were to be revoked. Parties may find a complete discussion of all issues raised in the review and the corresponding recommendations in this public memorandum which is on file

[1] *See Initiation of Five-Year (''Sunset'') Review,* 80 FR 17388 (April 1, 2015).

[2] *See* Letter to the Secretary from Seaman Paper, Five-Year Sunset Review of the Antidumping Duty Order on Certain Crepe Paper Products from the People's Republic of China—Notice of Intent to Participate in Review (April 9, 2015).

[3] *See* Letter to the Secretary from Seaman Paper, Five-Year Sunset Review of Antidumping Duty Order on Certain Crepe Paper Products from the People's Republic of China—Substantive Response to Notice of Initiation (April 30, 2015).

electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Services System (''ACCESS''). Access to 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 Decision Memorandum is available directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

Scope of the Order

For purposes of the order, the term ''certain crepe paper'' includes crepe paper products that have a basis weight not exceeding 29 grams per square meter prior to being creped and, if appropriate, flame-proofed. Crepe paper has a finely wrinkled surface texture and typically but not exclusively is treated to be flame-retardant. Crepe paper is typically but not exclusively produced as streamers in roll form and packaged in plastic bags. Crepe paper may or may not be bleached, dye colored, surface-colored, surface decorated or printed, glazed, sequined, embossed, die-cut, and/or flame retardant. Subject crepe paper may be rolled, flat or folded, and may be packaged by banding or wrapping with paper, by placing in plastic bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of crepe paper subject to the order may consist solely of crepe paper of one color and/or style, or may contain multiple colors and/or styles. The merchandise subject to the order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (''HTSUS''). Subject merchandise may be under one or more of several different HTSUS subheadings, including: 4802.30; 4802.54; 4802.61; 4802.62; 4802.69; 4804.39; 4806.40; 4808.30; 4808.90; 4811.90; 4818.90; 4823.90; 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

Final Results of Review

Pursuant to section 752(c) of the Act, we determine that revocation of the antidumping duty order on crepe paper from the PRC would be likely to lead to continuation or recurrence of dumping at weighted-average margins up to 266.83 percent.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return of destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This sunset review and notice are in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: July 24, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2015–19355 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–838; A–570–892]

Carbazole Violet Pigment 23 From India and the People's Republic of China: Final Results of Expedited Second Sunset Reviews of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of these sunset reviews, the Department of Commerce (the Department) finds that revocation of the antidumping duty orders on carbazole violet pigment 23 (CVP–23) from India and the People's Republic of China (the PRC) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Sunset Reviews'' section of this notice.

DATES: *Effective date:* August 6, 2015.

FOR FURTHER INFORMATION CONTACT: Kaitlin Wojnar, Antidumping and Countervailing Duty Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at (202) 482–3857.

SUPPLEMENTARY INFORMATION:

Background

On December 29, 2004, the Department of Commerce (the Department) published the AD orders on CVP–23 from India and the PRC.[1] On April 1, 2015, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), the Department published notice of the initiation of the second sunset reviews of the antidumping duty orders on CVP–23 from India and the PRC.[2] On April 13, 2015, in accordance with 19 CFR 351.218(d)(1)(i), the following domestic CVP–23 producers timely notified the Department of their intent to participate in these reviews: Nation Ford Chemical Company and Sun Chemical Corporation (collectively, Petitioners).[3] Petitioners claimed interested party status under section 771(9)(C) of the Act, as manufacturers of a domestic like product in the United States. On May 1, 2015, we received a complete substantive response for each review from Petitioners within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] We received no substantive responses from any respondent interested parties. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted expedited sunset reviews of these orders.

Scope of the Orders

The merchandise subject to this *AD Order* is CVP–23. Imports of merchandise included within the scope of this order are currently classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the United States. The Issues and Decision Memorandum, which is hereby adopted by this notice, provides a full description of the scope of the order.[5]

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[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbazole Violet Pigment 23 From India,* 69 FR 77988 (December 29, 2004); and *Antidumping Duty Order: Carbazole Violet Pigment 23 From the People's Republic of China,* 69 FR 77987 (December 29, 2004).

[2] *See Initiation of Five-Year (''Sunset'') Review,* 80 FR 17388 (April 1, 2015).

[3] *See* Letters from Petitioners, ''*Carbazole Violet Pigment 23 from India*/Notice of Intent to Participate in Second Sunset Review of Antidumping Duty Order'' and ''*Carbazole Violet Pigment 23 from the People's Republic of China*/Notice of Intent to Participate in Second Sunset Review of Antidumping Duty Order,'' April 13, 2015.

[4] *See* Letters from Petitioners, ''*Carbazole Violet Pigment 23 from India*/Petitioners' Substantive Response'' and ''*Carbazole Violet Pigment 23 from the People's Republic of China*/Petitioners' Substantive Response,'' May 1, 2015.

[5] *See* Department Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders on Carbazole Violet Pigment 23 from India and the People's Republic of China'' (Issues and Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

Analysis of Comments Received

All issues raised in these reviews, including the likelihood of continuation or recurrence of dumping in the event of revocation and the magnitude of the margins likely to prevail if the orders are revoked, are addressed in the accompanying Issues and Decision Memorandum. The Issues and Decision Memorandum is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is accessible to registered users at *http://access.trade.gov* and to all parties in the Department's Central Records Unit, Room B8024 of the Department's main building. In addition, a complete version of the Issues and Decision Memorandum can be viewed at *http://enforcement.trade.gov/frn/*. The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in content.

Final Results of Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1)–(3) of the Act, we determine that revocation of the antidumping duty orders on CVP–23 from India and the PRC would likely lead to continuation or recurrence of dumping up to the following weighted-average margin percentages:

Country	Weighted-average dumping margin (percent)
India	44.80
PRC	241.32

Notification to Interested Parties

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these results and notice in accordance with sections 751(c), 752(c), and 771(i)(1) of the Act and 19 CFR 351.218.

Dated: July 30, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2015–19358 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–825]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results and Partial Recission of Countervailing Duty Administrative Review; 2013

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review under the countervailing duty (CVD) order on polyethylene terephthalate film, sheet and strip (PET film) from India for the period of review (POR) January 1, 2013, through December 31, 2013. We preliminarily determine that Jindal Poly Films Limited of India (Jindal) and SRF Limited (SRF) received countervailable subsidies during the POR. *See* the ''Preliminary Results of Review'' section, below. Interested parties are invited to comment on these preliminary results.

DATES: *Effective date:* August 6, 2015.

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0197.

Partial Rescission of Administrative Review

The Department initiated a review of eight companies in this proceeding.[1] In response to timely filed withdrawal requests, we are rescinding this administrative review with respect to MTZ and Uflex pursuant to 19 CFR 351.213(d)(1). Accordingly, the companies subject to the instant review are: Ester, Garware, Polyplex, SRF, Jindal, Vacmet, and Vacmet India Limited, of which the Department has selected Jindal and SRF as the mandatory respondents.[2]

Scope of the Order

For purposes of the order, the products covered are all gauges of raw, pretreated, or primed polyethylene terephthalate film, sheet and strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Methodology

The Department conducted this review in accordance with section 751(a)(l)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[3] For a full description of the methodology underlying our conclusions, *see* the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Deputy Assistant Secretary for Enforcement and Compliance, titled ''Decision Memorandum for the Preliminary Results and Partial Rescission of the Countervailing Duty (CVD) Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from India; 2013'' (Preliminary Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically 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 in the

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[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 79 FR 51548 (August 29, 2014) (*Initiation Notice*). The seven companies were Ester Industries Limited (Ester), Garware Polyester Ltd. (Garware), Jindal Poly Films Limited of India (Jindal), MTZ Polyesters Ltd. (MTZ), Polyplex Corporation Ltd. (Polyplex), SRF Limited (SRF), and Vacmet. *See also, Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 79 FR 76956 (December 23, 2014). The one additional company was Uflex Ltd (Uflex), which was inadvertently omitted from the prior initiation notice.

[2] *See* Preliminary Decision Memorandum.

[3] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

Central Records Unit, room 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://trade.gov/enforcement/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Companies Not Selected for Individual Review

For the companies not selected for individual review (Ester, Garware, Polyplex, Vacmet, and Vacmet India Limited), because the rates calculated for Jindal and SRF were above *de minimis* and not based entirely on facts available, we applied, consistent with section 705(c)(5)(A) of the Act, a subsidy rate based on a weighted average of the subsidy rates calculated for Jindal and SRF using publicly ranged sales data submitted by respondents.

Preliminary Results of Review

We determine the total estimated net countervailable subsidy rates for the period January 1, 2013, through December 31, 2013 to be:

Manufacturer/exporter	Subsidy rate (percent *ad valorem*)
Jindal Poly Films of India Limited	9.86
SRF Limited	2.11
Ester Industries Limited	6.65
Garware Polyester Ltd	6.65
Polyplex Corporation Ltd	6.65
Vacmet	6.65
Vacmet India Limited	6.65

Disclosure and Public Comment

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[4] Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs.[5] Rebuttal briefs must be limited to issues raised in the case briefs.[6] Parties who submit case or rebuttal briefs are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[7]

Interested parties who wish to request a hearing, must do so within 30 days of publication of these preliminary results by submitting a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, using Enforcement and Compliance's ACCESS system.[8] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined.[9] Parties should confirm by telephone the date, time, and location of the hearing. Issues addressed at the hearing will be limited to those raised in the briefs.[10] All briefs and hearing requests must be filed electronically and received successfully in their entirety through ACCESS by 5:00 p.m. Eastern Time on the due date.

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after publication of these preliminary results.

Assessment Rates and Cash Deposit Requirement

In accordance with 19 CFR 351.221(b)(4)(i), we assigned a subsidy rate for each producer/exporter subject to this administrative review. Upon issuance of the final results, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue instructions to CBP 15 days after publication of the final results of review.

Pursuant to section 751(a)(2)(C) of the Act, the Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties, in the amounts shown above for each of the respective companies shown above, on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits at the most-recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

These preliminary results of review are issued and published in accordance with sections 751(a)(l) and 777(i)(l) of the Act and 19 CFR 351.213 and 351.221(b)(4).

Dated: July 31, 2015.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Partial Rescission of Administrative Review
4. Scope of the Order
5. Subsidies Valuation Information
6. Analysis of Programs
7. Recommendation

[FR Doc. 2015–19357 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

[4] *See* 19 CFR 351.224(b).

[5] *See* 19 CFR 351.309(c)(l)(ii) and 351.309(d)(l).

[6] *See* 19 CFR 351.309(d)(2).

[7] *See* 19 CFR 351.309(c)(2) and (d)(2).

[8] *See* 19 CFR 351.310(c).

[9] *See* 19 CFR 351.310.

[10] *See* 19 CFR 351.310(c).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2013–2014

AGENCY: Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty (AD) order on polyethylene terephthalate film, sheet, and strip (PET Film) from India. The period of review (POR) is July 1, 2013, through June 30, 2014. The Department preliminarily determines that Jindal did not, and that SRF did, make sales of subject merchandise at prices below normal value (NV) during the POR. The preliminary results are listed below in the section titled ''Preliminary Results of Review.'' Interested parties are invited to comment on these preliminary results.

DATES: *Effective date:* August 6, 2015.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo at (202) 482–2371; AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of

Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise subject to the order is polyethylene terephthalate film, sheet, and strip. The PET Film subject to the order is currently classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheading is provided for convenience and customs purposes. The written description is dispositive. A full description of the scope of the order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, ''Decision Memorandum for Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India; 2013–2014'' (Preliminary Decision Memorandum), which is dated concurrently with these preliminary results and hereby adopted by this notice.

Partial Rescission of Administrative Review

The Department initiated a review of eight companies in this proceeding.[1] In response to timely filed withdrawal requests, we are rescinding this administrative review with respect to MTZ and Uflex pursuant to 19 CFR 351.213(d)(1). Accordingly, the companies subject to the instant review are: Ester, Garware, Polyplex, SRF, Jindal and Vacmet, of which the Department has selected Jindal and SRF as the mandatory respondents.[2]

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. NV is calculated in accordance with section 773 of the Act.

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 attached as an Appendix to this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS''). ACCESS is available to registered users at *https://access.trade.gov/login.aspx* and it 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 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.

Companies Not Selected for Individual Review

We preliminarily assign to those companies not selected for individual review the rate calculated for SRF in this review, in accordance with section 735(c)(5) of the Act. *See* Preliminary Decision Memorandum.

Preliminary Results of Review

As a result of this review, we preliminarily determine the following weighted-average dumping margins for the period July 1, 2013, through June 30, 2014.

Manufacturer/exporter	Weighted-average margin (percent)
Jindal Poly Films Limited[3]	0.00
SRF Limited	0.79
Ester Industries Limited	0.79
Garware Polyester Ltd	0.79
Polyplex Corporation Limited	0.79
Vacmet	0.79

Disclosure and Public Comment

The Department will disclose to interested parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice.[4] Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs no later than 30 days after the date of publication of this notice.[5] 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.[6] 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.[7] Case and rebuttal briefs should be filed using ACCESS.[8] In order to be properly filed, ACCESS must successfully receive an electronically-filed document in its entirety by 5:00 p.m. Eastern Time.

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, within 30 days after the date of publication of this notice.[9] Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs.

The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act, unless that time is extended.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to liquidate entries of merchandise produced and/or exported by respondent companies. We intend to issue instructions to CBP 15 days after the date of publication of the final results of this review.

For the individually examined respondents Jindal and SRF, if the weighted-average dumping margins are not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific (or customer-specific) *ad valorem* assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of the sales in accordance with 19 CFR

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 79 FR 51548 (August 29, 2014) (*Initiation Notice*). The seven companies were Ester Industries Limited (Ester), Garware Polyester Ltd. (Garware), Jindal Poly Films Limited of India (Jindal), MTZ Polyesters Ltd. (MTZ), Polyplex Corporation Ltd. (Polyplex), SRF Limited (SRF), and Vacmet. *See also, Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 79 FR 76956 (December 23, 2014). The one additional company was Uflex Ltd (Uflex), which was inadvertently omitted from the prior initiation notice.

[2] *See* Preliminary Decision Memorandum.

[3] The Initiation Notice lists the company as Jindal Poly Films Limited of India.

[4] *See* 19 CFR 351.224(b).

[5] *See* 19 CFR 351.309(c)(ii).

[6] *See* 19 CFR 351.309(d).

[7] *See* 19 CFR 351.309(c)(2) and (d)(2).

[8] *See* 19 CFR 351.303.

[9] *See* 19 CFR 351.310(c).

351.212(b)(1). However, where the respondent did not report the entered value for its sales, we will calculate importer-specific (or customer-specific) per-unit duty assessment rates. Where the respondents' weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For companies MTZ and Uflex, for which this review is rescinded, we will instruct CBP to assess antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse for consumption, in accordance with 19 CFR 351.212(c)(1)(i).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of PET Film from India entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the company under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash deposit rate will be the all others rate for this proceeding, 5.71 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h)(1) and 351.221(b)(4).

Dated: July 30, 2015.

Ronald K. Lorentzen,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Partial Rescission
4. Scope of the Order
5. Comparisons to Normal Value
6. Product Comparisons
7. Date of Sale
8. Export Price
9. Normal Value
10. Currency Conversion
11. Companies Not Selected for Individual Review
12. Recommendation

[FR Doc. 2015–19356 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of National Estuarine Research Reserve

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management, National Ocean Service, Commerce.

ACTION: Notice of intent to evaluate.

SUMMARY: The NOAA Office for Coastal Management (OCM) announces its intent to evaluate the performance of the Weeks Bay and South Slough National Estuarine Research Reserves.

The National Estuarine Research Reserve evaluations will be conducted pursuant to sections 312 and 315 of the Coastal Zone Management Act (CZMA) and regulations at 15 CFR part 921, subpart E and part 923, subpart L. Evaluation of a National Estuarine Research Reserve requires findings concerning the extent to which a state has met the national objectives, adhered to its Reserve final management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

The evaluation will include a public meeting, consideration of written and oral public comments and consultations with interested Federal, state, and local agencies and members of the public. When the evaluation is completed, OCM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings. Notice is hereby given of the date, local time, and location of the public meeting.

DATES: The Weeks Bay National Estuarine Research Reserve public meeting will be held Wednesday, September 9, 2015, at 6:00 p.m. at the Weeks Bay Auditorium at 11300 U.S. Highway 98, Fairhope, Alabama.

The South Slough National Estuarine Research Reserve public meeting will be held Wednesday, September 16, 2015, at 5 p.m. at the South Slough Reserve at 61907 Seven Devils Road, Charleston, Oregon.

ADDRESSES: Copies of the reserves' most recent performance report, as well as OCM's evaluation notification letter to the state, are available upon request from OCM. Written comments from interested parties regarding these programs are encouraged and will be accepted for Weeks Bay Reserve until September 18, 2015 and for South Slough Reserve until September 25, 2015. Please direct written comments to Carrie Hall, Evaluator, Planning and Performance Measurement Program, Office for Coastal Management, NOS/NOAA, 1305 East-West Highway, Rm. 11212, N/OCM1, Silver Spring, Maryland 20910, or *Carrie.Hall@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Carrie Hall, Evaluator, Planning and Performance Measurement Program, Office for Coastal Management, NOS/NOAA, 1305 East-West Highway, Rm. 11212, N/OCM1, Silver Spring, Maryland 20910, or *Carrie.Hall@noaa.gov.*

(Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration)

Dated: July 31, 2015.

Christopher C. Cartwright,

Associate Assistant Administrator for Management and CFO/CAO, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 2015–19444 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Atlantic Highly Migratory Species Tournament Registration and Reporting

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 October 5, 2015.

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*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Katie Davis, (727) 824–5399 or *Katie.Davis@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection. Under the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) is responsible for management of the nation's marine fisheries. Existing regulations require operators of tournaments involving Atlantic highly migratory species (HMS: Atlantic swordfish, sharks, billfish, and tunas) to register four weeks in advance of the Atlantic Highly Migratory Species Tournament. Operators must provide contact information and the tournament's date(s), location(s), and target species. If selected by NMFS, operators are required to submit an HMS tournament summary report within seven days after tournament fishing has ended. Most of the catch data in the summary report is routinely collected in the course of regular tournament operations. NMFS uses the data to estimate the total annual catch of HMS and the impact of tournament operations in relation to other types of fishing activities. In addition, HMS tournament registration provides a method for tournament operators to request educational and regulatory outreach materials from NMFS.

II. Method of Collection

Operators have a choice of either electronic or paper forms. Methods of submittal include email of electronic forms, and mail and facsimile transmission of paper forms. An online registration site is currently in beta testing.

III. Data

OMB Control Number: 0648–0323.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations; not-for-profit institutions.

Estimated Number of Respondents: 300.

Estimated Time per Response: Tournament registration, 2 minutes; tournament summary reporting, 20 minutes.

Estimated Total Annual Burden Hours: 110.

Estimated Total Annual Cost to Public: $150 in recordkeeping/reporting costs.

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: August 3, 2015.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2015–19347 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE081

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 41 post Data Workshop II webinar for South Atlantic red snapper and gray triggerfish.

SUMMARY: The SEDAR 41 assessments of the South Atlantic stocks of red snapper and gray triggerfish will consist of a series of workshops and webinars: Data Workshop(s); an Assessment Workshop; and a Review Workshop. See **SUPPLEMENTARY INFORMATION.**

DATES: A SEDAR 41 post Data Workshop II webinar will be held on Thursday, August 20, 2015, from 9:30 a.m. until 1:30 p.m.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator; phone: (843) 571–4366; email: *julia.byrd@safmc.net*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop(s); (2) Assessment Process utilizing a workshop and webinars; and 3) Review Workshop. The product of the Data Workshop(s) is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates

the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the post Data Workshop II webinar are as follows:

Participants will finalize data recommendations from the Data Workshop II and provide early modeling advice.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SEDAR office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 31, 2015.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2015–19234 Filed 8–5–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Demonstration and Training: Career Pathways for Individuals With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information:

Demonstration and Training: Career Pathways for Individuals with Disabilities.

Notice inviting applications for new awards for fiscal year (FY) 2015.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.235N.

DATES: *Applications Available:* August 6, 2015.

Date of Pre-Application Webinar: August 13, 2015.

Deadline for Transmittal of Applications: September 8, 2015.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Demonstration and Training Program is to provide competitive grants to, or enter into contracts with, eligible entities to expand and improve rehabilitation and other services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act), or to further the purposes and policies in sections 2(b) and 2(c) of the Rehabilitation Act by supporting activities that increase the provision, extent, availability, and scope, as well as improve the quality of rehabilitation services under the Rehabilitation Act.

Priority: This notice includes one absolute priority. This priority is from the notice of final priority for this program (NFP), published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2015 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Career Pathways for Individuals with Disabilities.

Note: The full text of this priority is included in the notice of final priority for this program, published elsewhere in this issue of the **Federal Register**, and in the application package for this competition.

Program Authority: 29 U.S.C. 773(b).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474. (d) 34 CFR part 373. (e) The NFP.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply only to institutions of higher education (IHEs).

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $3,500,000 annually.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2016 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $575,000–$875,000.

Estimated Average Size of Awards: $725,000.

Maximum Award: We will reject any application that proposes a budget exceeding $875,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Continuing the Fourth and Fifth Years of the Project: In deciding whether to continue funding the projects awarded through this competition for the fourth and fifth years, the Department, as part of the review of the application narrative and annual performance reports, will consider the degree to which the projects demonstrate substantial progress toward their goals and objectives regarding—

(a) The number of distinct career pathways accessed and/or created through the project, and the recognized postsecondary credentials and occupational clusters in each;

(b) The number of eligible individuals who entered each career pathway;

(c) The number of eligible individuals who attained one or more recognized secondary or postsecondary credentials;

(d) The number of eligible individuals who achieved competitive integrated employment in each career pathway; and

(e) The corresponding weekly wage and employer benefits received by these individuals.

III. Eligibility Information

1. *Eligible Applicants:* A State VR agency or State VR agencies applying as a group in accordance with 34 CFR 75.128.

2. *Cost Sharing or Matching:* Cost sharing of 10 percent of the total cost of the project is required of grantees under the Demonstration and Training Program. Any program income that may be incurred during the period of performance may only be directed towards advancing activities in the approved grant application and may not be used towards the 10 percent match requirement.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office. To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.235N.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Because of the limited time available to review applications and make a recommendation for funding, we strongly encourage applicants to limit the application narrative to no more than 45 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

In addition to the page-limit guidance on the application narrative section, we recommend that you adhere to the following page limits, using the standards listed above: (1) The abstract should be no more than one page, (2) the resumes of key personnel should be no more than two pages per person, and (3) the bibliography should be no more than three pages. The only optional materials that will be accepted are letters of support. Please note that our reviewers are not required to read optional materials.

Please note that any funded applicant's application abstract will be made available to the public.

3. *Submission Dates and Times: Applications Available:* August 6, 2015.

Date of Pre-Application Webinar: Interested parties are invited to participate in a pre-application webinar. The pre-application webinar with staff from the Department will be held on August 13, 2015. The webinar will be recorded. For further information about the pre-application webinar, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Deadline for Transmittal of Applications: September 8, 2015.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make an award by the end of FY 2015.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data entered into the SAM database by an entity. Thus, if you

think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, you will need to allow 24 to 48 hours for the information to be available in Grants.gov and before you can submit an application through Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.* Applications for grants under the Demonstration and Training: Career Pathways for Individuals with Disabilities, CFDA number 84.235N, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Demonstration and Training: Career Pathways for Individuals with Disabilities competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.235, not 84.235N).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please

contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW., Room 5054, Potomac Center Plaza (PCP), Washington, DC 20202–2800. FAX: (202) 245–7592.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.* If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.235N), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.235N), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy

requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

The purpose of this priority is to demonstrate promising practices in the use of career pathways to help VR-eligible individuals with disabilities, including youth with disabilities, to acquire marketable skills and recognized postsecondary credentials necessary to secure competitive integrated employment in high-demand, high-quality occupations, as measured by the following project outcomes, at a minimum: (a) Increase the number of distinct career pathways accessed or created by the participating State VR agency(ies) for eligible individuals seeking competitive integrated employment in related occupational clusters; (b) Increase the number and percentage of VR-eligible individuals who achieve competitive integrated employment within each of the project's career pathways; and (c) Increase the average weekly wage and employer benefits of VR-eligible individuals participating in each of the project's career pathways, as compared to those of non-participating eligible individuals.

Grantees' progress in achieving these performance measures will be evaluated based on the careful review of their annual financial and performance reports.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Felipe Lulli, U.S. Department of Education, Rehabilitation Services Administration, 400 Maryland Avenue SW., Room 5054, PCP, Washington, DC 20202–2800. Telephone: (202) 245–7425 or by email: *felipe.lulli@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: July 31, 2015.

Michael K. Yudin,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2015–19294 Filed 8–5–15; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

President's Advisory Commission on Educational Excellence for African Americans

AGENCY: President's Advisory Commission on Educational Excellence for African Americans, U.S. Department of Education.

ACTION: Announcement of an open meeting.

SUMMARY: This notice sets forth the schedule and agenda of the meeting of the President's Advisory Commission on Educational Excellence for African Americans. The notice also describes the functions of the Commission. Notice of the meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and intended to notify the public of its opportunity to attend.

DATES: The President's Advisory Commission on Educational Excellence for African Americans meeting will be held on September 14, 2015 at 9:00 a.m.–4:00 p.m. on Capitol Hill in room 1539 Longworth House Office Building (New Jersey Avenue and Independence SE., Washington, DC).

FOR FURTHER INFORMATION CONTACT: David J. Johns, White House Initiative on Educational Excellence for African Americans, 400 Maryland Avenue SW., Washington, DC 20202; telephone: (202) 453–5721.

SUPPLEMENTARY INFORMATION:

Statutory Authority and Function: The President's Advisory Commission on Educational Excellence for African Americans is established under Executive Order 13621, dated July 26, 2012 and extended by Executive Order 13621. The Commission is governed by the provisions of the Federal Advisory Committee Act (FACA) (P.L. 92–463; as amended, 5 U.S.C.A., Appendix 2) which sets forth standards for the formation and use of advisory committees. The purpose of the Commission is to advise the President

and the Secretary of Education on matters pertaining to the educational attainment of the African American community, including: (a) The development, implementation, and coordination of educational programs and initiatives at the Department and other agencies to improve educational opportunities and outcomes for African Americans of all ages; (2) efforts to increase the participation of the African American community and institutions that serve the African American community in the Department's programs and in education programs at other agencies; (3) efforts to engage the philanthropic, business, nonprofit, and education communities in a national dialogue on the mission and objectives of this order; and (4) the establishment of partnerships with public, private, philanthropic, and nonprofit stakeholders to meet the mission and policy objectives of its Executive Order.

Meeting Agenda

The Commission will meet to review strategic goals and discuss progress to date; learn about any new federal or department priorities and initiatives impacting the learning and development of African American students of all ages; and discuss recommendations to be made to the President of the United States and to the U.S. Secretary of Education consistent with Executive Order 13621.

Access to Records of the Meeting: The Department will post the official report of the meeting on the Committee's Web site 90 days after the meeting. Pursuant to the FACA, the public may also inspect the materials at 400 Maryland Avenue SW., Washington, DC, by emailing *AfAmEvents@ed.gov* or by calling (202) 453–5721 to schedule an appointment.

Reasonable Accommodations: The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least two weeks before the scheduled meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Electronic Access To This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Executive Order 13621, dated July 26, 2012.

Ted Mitchell,

Under Secretary, U.S. Department of Education.

[FR Doc. 2015–19340 Filed 8–5–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

[FE Docket No. 15–62–LNG]

Texas LNG Brownsville LLC; Application for Long-Term, Multi-Contract Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations for a 25-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on April 15, 2015, by Texas LNG Brownsville LLC (Texas LNG), requesting long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to approximately 0.55 billion cubic feet per year (Bcf/d) of natural gas (200.75 Bcf per year (Bcf/yr)). On May 22, 2015, Texas LNG filed a First Amendment to the Application, increasing the requested export volume to 0.56 Bcf/d of natural gas (204.4 Bcf/yr), which it states is equivalent to 4 million metric tons per annum of LNG. Texas LNG seeks authorization to export the LNG by vessel from the proposed Texas LNG facility to be constructed at the Port of Brownsville in Brownsville, Texas, to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[1] Texas LNG requests the authorization for a 25-year term to commence on the earlier of the date of first export or 10 years from the date the authorization is granted. Texas LNG seeks to export this LNG on its own behalf and as agent for other entities who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Additional details can be found in Texas LNG's Application and First Amendment to the Application, posted on the DOE/FE Web site at: *http://energy.gov/sites/prod/files/2015/05/f22/15_62_lng.pdf* and *http://energy.gov/sites/prod/files/2015/06/f22/Amendment%20to%20Application05_22_15.pdf.* Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, October 5, 2015.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Marc Talbert, U.S. Department of Energy (FE–34), Office of

[1] In FE Docket No. 13–160–LNG, DOE/FE previously issued Order No. 3443 to Texas LNG, authorizing it to export LNG in a volume equivalent to 100 Bcf/yr of natural gas (0.27 Bcf/d) to FTA countries. Texas LNG further notes that a non-FTA export application for the same volume remains pending in that docket. *See* App. at 7. In the current Application, Texas LNG states that ''[the] FTA authorization and non-FTA application in Docket No. 13–160–LNG shall remain in effect until the DOE/FE acts on the authorized requested in this new docket, at which time Texas LNG LLC shall request that Docket No. 13–160–LNG be novated.'' *Id.* Additionally, in the current Application, Texas LNG requests authorization to export LNG to any nation that currently has, or in the future may enter into, a FTA requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (FTA countries). DOE/FE will review that request for a FTA export authorization separately pursuant to NGA § 3(c), 15 U.S.C. 717b(c).

Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9793.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a), and DOE will consider any issues required by law or policy. To the extent determined to be relevant, these issues will include the domestic need for the natural gas proposed to be exported, the adequacy of domestic natural gas supply, U.S. energy security, and the cumulative impact of the requested authorization and any other LNG export application(s) previously approved on domestic natural gas supply and demand fundamentals. DOE may also consider other factors bearing on the public interest, including the impact of the proposed exports on the U.S. economy (including GDP, consumers, and industry), job creation, the U.S. balance of trade, and international considerations; and whether the authorization is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014); and [2]
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014).[3]

Parties that may oppose this Application should address these issues in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Due to the complexity of the issues raised by the Applicant, interested persons will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 15–62–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Supply at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 15–62–LNG. PLEASE NOTE: If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on July 31, 2015.

John A. Anderson,

Director, Office of Oil and Gas Global Security and Supply, Office of Oil and Natural Gas.

[FR Doc. 2015–19331 Filed 8–5–15; 8:45 am]

BILLING CODE 6450–01–P

[2] The Addendum and related documents are available at: *http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[3] The Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

DEPARTMENT OF ENERGY

[FE Docket No. 15–67–LNG]

Cameron LNG, LLC; Application for Long-Term, Multi-Contract Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations for a 20-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on April 3, 2015, by Cameron LNG, LLC (Cameron LNG), requesting long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to approximately 152 billion cubic feet per year (Bcf/yr) of natural gas (0.42 Bcf per day). Cameron LNG seeks authorization to export the LNG by vessel from the Cameron LNG Terminal, which Cameron owns and operates in Cameron and Calcasieu Parishes, Louisiana (Cameron Terminal). Cameron LNG requests authorization to export this LNG to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by

U.S. law or policy (non-FTA countries).[1] Cameron LNG states that the requested export volume (152 Bcf/yr) is incremental and therefore additive to the volume of LNG previously authorized for export from the Cameron Terminal to non-FTA countries in DOE/FE Order No. 3391–A (620 Bcf/yr).[2] Cameron LNG states that, if the requested authorization is approved, Cameron LNG would have an aggregate non-FTA export authorization of 772 Bcf/yr of natural gas, which is equivalent to 14.95 million metric tons per annum of LNG (the maximum capacity of the Cameron Terminal's liquefaction project, as approved by the Federal Energy Regulatory Commission). Cameron LNG requests the authorization for a 20-year term to commence on the earlier of the date of first commercial export or seven years from the date the authorization is granted. Cameron LNG seeks to export this LNG on its own behalf and as agent for other entities who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Additional details can be found in Cameron LNG's Application, posted on the DOE/FE Web site at: *http://energy.gov/sites/prod/files/2015/05/f22/15_67_lng_nfta_1.pdf.*

Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, October 5, 2015.

ADDRESSES:

Electronic Filing by Email

fergas@hq.doe.gov.

Regular Mail

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Benjamin Nussdorf, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9793.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a), and DOE will consider any issues required by law or policy. To the extent determined to be relevant, these issues will include the domestic need for the natural gas proposed to be exported, the adequacy of domestic natural gas supply, U.S. energy security, and the cumulative impact of the requested authorization and any other LNG export application(s) previously approved on domestic natural gas supply and demand fundamentals. DOE may also consider other factors bearing on the public interest, including the impact of the proposed exports on the U.S. economy (including GDP, consumers, and industry), job creation, the U.S. balance of trade, and international considerations; and whether the authorization is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014);[3] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014).[4]

Parties that may oppose this Application should address these issues in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Due to the complexity of the issues raised by the Applicant, interested persons will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 15–67–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Supply at the address listed in **ADDRESSES.** All filings

[1] In a prior application filed in FE Docket No. 14–204–LNG on December 14, 2014, Cameron LNG requested authorization to export the same volume of LNG from the Cameron Terminal to any nation that currently has, or in the future may enter into, a FTA requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (FTA countries). On April 9, 2015, DOE/FE granted that request in Order No. 3620 pursuant to NGA § 3(c), 15 U.S.C. 717b(c). *See Cameron LNG, LLC,* DOE/FE Order No. 3620, FE Docket No. 14–204–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cameron LNG Terminal in Cameron Parish, Louisiana, to Free Trade Agreement Nations (Apr. 9, 2015). Cameron LNG describes the current Application as a ''corresponding authorization to non-FTA countries.'' App. at 4. For additional procedural history, see *Cameron LNG, LLC,* DOE/FE Order No. 3680, FE Docket No. 15–36–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cameron LNG Terminal in Cameron and Calcasieu Parishes, Louisiana, to Free Trade Agreement Nations (July 10, 2015).

[2] *See Cameron LNG, LLC,* DOE/FE Order No. 3391–A, FE Docket No. 11–162–LNG, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cameron Parish, Louisiana, to Non-Free Trade Agreement Nations (Sept. 10, 2014).

[3] The Addendum and related documents are available at: *http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[4] The Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

must include a reference to FE Docket No. 15–67–LNG. **Please Note:** If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on July 31, 2015.

John A. Anderson,

Director, Office of Oil and Gas Global Security and Supply, Office of Oil and Natural Gas.

[FR Doc. 2015–19329 Filed 8–5–15; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 15–38–LNG]

Floridian Natural Gas Storage Company, LLC; Application for Long-Term, Multi-Contract Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations for a 20-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on February 24, 2015, by Floridian Natural Gas Storage Company, LLC (Floridian), requesting long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) produced from domestic sources at its proposed liquefaction and storage facility to be constructed and operated in Martin County, Florida (Floridian Facility). Floridian requests authorization to export this LNG to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[1] Floridian seeks to export the LNG in a volume equivalent to approximately 14.6 billion cubic feet per year (Bcf/yr) of natural gas (0.04 Bcf per day (Bcf/d)), less the portion of that volume that may be under firm contract directly or indirectly to Carib Energy (USA) LLC (Carib).[2] According to Floridian, the LNG will be delivered to its customers in approved ISO IMO7/TVAC–ASME LNG (ISO) containers.[3] Floridian's customers (or their customers) will take delivery of the ISO containers, which the customers will transport via truck to the ports which will be the points of export (including the Port of Palm Beach, Port Everglades, Port of Miami, Port Canaveral, Port of Tampa, Port Manatee, and Port of Jacksonville, Florida). Upon arrival by truck at the point of export, the ISO containers will be loaded onto ocean-going marine vessels for transport to the destination countries. Floridian requests the authorization for a 20-year term to commence on the earlier of the date of first export or five years from the date the authorization is granted. Floridian seeks to export this LNG on its own behalf and as agent for other entities who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Additional details can be found in Floridian's Application, posted on the DOE/FE Web site at: *http://www.energy.gov/fe/downloads/floridian-natural-gas-storage-company-llc-fe-dkt-no-15-38-lng.*

Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, October 5, 2015.

ADDRESSES: *Electronic Filing by email: fergas@hq.doe.gov.*

Regular Mail

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy,

[1] In the Application, Floridian also requests authorization to export LNG to any nation that currently has, or in the future may enter into, a FTA requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (FTA countries). Concurrently with this notice, DOE/FE is granting Floridian's requested FTA authorization in DOE/FE Order No. 3691, pursuant to NGA § 3(c), 15 U.S.C. 717b(c). *See Floridian Natural Gas Storage Company, LLC,* DOE/FE Order No. 3691, FE Docket No. 15–38–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Proposed Floridian Facility in Martin County, Florida, and Exported by Vessel to Free Trade Agreement Nations (July 31, 2015).

[2] On September 10, 2014, DOE/FE issued a final LNG export order, DOE/FE Order No. 3487, Carib to export LNG from the Floridian facility to non-FTA countries in Central America, South America, or the Caribbean "at a volumetric rate not to exceed 14.6 Bcf/yr (0.04 Bcf/d) of natural gas, which is equivalent to the maximum daily send out capacity of natural gas in [its] liquefied state via the . . . truck loading station at the Floridian facility . . . ." *Carib Energy (USA) LLC,* DOE/FE Order No. 3487, FE Docket No. 11–141–LNG, Final Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers by Vessel to Non-Free Trade Agreement Nations in Central America, South America, or the Caribbean, at 2–3 (Sept. 10, 2014). Floridian states that, to its knowledge, Carib has not yet contracted with either Floridian or any Floridian customer holding capacity in the Facility for delivery of any volumes of LNG, on either a firm or interruptible basis. Nonetheless, by excluding LNG volumes from the Floridian Facility that may come under firm contract to Carib pursuant to DOE/FE Order No. 3487, Floridian states that its requested authorization would be consistent with DOE/FE's policy not to authorize exports that exceed the liquefaction capacity at a LNG facility that will be used for the proposed export operations. Floridian App. at 2, n.2.

[3] Floridian states that it has filed an application with the Federal Energy Regulatory Commission (FERC), seeking to amend FERC's original certification to scale back certain Phase 1 facilities proposed for the Floridian Facility. Floridian App. at 6–7. We note that FERC approved this project amendment in an Order Amending Certificate issued on July 16, 2015. *See Floridian Natural Gas Storage Co., LLC,* 152 FERC ¶ 61,041 (2015).

P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Benjamin Nussdorf, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9793.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a), and DOE will consider any issues required by law or policy. To the extent determined to be relevant, these issues will include the domestic need for the natural gas proposed to be exported, the adequacy of domestic natural gas supply, U.S. energy security, and the cumulative impact of the requested authorization and any other LNG export application(s) previously approved on domestic natural gas supply and demand fundamentals. DOE may also consider other factors bearing on the public interest, including the impact of the proposed exports on the U.S. economy (including GDP, consumers, and industry), job creation, the U.S. balance of trade, and international considerations; and whether the authorization is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Additionally, DOE will consider the following environmental document: *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014).[4] Parties that may oppose this Application should address these issues in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Due to the complexity of the issues raised by the Applicant, interested parties will be provided 60 days from the date of publication of this Notice in which to submit their comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 15-38–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Supply at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 15–38–LNG. **Please Note:** If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on July 31, 2015.

John A. Anderson,

Director, Office of Oil and Gas Global Security and Supply, Office of Oil and Natural Gas.

[FR Doc. 2015–19328 Filed 8–5–15; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 15–90–LNG]

Cameron LNG, LLC; Application for Long-Term, Multi-Contract Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations for a Period of 20 Years

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on May 28, 2015, by Cameron LNG, LLC (Cameron LNG), requesting long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to approximately 515 billion cubic feet per year (Bcf/yr) of natural gas (1.41 Bcf/day). Cameron LNG seeks authorization to export the LNG by vessel from the existing Cameron LNG Terminal (Cameron

[4] The Addendum and related documents are available at: *http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

Terminal), which Cameron LNG owns and operates in Cameron and Calcasieu Parishes, Louisiana. Cameron LNG already has received authorizations from the Federal Energy Regulation Commission (FERC) and DOE/FE, respectively, to construct and develop three liquefaction trains (Trains 1, 2, and 3) to liquefy natural gas at the Cameron Terminal for export to foreign markets (Liquefaction Project). In this Application, Cameron LNG seeks authorization from DOE/FE to export an additional volume of domestically produced LNG from two new liquefaction trains to be constructed at the Liquefaction Project—Trains 4 and 5 (Expansion Project). Cameron requests authorization to export this LNG to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[1] Cameron requests the authorization for a 20-year term to commence on the earlier of the date of first commercial export or seven years from the date the requested authorization is granted by DOE. Cameron seeks to export this LNG on its own behalf and as agent for other entities who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Additional details can be found in Cameron's Application, posted on the DOE/FE Web site at: *http://energy.gov/sites/prod/files/2015/06/f23/15_90_lng_nfta.pdf.* Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, October 5, 2015.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov

Regular Mail

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)

U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Benjamin Nussdorf, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9793.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a), and DOE will consider any issues required by law or policy. To the extent determined to be relevant, these issues will include the domestic need for the natural gas proposed to be exported, the adequacy of domestic natural gas supply, U.S. energy security, and the cumulative impact of the requested authorization and any other LNG export application(s) previously approved on domestic natural gas supply and demand fundamentals. DOE may also consider other factors bearing on the public interest, including the impact of the proposed exports on the U.S. economy (including GDP, consumers, and industry), job creation, the U.S. balance of trade, and international considerations; and whether the authorization is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements.

Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014);[2] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014).[3]

Parties that may oppose this Application should address these issues in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Due to the complexity of the issues raised by the Applicant, interested parties will be provided 60 days from the date of publication of this Notice in which to submit their comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 15–90–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Supply at the address listed in **ADDRESSES.** All filings must include a reference to FE Docket

[1] In a prior application filed in FE Docket No. 15–36–LNG on February 23, 2015, Cameron LNG requested authorization to export the same volume of LNG from the Cameron Terminal's Expansion Project to any nation that currently has, or in the future may enter into, a FTA requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (FTA countries). On July 10, 2015, DOE/FE granted that request in Order No. 3680 pursuant to NGA § 3(c), 15 U.S.C. 717b(c). *See Cameron LNG, LLC,* DOE/FE Order No. 3680, FE Docket No. 15–36–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cameron LNG Terminal in Cameron and Calcasieu Parishes, Louisiana, to Free Trade Agreement Nations (July 10, 2015).

[2] The Addendum and related documents are available at: *http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[3] The Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

No. 15–90–LNG. **Please Note:** If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on July 31, 2015.

John A. Anderson,

Director, Office of Oil and Gas Global Security and Supply, Office of Oil and Natural Gas.

[FR Doc. 2015–19330 Filed 8–5–15; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #3

July 30, 2015.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2353–007; ER10–2876–013; ER10–2878–012; ER10–2354–006; ER10–2355–007; ER10–2879–012; ER10–2384–006; ER10–2383–006; ER10–2880–012; ER11–2107–007; ER11–2108–007; ER10–2888–016; ER13–1745–007; ER13–1803–008; ER13–1788–007; ER13–1789–007; ER13–1790–008; ER10–2896–012; ER10–2913–012; ER13–1791–007; ER13–1746–009; ER13–1799–007; ER13–1801–007; ER13–1802–007; ER10–2916–012; ER10–2915–012; ER12–1525–012; ER12–2019–011; ER10–2266–003; ER12–2398–011; ER11–3459–011; ER10–2931–013; ER13–1965–010; ER10–2969–012; ER11–4351–007; ER11–4308–016; ER11–2805–015; ER10–1580–014; ER10–2382–006; ER11–2856–017; ER10–2356–006; ER10–2357–006; ER13–2107–007; ER13–2020–007; ER13–2050–007; ER14–2820–006; ER14–2821–006; ER11–2857–017; ER10–2359–005; ER10–2360–006; ER10–2369–005; ER10–2947–012; ER10–2381–005; ER10–2575–005; ER10–2361–006.

Applicants: Lookout Windpower, LLC, Louisiana Generating LLC, Middletown Power LLC, Midway-Sunset Cogeneration Company, Midwest Generation LLC, Montville Power LLC, Mountain Wind Power, LLC, Mountain Wind Power II LLC, NEO Freehold-Gen LLC, North Community Turbines LLC, North Wind Turbines LLC, Norwalk Power LLC, NRG Bowline LLC, NRG California South LP, NRG Canal LLC, NRG Chalk Point LLC, NRG Delta LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Florida LP, NRG Marsh Landing LLC, NRG Potomac River LLC, NRG Power Midwest LP, NRG REMA LLC, NRG Rockford LLC, NRG Rockford II LLC, NRG Solar Alpine LLC, NRG Solar Avra Valley LLC, NRG Solar Blythe LLC—NRG Solar Borrego I LLC, NRG Solar Roadrunner LLC, NRG Sterlington Power LLC, NRG Wholesale Generation LP, Oswego Harbor Power LLC, Pinnacle Wind, LLC, Reliant Energy Northeast LLC, RRI Energy Services, LLC, Saguaro Power Company, a Limited Partnership, San Juan Mesa Wind Project, LLC, Sand Drag LLC, Sierra Wind, LLC, Sleeping Bear, LLC, Solar Partners I, LLC, Solar Partners II, LLC, Solar Partners VIII, LLC, Spring Canyon Energy II LLC, Spring Canyon Energy III LLC, Sun City Project LLC—Sunrise Power Company, LLC, TAIR Windfarm, LLC, Taloga Wind, LLC, Vienna Power LLC, Walnut Creek Energy, LLC, Watson Cogeneration Company, Wildorado Wind, LLC.

Description: Notice of Non-Material Change in Status of NRG MBR Sellers [Part 2].

Filed Date: 7/29/15.

Accession Number: 20150729–5191.

Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2313–000.

Applicants: PJM Interconnection, L.L.C.

Description: Section 205(d) Rate Filing: ISA 4209 & Revised ICSA 4037, Queue No. Z1–090; Cancellation of SA 2107 & 3769 to be effective 6/30/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5170.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2314–000.

Applicants: Duke Energy Florida, LLC.

Description: Section 205(d) Rate Filing: City of Winter Park—Amendment to SA No. 144 to be effective 7/1/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5182.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2315–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: 1166R25 Oklahoma Municipal Power Authority NITSA and NOA to be effective 7/1/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5197.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2316–000.

Applicants: Entergy Gulf States Louisiana, L.L.C.

Description: Section 205(d) Rate Filing: EGSL–SRMPA 2nd Extension of Interim Agreement to be effective 7/31/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5206.

Comments Due: 5 p.m. ET 8/20/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 30, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19301 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #3

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC15–179–000.

Applicants: Calpine Energy Services Holdco LLC, Champion Energy Marketing LLC, Champion Energy Services, LLC, Champion Energy, LLC, Champion Energy Holdings LLC, EDF Trading North America, LLC.

Description: Joint Application for Approval under Section 203 of the Federal Power Act and Request for Expedited Action of Calpine Energy Services Holdco LLC, et al.

Filed Date: 7/31/15.

Accession Number: 20150731–5167.

Comments Due: 5 p.m. ET 8/21/15.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2178–014; ER10–2172–026; ER14–2144–005; ER12–2311–013; ER10–2179–029; ER11–2016–019; ER10–2184–025; ER10–1048–023; ER10–2192–025; ER15–1537–002; ER15–1539–002; ER11–2056–019; ER10–2178–025; ER14–1524–006; ER11–2014–022; ER11–2013–022; ER10–3308–023; ER10–1020–021; ER13–1536–009; ER10–1078–021; ER10–1080–021; ER11–2010–022; ER10–1081–022; ER14–2145–004; ER10–2180–025; ER12–2201–013; ER11–2011–022; ER12–2528–012; ER11–2009–022; ER11–3989–018; ER10–2181–029; ER10–1143–022; ER10–2182–029; ER12–1829–012; ER11–2007–019; ER12–1223–017; ER11–2005–022; ER15–1496–002.

Applicants: AV Solar Ranch 1, LLC, Baltimore Gas and Electric Company, Beebe 1B Renewable Energy, LLC, Beebe Renewable Energy, LLC, Calvert Cliffs Nuclear Power Plant, LLC, Cassia Gulch Wind Park LLC, CER Generation, LLC, Commonwealth Edison Company, Constellation Energy Commodities Group Maine, LLC, Constellation Energy Services, Inc., Constellation Energy Services of New York, Inc., Constellation Mystic Power, LLC, Constellation NewEnergy, Inc., Constellation Power Source Generation, LLC, Cow Branch Wind Power, LLC, CR Clearing, LLC, Criterion Power Partners, LLC, Exelon Framingham LLC, Exelon Generation Company, LLC, Exelon New Boston, LLC, Exelon West Medway, LLC, Exelon Wind 4, LLC, Exelon Wyman, LLC, Fourmile Wind Energy, LLC, Handsome Lake Energy, LLC, Harvest II Windfarm, LLC, Harvest Windfarm, LLC, High Mesa Energy, LLC, Michigan Wind 1, LLC, Michigan Wind 2, LLC, Nine Mile Point Nuclear Station, LLC, PECO Energy Company, R.E. Ginna Nuclear Power Plant, LLC, Shooting Star Wind Project, LLC, Tuana Springs Energy, LLC, Wildcat Wind, LLC, Wind Capital Holdings, LLC, 2014 ESA Project Company, LLC.

Description: Notice of Change in Status of the Exelon MBR Entities.

Filed Date: 7/30/15.

Accession Number: 20150730–5270.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–1772–001.

Applicants: Interstate Power and Light Company.

Description: Compliance filing: IPL Compliance Filing to be effective 7/31/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5138.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2345–000.

Applicants: New York Independent System Operator, Inc.

Description: Section 205(d) Rate Filing: 205 filing re: Cost recovery mechanism for the annual FERC fee to be effective 1/1/2016.

Filed Date: 7/31/15.

Accession Number: 20150731–5159.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2346–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: 3072 Resale Power Group of Iowa Attachment A to be effective 10/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5166.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2347–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: Western Area Power Administration Contract Services Agreement to be effective 10/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5170.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2348–000.

Applicants: Tucson Electric Power Company.

Description: Section 205(d) Rate Filing: Amendments to Rate Schedule No. 102 to be effective 7/30/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5174.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2349–000.

Applicants: New York Independent System Operator, Inc.

Description: Section 205(d) Rate Filing: 205 filing tariff revision to MST Att. K to ICAP Spot Market provision to be effective 10/28/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5188.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2350–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: Attachment AE Revisions to Support the Integration of Western-UGP to be effective 10/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5193.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2351–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: Alliant Energy Corp. Services Att AH SA 3066/Att AO SA 3071 to be effective 10/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5198.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2352–000.

Applicants: Imperial Valley Solar Company (IVSC) 2, LLC.

Description: Compliance filing: Compliance Filing—Request for Waivers MBR Tariff to be effective 8/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5199.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2353–000.

Applicants: R.E. Ginna Nuclear Power Plant, LLC.

Description: Section 205(d) Rate Filing: 2015 Normal July to be effective 8/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5200.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2354–000.

Applicants: Southwest Power Pool, Inc.

Description: Section 205(d) Rate Filing: Western Area Power Administration Upper Great Plains Region Formula Rate to be effective 10/1/2015.

Filed Date: 7/31/15.

Accession Number: 20150731–5209.

Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2355–000.

Applicants: Entergy Mississippi, Inc.

Description: Tariff Cancellation: EMI Notice of Cancellation of SA 591 to be effective 10/1/2015.

Filed Date: 7/31/15.
Accession Number: 20150731–5211.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2356–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: 2725R1 MidAmerican Energy Company Market Participant Agr to be effective 10/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5212.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2357–000.
Applicants: Indiana Michigan Power Company, PJM Interconnection, L.L.C.
Description: Section 205(d) Rate Filing: AEP submits Twelfth Revised Service Agreement No. 1262 to be effective 7/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5213.
Comments Due: 5 p.m. ET 8/21/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19303 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2563–004; ER10–1894–007; ER10–1882–004; ER10–3036–004; ER10–3042–005.
Applicants: Wisconsin Electric Power Company, Wisconsin Public Service Corporation, Wisconsin River Power Company, WPS Power Development, LLC, Combined Locks Energy Center, LLC.
Description: Notice of Change in Status of the WEC MBR Entities.
Filed Date: 7/29/15.
Accession Number: 20150729–5179.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2317–000.
Applicants: NorthWestern Corporation.
Description: Section 205(d) Rate Filing: SA 290 Fifth Revised—NITSA with Oldcastle Materials to be effective 8/1/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5211.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2318–000.
Applicants: Great Bay Energy, LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5214.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2319–000.
Applicants: Great Bay Energy V, LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5215.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2320–000.
Applicants: Great Bay Energy VII, LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5216.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2321–000.
Applicants: Great Bay Energy I LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5217.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2322–000.
Applicants: Great Bay Energy VI, LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5218.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2323–000.
Applicants: Great Bay Energy IV, LLC.
Description: Tariff Cancellation: notice of cancellation to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5219.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2324–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: Missouri River Energy Services Members Formula Rate to be effective 10/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5001.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2325–000.
Applicants: Southern California Edison Company.
Description: Section 205(d) Rate Filing: GIA and Distrib Serv Agmt Energy Develop & Construct Corp Karen Wind Farm to be effective 8/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5003.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2326–000.
Applicants: Southern California Edison Company.
Description: Section 205(d) Rate Filing: LGIA Blythe Mesa Solar, LLC to be effective 8/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5007.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2327–000.
Applicants: Appalachian Power Company.
Description: Section 205(d) Rate Filing: OATT—Revise Attachment K, TCC and TNC Rate Update to be effective 12/31/9998.
Filed Date: 7/31/15.
Accession Number: 20150731–5044.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2328–000.
Applicants: PJM Interconnection, L.L.C.
Description: Section 205(d) Rate Filing: Original Service Agreement No. 4227; NQ–131 (ISA) to be effective 7/2/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5045.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2329–000.
Applicants: Public Service Company of New Mexico.
Description: Section 205(d) Rate Filing: Revised NITSA and NOA between PNM and the City of Gallup, New Mexico to be effective 7/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5061.
Comments Due: 5 p.m. ET 8/21/15.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA15–2–000.
Applicants: Blue Sky East, LLC, Blue Sky West, LLC, Canandaigua Power Partners, LLC, Canandaigua Power Partners II, LLC, Erie Wind, LLC,

Evergreen Wind Power, LLC, Evergreen Wind Power II, LLC, Evergreen Wind Power III, LLC, First Wind Energy Marketing, LLC, Imperial Valley Solar 1, LLC, Longfellow Wind, LLC, Meadow Creek Project Company LLC, Milford Wind Corridor Phase I, LLC, Milford Wind Corridor Phase II, LLC, Niagara Wind Power, LLC, Regulus Solar, LLC, Rockland Wind Farm LLC, Stetson Holdings, LLC, Stetson Wind II, LLC, Vermont Wind, LLC, Canadian Hills Wind, LLC.

Description: Quarterly Land Acquisition Report of Blue Sky East, LLC, et al.

Filed Date: 7/30/15.

Accession Number: 20150730–5221.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: LA15–2–000.

Applicants: Bayonne Plant Holding, L.L.C., Brandon Shores LLC, Brunner Island, LLC, C.P. Crane LLC, Camden Plant Holding, L.L.C., Dartmouth Power Associates Limited Partnership, Elmwood Park Power, LLC, Fowler Ridge IV Wind Farm LLC, H.A. Wagner LLC, Hatchet Ridge Wind, LLC, Holtwood, LLC, Lost Creek Wind, LLC, Lower Mount Bethel Energy, LLC, Lyonsdale Biomass, LLC, Martins Creek, LLC, Montour, LLC, Newark Bay Cogeneration Partnership L.P., Ocotillo Express LLC, Pedricktown Cogeneration Company LP, Post Rock Wind Power Project, LLC, Raven Power Marketing LLC, ReEnergy Ashland LLC, ReEnergy Black River LLC, ReEnergy Fort Fairfield LLC, ReEnergy Livermore Falls LLC, ReEnergy Sterling CT Limited Partnership, ReEnergy Stratton LLC, Sapphire Power Marketing LLC, Spring Valley Wind LLC, Susquehanna Nuclear, LLC, Talen Energy Marketing, LLC, Talen Ironwood, LLC, Talen Montana, LLC, Talen New Jersey Biogas, LLC, Talen New Jersey Solar, LLC, Talen Renewable Energy, LLC, TrailStone Power, LLC, York Generation Company LLC.

Description: Quarterly Land Acquisition Report of Hatchet Ridge Wind, LLC, et al.

Filed Date: 7/30/15.

Accession Number: 20150730–5222.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: LA15–2–000.

Applicants: Arlington Valley Solar Energy II, LLC, Bluegrass Generation Company, L.L.C., Calhoun Power Company, LLC, Carville Energy LLC, Centinela Solar Energy, LLC, Cherokee County Cogeneration Partners, LLC, Columbia Energy LLC, Decatur Energy Center, LLC, DeSoto County Generating Company, LLC, Doswell Limited Partnership, Las Vegas Power Company, LLC, LS Power Marketing, LLC, LSP University Park, LLC, Mobile Energy LLC, Oneta Power, LLC, Renaissance Power, L.L.C., Riverside Generating Company, L.L.C., Santa Rosa Energy Center, LLC, Seneca Generation, LLC, University Park Energy, LLC, Wallingford Energy LLC, West Deptford Energy, LLC.

Description: Quarterly Land Acquisition Report of Arlington Valley Solar Energy II, LLC.

Filed Date: 7/30/15.

Accession Number: 20150730–5224.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: LA15–2–000.

Applicants: Goshen Phase II LLC.

Description: Quarterly Land Acquisition Report of Goshen Phase II LLC.

Filed Date: 7/30/15.

Accession Number: 20150730–5226.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: LA15–2–000.

Applicants: Solar Star California XIII, LLC.

Description: Quarterly Land Acquisition Report of Solar Star California XIII, LLC.

Filed Date: 7/30/15.

Accession Number: 20150730–5257.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: LA15–2–000.

Applicants: Battery Utility of Ohio, LLC, Border Winds Energy, LLC, Pleasant Valley Wind, LLC.

Description: Quarterly Land Acquisition Report of Battery Utility of Ohio, LLC, et al.

Filed Date: 7/30/15.

Accession Number: 20150730–5259.

Comments Due: 5 p.m. ET 8/20/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19302 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER15–2340–000]

Aspirity Energy Mid-States LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding Aspirity Energy Mid-States LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 20, 2015.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19308 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC15–178–000.
Applicants: Chevron Power Holdings Inc., Coalinga Cogeneration Company, Kern River Cogeneration Company, Mid-Set Cogeneration Company, Salinas River Cogeneration Company, Sargent Canyon Cogeneration Company, Sycamore Cogeneration Company.
Description: Application for Authorization for Disposition and Consolidation of Jurisdictional Facilities and Acquisition of Existing Generation Facilities and Request for Expedited Action of Chevron Power Holdings Inc., et al.
Filed Date: 7/29/15.
Accession Number: 20150729–5188.
Comments Due: 5 p.m. ET 8/19/15.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER14–2626–002.
Applicants: Southern California Edison Company.
Description: Compliance filing: SCE Compliance Filing June 29 2015 FERC Order re Order No. 792 to be effective 11/1/2014.
Filed Date: 7/29/15.
Accession Number: 20150729–5112.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–1571–002.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Compliance filing: 2015–07–30 NCA BCA RSG Mitigation Compliance Filing to be effective 6/30/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5037.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–1937–001.
Applicants: PJM Interconnection, L.L.C., Old Dominion Electric Cooperative.
Description: Compliance filing: Compliance Filing per 7/15/15 Order in Docket No. ER15–1937–000 to be effective 6/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5137.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2009–000.
Applicants: 2015 ESA Project Company, LLC.
Description: Supplement to June 26, 2015—2015 ESA Project Company, LLC tariff filing under ER15–2009.
Filed Date: 7/29/15.
Accession Number: 20150729–5184.
Comments Due: 5 p.m. ET 8/12/15.

Docket Numbers: ER15–2062–001.
Applicants: Consumers Energy Company.
Description: Compliance filing: Amend Cost-Based Tariff to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5001.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2296–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Section 205(d) Rate Filing: 2015–07–29_SA 2693 NSP-Black Oak Wind 3rd Rev GIA (G858/H071) to be effective 7/30/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5069.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2297–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: Regulation Deployment Clarification to be effective 9/28/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5121.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2298–000.
Applicants: PacifiCorp.
Description: Section 205(d) Rate Filing: BPA General Transfer Agreement (West) Rev 5 to be effective 1/7/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5140.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2299–000.
Applicants: ITC Midwest LLC.
Description: Section 205(d) Rate Filing: Filing of Transmission Operator Function Agreements to be effective 9/28/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5141.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2300–000.
Applicants: PJM Interconnection, L.L.C.
Description: Section 205(d) Rate Filing: First Revised WMPA Service Agreement No. 4066, Queue No. Y1–079 to be effective 7/2/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5152.
Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–2301–000.
Applicants: Pacific Gas and Electric Company.
Description: Section 205(d) Rate Filing: CCSF IA—50th Quarterly Filing of Facilities Agreements to be effective 6/29/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5000.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2302–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Section 205(d) Rate Filing: 2015–07–30_SA 2822 MidAmerican Energy-Highland Wind Energy II E&P (J285) to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5032.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2303–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Section 205(d) Rate Filing: 2015–07–30_SA 2823 MidAmerican Energy-Ida Grove Wind Energy E&P (J411) to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5040.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2304–000.
Applicants: Oildale Energy LLC.
Description: Baseline eTariff Filing: Application for Initial Market-Base Rate Tariff and Granting Certain Waivers to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5058.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2305–000.
Applicants: VECO Power Trading, LLC.
Description: Section 205(d) Rate Filing: Notice of Succession and Revisions to Market-Based Rate Tariff to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5068.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2306–000.
Applicants: DC Energy, LLC.
Description: Section 205(d) Rate Filing: Revisions to Market-Based Rate Tariff to be effective 7/31/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5069.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2307–000.
Applicants: DC Energy Midwest, LLC.
Description: Section 205(d) Rate Filing: Revisions to Market-Based Rate Tariff to be effective 7/31/2015.
Filed Date: 7/30/15.

Accession Number: 20150730–5072.

Comments Due: 5 p.m. ET 8/20/15.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA15–2–000.

Applicants: Beech Ridge Energy LLC, Beech Ridge Energy II LLC, Beech Ridge Energy Storage LLC, Bishop Hill Energy LLC, Bishop Hill Energy III LLC, California Ridge Wind Energy LLC, Buckeye Wind Energy LLC, Forward Energy LLC, Grand Ridge Energy LLC, Grand Ridge Energy II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy V LLC, Grand Ridge Energy Storage LLC, Gratiot County Wind LLC, Gratiot County Wind II LLC, Grays Harbor Energy LLC, Hardee Power Partners Limited, Invenergy Cannon Falls LLC, Invenergy Nelson LLC, Invenergy TN LLC, Judith Gap Energy LLC, Prairie Breeze Wind Energy LLC, Prairie Breeze Wind Energy II LLC, Sheldon Energy LLC, Spindle Hill Energy LLC, Spring Canyon Energy LLC, Stony Creek Energy LLC, Vantage Wind Energy LLC, Willow Creek Energy LLC, Wolverine Creek Energy LLC.

Description: Quarterly Land Acquisition Report of Beech Ridge Energy LLC, et al.

Filed Date: 7/30/15.

Accession Number: 20150730–5054.

Comments Due: 5 p.m. ET 8/20/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 30, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19299 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–432]

Grand River Dam Authority; Notice of Application for Temporary Variance and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Temporary variance from the Article 401 reservoir elevation rule curve in order to keep reservoir levels in the Grand Lake O' the Cherokees (Grand Lake) higher than normal from August 15, 2015 through October 31, 2015.

b. *Project No.:* 1494–432.

c. *Date Filed:* July 30, 2015.

d. *Applicant:* Grand River Dam Authority (GRDA).

e. *Name of Project:* Pensacola Hydroelectric Project.

f. *Location:* The project is located on the Grand River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Daniel S. Sullivan, Chief Executive Officer, Grand River Dam Authority, P.O. Box 409, Vinita, OK 74301; telephone: (918) 256–5545.

i. *FERC Contact:* B. Peter Yarrington, telephone: (202) 502–6129, and email address: *peter.yarrington@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests is 10 days from the issuance date of this notice by the Commission.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail a copy to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–1494–432) on any comments or motions filed.

k. *Description of Request:* GRDA requests a temporary variance to deviate from the reservoir elevation rule curve stipulated under Article 401 of the project license. GRDA says the requested variance would improve public recreational opportunities, increase public safety at Grand Lake, assist in managing dissolved oxygen levels at the project and other downstream projects, and provide a cushion against a potential late-summer drought. Specifically, GRDA proposes to modify the existing rule curve between the dates of August 16 and October 31, 2015. Between August 16 and September 15, the reservoir would be maintained at elevation 743 feet Pensacola Datum (PD) which is up to two feet higher than the current rule curve. Between September 16 and September 30, the elevation would be lowered from 743 to 742 feet PD. Between October 1 and October 31, the reservoir would be maintained at elevation 742 feet PD which is up to one foot higher than the current rule curve. After October 31, reservoir elevations would be identical to the existing rule curve. GRDA also requests to deviate from the reservoir elevations under the rule curve and release 0.03 and 0.06 feet of water per day, regardless of reservoir levels authorized under this variance, to comply with dissolved oxygen (DO) requirements in Article 403 of the license. In addition, GRDA proposes to implement an adaptive management plan with resource agencies and stakeholders to address concerns in the event of a drought or high precipitation that may occur during the variance period. The proposed temporary variance and procedures for DO enhancement would end on November 1, 2015.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects.

For assistance, contact FERC Online Support.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19309 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER15–2336–000]

Aspirity Energy Northeast LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding Aspirity Energy Northeast LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 20, 2015.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19307 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER15–2330–000]

ORNI 37 LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding ORNI 37 LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 20, 2015.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19306 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM14–2–002]

Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities

Before Commissioners: Norman C. Bay, Chairman; Philip D. Moeller, Cheryl A. LaFleur, Tony Clark, and Colette D. Honorable.

Order on Request for Clarification and Notice of Comment Procedures

1. Order No. 809 revised the Commission's regulations relating to the scheduling of transportation service on interstate natural gas pipelines to better coordinate the scheduling practices of the wholesale natural gas and electric industries, as well as to provide additional scheduling flexibility to all shippers on interstate natural gas pipelines.[1] Among other things, Order No. 809 expanded the number of intraday nomination cycles from the current two to three and incorporated by reference into the Commission's regulations certain modified standards developed and filed by the North American Energy Standards Board (NAESB) that revised the standard nomination timeline for interstate natural gas pipelines. Order No. 809 established an implementation date of April 1, 2016. On May 28, 2015 the American Gas Association, the American Public Gas Association, and the Interstate Natural Gas Association of America (collectively, Associations) filed a request for the Commission to clarify the manner in which all pipelines should implement the standards on April 1, 2016, and a request for clarification relating to interpretations of recall rights under existing capacity release contracts in light of the transition from two to three intraday nomination cycles. As discussed below, we grant the request with respect to the manner in which the pipelines should implement the standards and request comment on their default proposal regarding transitioning capacity release contracts.

I. Background

2. On April 16, 2015, the Commission issued Order No. 809, which revised the Commission's regulations relating to the scheduling of transportation service on interstate natural gas pipelines to better coordinate the scheduling practices of the wholesale natural gas and electric industries, as well as to provide additional scheduling flexibility to all shippers on interstate natural gas pipelines. Among other things, the Commission revised its regulations to incorporate by reference the modified NAESB Wholesale Gas Quadrant (WGQ) Business Practice Standards, which revised the standard nomination timeline for interstate natural gas pipelines. The current and revised nomination timelines are as follows:

All times Central Clock Time (CCT)	Current NAESB standards	Revised NAESB standards
Timely:		
Nomination Deadline	11:30 AM	1:00 PM.
Confirmations		4:30 PM.
Schedule Issued	4:30 PM	5:00 PM.
Start of Gas Flow	9:00 AM	9:00 AM.
Evening:		
Nomination Deadline	6:00 PM	6:00 PM.
Confirmations	9:00 PM	8:30 PM.
Schedule Issued	10:00 PM	9:00 PM.
Start of Gas Flow	9:00 AM	9:00 AM.
Intraday 1:		
Nomination Deadline	10:00 AM	10:00 AM.
Confirmations	1:00 PM	12:30 PM.
Schedule Issued	2:00 PM	1:00 PM.
Start of Gas Flow	5:00 PM	2:00 PM.
IT Bump Rights	bumpable	bumpable.
Intraday 2:		
Nomination Deadline	5:00 PM	2:30 PM.
Confirmations	8:00 PM	5:00 PM.
Schedule Issued	9:00 PM	5:30 PM.
Start of Gas Flow	9:00 PM	6:00 PM.
IT Bump Rights	no bump	bumpable.
Intraday 3:		
Nomination Deadline		7:00 PM.
Confirmations		9:30 PM.
Schedule Issued		10:00 PM.

[1] *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities,* Order No. 809, 80 FR 23197 (Apr. 24, 2015), FERC Stats. & Regs. ¶ 31,368 (cross-referenced at 151 FERC ¶ 61,049 (2015)).

All times Central Clock Time (CCT)	Current NAESB standards	Revised NAESB standards
Start of Gas Flow		10:00 PM.
IT Bump Rights		no bump.

3. In conjunction with moving the Timely Nomination Cycle nomination deadline to 1:00 p.m. CCT, the modified NAESB standards adopted in Order No. 809 included revised capacity release standards that allow shippers to acquire released capacity in time to be nominated in the Timely Nomination Cycle on the same day the shipper receives the capacity release.[2] For example, the modified standards require that pipelines post awards for biddable capacity no later than 12:00 p.m. CCT, instead of 3:00 p.m. CCT as under the previous standards.

4. The Commission required interstate natural gas pipelines to implement the revised NAESB standards beginning on April 1, 2016.

II. Request for Clarification

5. On May 28, 2015, as supplemented on June 26, 2015, the Associations filed a request to clarify the date interstate natural gas pipelines must implement the modified NAESB standards as required by Order No. 809. The Associations ask the Commission to act expeditiously on the clarifications, which are discussed below.

6. The Associations state that the April 1, 2016 implementation date does not explicitly define whether the implementation date refers to the date for which the nominations are effective or the date on which the day-ahead nominations (Timely and Evening Nomination Cycles) are to be made. For example, if the effective date of the nominations is April 1, 2016, should the new day-ahead nomination schedules be used on March 31, 2016? The Associations believe it is essential that the entire industry implement the same scenario and propose that the Commission clarify that implementation will become effective for the Gas Day that begins at 9:00 a.m. CCT on April 1, 2016. Under that scenario, the Timely and Evening Nomination Cycle deadlines on March 31, 2016, for the April 1, 2016 Gas Day will be 1:00 p.m. CCT and 6:00 p.m. CCT, respectively, and the new nomination deadlines for the intraday cycles will become effective on April 1, 2016. The Associations also propose that, for transition purposes, the new timeline for biddable capacity releases will be utilized for all biddable releases effective on March 31, 2016 or thereafter.[3] The Associations include in their initial request for clarification Appendices A and B explaining how their proposal will be implemented.

7. The Associations also propose that the Commission establish default provisions for capacity release transactions with the right to recall capacity into which the parties entered prior to April 1, 2016 and that extend through April 1, 2016. In the absence of mutual agreement to the contrary, the Associations propose such transactions shall have the default rights set forth below. In their supplemental filing, the Associations explain their proposal in more detail, stating that it is not unduly speculative to presume that long-term capacity releases consummated before April 1, 2016 will contain recall provisions based on the obsolete scheduling timeline and may not function as intended after the new scheduling standards are implemented. The Associations state that, currently, releasing shippers can specify whether releases are recallable and select which cycles are subject to recall rights. The Associations recognize that capacity release transactions with recall rights may vary, and that the parties to the transactions may want to come to an agreement as to the capacity release recall rights that will be available for the Intraday 3 Nomination Cycle beginning April 1, 2016. They believe that specifying default outcomes in the absence of the parties' agreement would assist the parties to these transactions in defining the capacity release recall rights that will be available on April 1, 2016 and thereafter, and smooth the transition to the new nomination timeline.

8. Accordingly, the Associations request that for capacity release transactions with the right to recall capacity entered into prior to April 1, 2016, for periods that include April 1, 2016, and terminate thereafter, the Commission establish default rights as follows:[4]

- If the transaction only specifies that recalls are permitted at the Intraday 1 Nomination Cycle, then for periods that include April 1, 2016, and thereafter, recalls only will be permitted at the Intraday 1 Nomination Cycle.
- If the transaction only specifies that recalls are permitted at the Intraday 2 Cycle, then for periods that include April 1, 2016, and thereafter, recalls will be permitted at the Intraday 2 Nomination Cycle and Intraday 3 Nomination Cycle.
- If the transaction specifies that recalls are permitted at the Intraday 1 Nomination Cycle and the Intraday 2 Nomination Cycle, then for periods that include April 1, 2016, and thereafter recalls will be permitted at the Intraday 1 Nomination Cycle, Intraday 2 Nomination Cycle and Intraday 3 Nomination Cycle.

9. The Associations state that shippers releasing capacity for periods that straddle April 1, 2016, should notify the pipeline by way of a letter in advance of that date if they do not want the default rights specified above to apply to the transaction. They state that the letter should memorialize that the default recall rights do not apply and indicate the mutual agreement of the releasing and replacement shippers.[5] They state that, in the absence of such a letter provided to the pipeline by a shipper in advance of April 1, 2016, recall rights will transition according to the default rights specified above as an administrative transition matter without any further action. The Associations state that the transition of recall rights for these types of capacity release transactions, whether by default or through mutual agreement, should be administrative and should not impact other attributes of the capacity release, *e.g.,* prices or quantities, and as such, implementation of the transition of such recall rights would not require posting or allow or require re-bidding. Finally, the Associations state that the releasing shipper should have the ability to recall

[2] The Commission's current capacity release program allows a firm shipper to sell (or release) its capacity to another entity when it is not using it. The pipeline contracts with, and receives payment from, the replacement shipper and then issues a credit to the releasing shipper. The results of all releases are posted by the pipeline on its Internet Web site and made available through standardized, downloadable files.

[3] Associations' Request for Clarification at Appendix B.

[4] The Associations state that for all other transactions, the capacity release recall rights will not change.

[5] The Associations note that, as a supplement to the letter, the releasing shipper can memorialize in the special terms and conditions that the default rights do not apply to prospective releases, consistent with the letter.

capacity under a transaction's existing provisions if it wishes to terminate the transaction, even if the releasing shipper and the replacement shipper are unable to reach agreement on a non-default recall transition.

III. Commission Determination

A. Implementation Date

10. As requested, the Commission finds the timing proposed by the Associations to effectuate a reasonable implementation of Order No. 809. We agree that having all pipelines follow the same schedule will provide for a smoother transition and help shippers by ensuring that they can conduct transactions on all pipelines under the same timetable.

11. We accept the schedules proposed by the Associations as described in full in Appendices A and B to their request for clarification. In general, the new day-ahead nomination timelines will apply as of March 31, 2016 for those nominations that will become effective April 1, 2016. Specifically, the Timely and Evening Nomination Cycle deadlines on March 31, 2016 for the April 1, 2016 Gas Day will be 1:00 p.m. CCT and 6:00 p.m. CCT, respectively. Otherwise, the intraday nomination timelines on March 31, 2016 will follow the existing timeline.

12. With respect to capacity releases, the new biddable release schedule will start at 9:00 a.m. CCT on March 31, 2016, for all releases with contracts to be effective on March 31, 2016, April 1, 2016, or thereafter. Non-biddable releases effective on March 31, 2016 will follow the existing posting schedule for the Intraday 1 and Intraday 2 Nomination Cycles, and will follow the new day-ahead nomination schedule for the Timely and Evening Nomination Cycles.[6]

B. Default Capacity Release Recall Rights

13. The Commission sees value in establishing a default interpretation of capacity release contractual recall provisions to assist parties in effectuating the transition between the two intraday and three intraday nomination schedules. While parties may vary such a default interpretation by agreement, a default may reduce the burden of negotiation on those parties satisfied with the default interpretation.

14. Such a request, however, goes beyond merely clarifying the implementation date adopted in Order No. 809 and should be subject to notice and comment to establish that the default interpretation is reasonable. In particular, the Commission seeks comment on a number of aspects of the proposal. Commenters should address the merits of establishing a default approach or propose an alternative approach. Commenters should address whether the default should apply to all agreements into which the parties have entered before April 1, 2016 (as proposed by the Associations), or should only apply to releases entered into by an earlier date, such as the date of issuance of Order No. 809, which put the parties on notice that the nomination schedule would change as of April 1, 2016, and therefore permitted negotiations as to the applicability of recall conditions for releases that are still in effect on April 1, 2016 or thereafter. They also should address whether the default that should apply when the transaction specifies that recalls are permitted only at the Intraday 2 Nomination Cycle is to permit recalls at Intraday 2 and 3 (as proposed by the Associations) or only Intraday 3. Finally, commenters should address the proposal that "the releasing shipper should have the ability to recall capacity under a transaction's existing provisions if it wishes to terminate the transaction, even if the releasing shipper and the replacement shipper are unable to reach agreement on a non-default recall transition."[7] Comments should address how this provision would operate and why the general default provisions should not apply to a contract in dispute if the parties are unable to reach agreement (and have not sought Commission resolution of the dispute).

15. Initial comments will be due 20 days from the date of this order and reply comments will be due 30 days from the date of this order.

The Commission orders:

(A) The Commission grants the Associations' requested clarification as to the implementation date of Order No. 809, as discussed in the body of this order.

(B) Initial comments on the Associations' proposed default recall rights for capacity release transactions are due 20 days from the date of this order with reply comments due 10 days thereafter.

By the Commission.

Issued: July 31, 2015.

Kimberly D. Bose,

Secretary.

[FR Doc. 2015–19292 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

[6] For example, a non-biddable release for the Timely Nomination Cycle on March 31, 2016 (to become effective April 1, 2016) must submit its notice by 12 a.m. CCT.

[7] Associations' Supplemental Filing at 3.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP15–1138–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Section 4(d) Rate Filing: BUG 2015–08–01 Ramapo Release to be effective 8/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5025.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1139–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Section 4(d) Rate Filing: KeySpan 2015–08–01 Ramapo Release to be effective 8/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5027.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1140–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Section 4(d) Rate Filing: BBPC 2015–08–01 Releases to EDF Trading to be effective 8/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5028.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1141–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Section 4(d) Rate Filing: ConEdison 2015–08–01 Ramapo Release to Spark Energy to be effective 8/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5029.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1142–000.
Applicants: Questar Pipeline Company.
Description: Section 4(d) Rate Filing: ? 31, Capacity Reserved for Future Expansion, Version 1.0.0 to be effective 9/1/2015.
Filed Date: 7/29/15.
Accession Number: 20150729–5062.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1143–000.
Applicants: Alliance Pipeline L.P.
Description: Section 4(d) Rate Filing: August 1–14 2015 Auction to be effective 8/1/2015.

Filed Date: 7/29/15.
Accession Number: 20150729–5071.
Comments Due: 5 p.m. ET 8/10/15.

Docket Numbers: RP15–1144–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: Section 4(d) Rate Filing: Negotiated Rates Filing on 7–30–15 to be effective 8/1/2015.
Filed Date: 7/30/15.
Accession Number: 20150730–5031.
Comments Due: 5 p.m. ET 8/11/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 30, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19322 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP15–534–000]

Hiland Partner Holdings, LLC; Notice of Application

Take notice that on July 17, 2015, Hiland Partner Holdings LLC (Hiland), pursuant to section 7(c) of the Federal Energy Regulatory Commission's (FERC) regulations under the Natural Gas Act (NGA), filed in Docket No. CP15–534–000, application for a certificate of public convenience and necessity (Application) and all authorizations necessary for it to own, operate, and maintain an existing 6.65 miles long and 6-inch in diameter natural gas pipeline (Norse Residue Line) located in Divide County, North Dakota, all as more fully set forth in the Application which is on file with the Commission and open for public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions concerning this application may be directed to: Mr. Peter Trombley, Associate General Counsel, Kinder Morgan Inc., 1001 Louisiana Street, Suite 1000, Houston, Texas, 77002, by phone at (713) 420–3348, or email at *peter_trombley@kindermorgan.com.*

Specifically, Hiland requests (i) certificate authorization of Norse Residue Line for the limited purpose of transporting its own natural gas from the Hiland owned Norse processing plant to an interconnect with WBI interstate gas pipeline system; (ii) a Part 157, Subpart F blanket certificate authorizing certain routine construction, operation, and abandonment activities; (iii) waivers of certain regulatory requirements; and (iv) confirmation that the Commission's assertion of jurisdiction over the Norse Residue Line will not jeopardize the non-jurisdictional status of Hiland's otherwise non-jurisdictional gathering and processing facilities and operations.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on August 21, 2015.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19304 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF15–9–000]

Bonneville Power Administration; Notice of Filing

Take notice that on July 29, 2015 the Bonneville Power Administration submitted a tariff filing per 300.10: Bonneville Power Administration BP–16 Rate Filing (Proposed 2016 Wholesale Power and Transmission Rate Adjustment) to be effective 10/1/2015.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on August 28, 2015.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19305 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2265–007; ER12–21–017; ER11–2211–006; ER11–2209–006; ER11–2210–006; ER11–2207–006; ER11–2206–006; ER13–1150–004; ER13–1151–004; ER10–2783–012; ER10–2784–012; ER11–2855–017; ER10–2791–013; ER10–2333–006; ER10–2792–013; ER14–1818–007; ER12–1238–005; ER10–2260–004; ER10–2261–004; ER10–2337–007; ER14–1668–004; ER14–1669–004; ER14–1674–004; ER14–1670–004; ER14–1671–004; ER14–1675–004; ER14–1673–004; ER14–1676–004; ER14–1677–004; ER14–1678–004; ER14–1679–004; ER14–1672–004; ER10–2795–012; ER10–2798–012; ER10–1575–011; ER10–2339–009; ER10–2338–009; ER10–2340–009; ER12–1239–005; ER10–2336–006; ER10–2335–006; ER10–2799–012; ER10–2801–012; ER10–2385–006; ER11–3727–012; ER10–2262–003; ER12–2413–011; ER11–2062–016; ER10–2346–007; ER10–2812–011; ER10–1291–017; ER10–2843–010; ER11–2508–015; ER11–2863–009; ER11–4307–016; ER10–2347–006; ER10–2348–005; ER12–1711–012; ER10–2350–006; ER10–2846–012; ER12–261–015; ER10–3223–006; ER10–2351–006; ER10–2875–012; ER10–2368–005; ER10–2352–006; ER10–2264–004; ER10–1581–014.

Applicants: NRG Power Marketing LLC, Agua Caliente Solar, LLC, Alta Wind I, LLC, Alta Wind II, LLC, Alta Wind III, LLC, Alta Wind IV, LLC, Alta Wind V, LLC, Alta Wind X, LLC, Alta Wind XI, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Avenal Park LLC, Bayou Cove Peaking Power, LLC, Bendwind, LLC, Big Cajun I Peaking Power LLC, Boston Energy Trading and Marketing LLC, Broken Bow Wind, LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, CL Power Sales Eight, L.L.C., Community Wind North 1 LLC, Community Wind North 2 LLC, Community Wind North 3 LLC, Community Wind North 5 LLC, Community Wind North 6 LLC, Community Wind North 7 LLC, Community Wind North 8 LLC, Community Wind North 9 LLC, Community Wind North 10 LLC, Community Wind North 11 LLC, Community Wind North 13 LLC, Community Wind North 15 LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Cottonwood Energy Company LP, CP Power Sales Seventeen, L.L.C., CP Power Sales Nineteen, L.L.C., CP Power Sales Twenty, L.L.C., Crofton Bluffs Wind, LLC, DeGreeff DP, LLC, DeGreeffpa, LLC, Devon Power LLC, Dunkirk Power LLC, Elkhorn Ridge Wind, LLC, El Segundo Energy Center LLC, El Segundo Power, LLC, Energy Alternatives Wholesale, LLC, Energy Plus Holdings LLC, Forward WindPower LLC, GenConn Devon LLC, GenConn Energy LLC, GenConn Middletown LLC, GenOn Energy Management, LLC, GenOn Mid-Atlantic, LLC, Green Mountain Energy Company, Groen Wind, LLC, High Lonesome Mesa, LLC, High Plains Ranch II, LLC, Hillcrest Wind, LLC, Huntley Power LLC, Independence Energy Group LLC, Indian River Power LLC, Jeffers Wind 20, LLC, Keystone Power LLC, Laredo Ridge Wind, LLC, Larswind, LLC, Long Beach Generation LLC, Long Beach Peakers LLC.

Description: Notification of Change in Status of NRG Power Marketing LLC, *et al.*

Filed Date: 7/29/15.

Accession Number: 20150729–5190.

Comments Due: 5 p.m. ET 8/19/15.

Docket Numbers: ER15–1020–001.

Applicants: Rising Tree Wind Farm III LLC.

Description: Notice of Non-Material Change in Status of Rising Tree Wind Farm III LLC.

Filed Date: 7/30/15.

Accession Number: 20150730–5106.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–1650–001.

Applicants: ISO New England Inc.

Description: Compliance filing: Market Monitor Capacity Related Revisions to be effective 6/1/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5096.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2308–000.

Applicants: PJM Interconnection, L.L.C.

Description: Section 205(d) Rate Filing: Second Revised Service Agreement No. 937; Queue Z2–108 (ISA) to be effective 6/30/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5095.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2309–000.

Applicants: PacifiCorp.

Description: Section 205(d) Rate Filing: CPUD Construct Agmt ? Merwin Sub to be effective 9/29/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5103.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2310–000.

Applicants: Nevada Power Company.

Description: Section 205(d) Rate Filing: Rate Schedule No. 139 NPC Amendments to be effective 9/29/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5110.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2311–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: Section 205(d) Rate Filing: 2015–7–30_JPZ Rev Alloc Agrmt Amnd _304–NSP–0.3.0 to be effective 6/1/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5124.

Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2312–000.

Applicants: Arizona Public Service Company.

Description: Section 205(d) Rate Filing: Service Agreement Nos. 218 and 335 Amended and Restated—Mead to be effective 7/1/2015.

Filed Date: 7/30/15.

Accession Number: 20150730–5148.

Comments Due: 5 p.m. ET 8/20/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 30, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19300 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1556–007.
Applicants: Longview Power, LLC.
Description: Supplement to May 13, 2015 Notice of Change in Status of Longview Power, LLC.
Filed Date: 7/28/15.
Accession Number: 20150728–5149.
Comments Due: 5 p.m. ET 8/18/15.

Docket Numbers: ER10–1901–010.
Applicants: Upper Peninsula Power Company.
Description: Supplement to October 16, 2014 Notice of Non-Material Change in Status of Upper Peninsula Power Company.
Filed Date: 7/24/15.
Accession Number: 20150724–5166.
Comments Due: 5 p.m. ET 8/14/15.

Docket Numbers: ER13–913–006.
Applicants: Ohio Valley Electric Corporation.
Description: Compliance filing: Compliance filing on Attachment M to be effective 6/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5131.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER13–2109–004; ER13–2106–004; ER10–1410–004; ER13–321–004; ER13–412–003; ER13–450–003; ER13–434–003; ER13–518–003; ER13–1403–005; ER14–2140–004; ER14–2141–004; ER15–632–002; ER15–634–002; ER14–2466–003; ER14–2465–003; ER15–1952–001.
Applicants: Fowler Ridge Wind Farm LLC, NedPower Mount Storm, LLC, Virginia Electric and Power Company, Fairless Energy, LLC, Dominion Nuclear Connecticut, Inc., Dominion Energy Manchester Street, Inc., Dominion Energy Marketing, Inc., Dominion Retail, Inc., Dominion Bridgeport Fuel Cell, LLC, Mulberry Farm, LLC, Selmer Farm, LLC, CID Solar, LLC, Cottonwood Solar, LLC, RE Camelot LLC, RE Columbia Two LLC, Pavant Solar LLC.
Description: Notice of Non-Material Change in Status of the Dominion Companies.
Filed Date: 7/30/15.
Accession Number: 20150730–5269.
Comments Due: 5 p.m. ET 8/20/15.

Docket Numbers: ER15–2330–000.
Applicants: ORNI 37 LLC.
Description: Baseline eTariff Filing: Petition of ORNI 37 LLC for Approval of Initial Market-Based Rate Tariff to be effective 9/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5075.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2331–000.
Applicants: PJM Interconnection, L.L.C., Baltimore Gas and Electric Company.
Description: Section 205(d) Rate Filing: BG&E submits revisions to OATT Attachment H–2A to be effective 10/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5095.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2332–000.
Applicants: Public Service Company of New Mexico.
Description: Application of Public Service Company of New Mexico to terminate Construction Agreements not filed in eTariff.
Filed Date: 7/31/15.
Accession Number: 20150731–5105.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2333–000.
Applicants: PPL Electric Utilities Corporation.
Description: Notice of Termination of MBR Power Sales Service Agreement No. 166 of PPL Electric Utilities Corporation.
Filed Date: 7/31/15.
Accession Number: 20150731–5108.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2334–000.
Applicants: PJM Interconnection, L.L.C.
Description: Section 205(d) Rate Filing: Original Service Agreement No. 4219; Queue AA1–067 (Interim ISA) to be effective 7/10/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5111.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2335–000.
Applicants: PJM Interconnection, L.L.C., American Electric Power Service Corporation.
Description: Section 205(d) Rate Filing: AEP submits an Interconnection and Local Delivery Agreement No. 4234 to be effective 7/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5114.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2336–000.
Applicants: Aspirity Energy Northeast LLC.
Description: Baseline eTariff Filing: Aspirity Northeast Tariff to be effective 7/31/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5121.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2337–000.
Applicants: PJM Interconnection, L.L.C.

Description: Section 205(d) Rate Filing: First Revised Service Agreement No. 3763; Queue #Z2–112 to be effective 7/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5132.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2338–000.
Applicants: Midcontinent Independent System Operator, Inc., Ameren Transmission Company of Illinois.
Description: Section 205(d) Rate Filing: 2015–07–31_ATXI Depreciation Rate Filing to be effective 10/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5139.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2339–000.
Applicants: New England Power Pool Participants Committee.
Description: Section 205(d) Rate Filing: July 31, 2015 Membership Filing to be effective 8/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5140.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2340–000.
Applicants: Aspirity Energy Mid-States LLC.
Description: Baseline eTariff Filing: Aspirity Mid-States MBR to be effective 7/31/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5141.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2341–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: 1518R10 Arkansas Electric Cooperative Corp NITSA NOA to be effective 7/1/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5143.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2342–000.
Applicants: Arizona Public Service Company.
Description: Section 205(d) Rate Filing: Rate Schedule No. 217 Exhibit B Revisions to be effective 9/30/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5152.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2343–000.
Applicants: Arizona Public Service Company.
Description: Section 205(d) Rate Filing: Rate Schedule No. 252 Amendment No. 1—Morgan-Pinnacle Peak with SRP to be effective 9/30/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5153.
Comments Due: 5 p.m. ET 8/21/15.

Docket Numbers: ER15–2344–000.
Applicants: New York Independent System Operator, Inc.
Description: Section 205(d) Rate Filing: 205 Att K Credit Support for External Transactions to be effective 10/28/2015.
Filed Date: 7/31/15.
Accession Number: 20150731–5154.
Comments Due: 5 p.m. ET 8/21/15.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA15–2–000.
Applicants: Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Power Company.
Description: Quarterly Land Acquisition Report of Alabama Power Company, et al.
Filed Date: 7/31/15.
Accession Number: 20150731–5129.
Comments Due: 5 p.m. ET 8/21/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–19298 Filed 8–5–15; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9931–99–REGION 4; CERCLA–04–2015–3751]

Pender Plating Site; Burgaw, Pender County, North Carolina; Notice of Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of settlement.

SUMMARY: Under 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement with Jeffrey Jones Properties, LLC concerning the Pender Plating Superfund Site located in Burgaw, Pender County, North Carolina. The settlement addresses costs from a time-critical Removal performed by the EPA at the Site.

DATES: The Agency will consider public comments on the settlement until September 8, 2015. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the amended settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from the Agency by contacting Ms. Paula V. Painter, Program Analyst, using the contact information provided in this notice. Comments may also be submitted by referencing the Site's name through one of the following methods:

- *Internet: www.epa.gov/region4/superfund/programs/enforcement/enforcement.html.*
- *U.S. Mail:* U.S. Environmental Protection Agency, Superfund Division, Attn: Paula V. Painter, 61 Forsyth Street SW., Atlanta, Georgia 30303.
- *Email: Painter.Paula@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: June 30, 2015.

Anita L. Davis,

Chief, Enforcement and Community Engagement Branch, Superfund Division.

[FR Doc. 2015–19350 Filed 8–5–15; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9931–98–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended, (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by Center for Biological Diversity and Center for Environmental Health (collectively ''Plaintiffs''): *Center for Biological Diversity, et al.* v. *EPA,* No. 3:14–cv–05138–WHO (N.D. CA). In this lawsuit, Plaintiffs allege that EPA has failed to find that Iowa and Puerto Rico failed to

submit nonattainment state implementation plans (''SIPs'') for the Pottawattamie and Arecibo areas designated nonattainment for the 2008 lead National Ambient Air Quality Standard (''NAAQS''). They also allege that EPA has failed to take final action to approve or disapprove, in whole or in part, certain 2008 lead NAAQS nonattainment SIP submissions from Florida (Tampa/Hillsborough area), Minnesota (Eagan area), Texas (Frisco area), Indiana (Muncie area), and Ohio (Cleveland and Delta areas). In addition, Plaintiffs allege that EPA has failed to take final action to approve or disapprove, in whole or in part, North Carolina's infrastructure SIP submission addressing the requirements for the 2008 lead NAAQS. The proposed consent decree would establish deadlines for EPA to take final actions for meeting these obligations.

DATES: Written comments on the proposed consent decree must be received by September 8, 2015.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2015–0536, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Jonathan Skinner-Thompson, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–0291; email address: *Skinner-Thompson.Jonathan@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 110(k) regarding several SIP submissions for the 2008 lead NAAQS.

The proposed consent decree addresses the Plaintiffs' allegation that EPA has failed to perform a duty mandated by CAA section 110(k)(1)(B), 42 U.S.C. 7410(k)(1)(B), to find that Iowa and Puerto Rico failed to submit nonattainment SIPs for the Pottawattamie and Arecibo areas designated nonattainment for the 2008 lead NAAQS. After the complaint was filed, EPA received nonattainment SIP submissions from Iowa and Puerto Rico addressing the requirements of CAA section 110(a)(2)(I) for the designated areas and EPA determined that the submissions were administratively complete. Accordingly, Plaintiffs would agree that this allegation is now moot.

The proposed consent decree also addresses the allegation that EPA failed to perform a duty mandated by CAA section 110(k)(2)–(4), 42 U.S.C. 7410(k)(2)–(4), to take final action to approve or disapprove, in whole or in part, certain 2008 lead NAAQS nonattainment SIP submissions from Florida (Tampa/Hillsborough area), Minnesota (Eagan area), Texas (Frisco area), Indiana (Muncie area), and Ohio (Cleveland and Delta areas) addressing the requirements of 42 U.S.C. 7410(a)(2)(I). Based on several factors, Plaintiffs would agree to withdraw their claim with respect to the Frisco area and would agree that the allegation with respect to the Tampa/Hillsborough area is now moot. Additionally, the proposed consent decree addresses Plaintiffs' allegation that EPA failed to perform a duty mandated by CAA section 110(k)(2)–(4), 42 U.S.C. 7410(k)(2)–(4), to take final action to approve or disapprove, in whole or in part, North Carolina's infrastructure SIP submission addressing the requirements of 42 U.S.C. 7410(a)(2) for the 2008 lead NAAQS. The proposed consent decree establishes deadlines for EPA final actions to meet these obligations. See the proposed consent decree for further details.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who were not named as parties or interveners 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 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–2015–0536) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, information that is claimed as 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* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: July 29, 2015.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2015–19349 Filed 8–5–15; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request (3064–0072 and 3064–0093)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing collections of information, as required by the Paperwork Reduction Act of 1995. Currently, the FDIC is soliciting comment on the renewal of the collections of information described below.

DATES: Comments must be submitted on or before October 5, 2015.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper, Counsel, (202.898.3877), MB–3074 or John Popeo, Counsel, (202.898.6923), MB–3007, 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 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper or John W. Popeo, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently-approved collections of information:

1. *Title:* Acquisition Services Information Requirements.

OMB Number: 3064–0072.

Form Numbers: 3064–1600/04, 1600–07, 3700–57, 3700/4A, 3700/12, 3700/44.

Affected Public: State nonmember banks.

Estimated Number of Respondents: 4049.

Estimated Average Burden per Respondent: .4 hours.

Estimated Total Annual Burden Hours: 1620 hours.

General Description of Collection: This is a collection of information involving the submission of various forms by contractors doing business with the FDIC.

2. *Title:* Notices Required of Government Securities Dealers or Brokers (Insured State Nonmember Banks).

OMB Number: 3064–0093.

Form Numbers: G–FIN; G–FINW; G–FIN4 & G–FIN5.

Affected Public: Insured state nonmember banks acting as government securities brokers and dealers.

Estimated Number of Respondents: 17.

Frequency of Response: On occasion.

Estimated Annual Burden Hours per Response: 1 hour.

Estimated Total Annual Burden Hours: 17 hours.

General Description of Collection: The Government Securities Act of 1986 requires all financial institutions acting as government securities brokers and dealers to notify their Federal regulatory agencies of their broker-dealer activities, unless exempted from the notice requirements by Treasury Department regulation.

Request for Comment

Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the collections of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 31st day of July 2015.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2015–19245 Filed 8–5–15; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal

Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 21, 2015.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Oxford Exempt Trust,* Oak Brook, Illinois; to acquire, and George P. Colis; John N. Colis; Leslie Colis-Ward; and Valerie Colis; as trustees of the Oxford Exempt Trust, to acquire or retain voting shares of the Oxford Financial Corporation, and thereby indirectly retain voting shares of Oxford Bank and Trust, both in Oak Brook, Illinois.

Board of Governors of the Federal Reserve System, August 3, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–19314 Filed 8–5–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the notices must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 31, 2015.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President), 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Equity Bancshares, Inc.,* Wichita, Kansas; to acquire First Independence Corporation, and indirectly acquire First Federal Savings and Loan Association of Independence, both in Independence, Kansas, and thereby engage in the operation of a savings association, pursuant to section 225.28(b)(4)(ii).

Board of Governors of the Federal Reserve System, August 3, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–19313 Filed 8–5–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The FTC intends to ask the Office of Management and Budget (''OMB'') to extend for an additional three years the current Paperwork Reduction Act (''PRA'') clearance [1] for the FTC's shared enforcement with the Consumer Financial Protection Bureau (''CFPB'') of the information collection requirements in subpart N of Regulation V (''Rule''). That clearance expires on December 31, 2015.

DATES: Comments must be filed by October 5, 2015.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Subpart N of Regulation V, PRA Comment, P125403,'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/regulationVsubpartNpra* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Ryan Mehm, Attorney, Bureau of Consumer Protection, (202) 326–2918, Federal Trade Commission, 600 Pennsylvania Ave. NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Overview of the Rule

The FTC shares enforcement authority with the CFPB for subpart N of Regulation V.[2] Subpart N requires nationwide consumer reporting agencies and nationwide consumer specialty reporting agencies to provide to consumers, upon request, one free file disclosure within any 12-month period. Generally, it requires the nationwide consumer reporting agencies, as defined in section 603(p) of the Fair Credit Reporting Act (''FCRA''), 15 U.S.C. 1681a(p), to create and operate a centralized source that provides consumers with the ability to request their free annual file disclosures from each of the nationwide consumer reporting agencies through a centralized Internet Web site, toll-free telephone number, and postal address. Subpart N also requires the nationwide consumer reporting agencies to establish a standardized form for Internet and mail requests for annual file disclosures, and provides a model standardized form that may be used to comply with that requirement. It additionally requires nationwide specialty consumer reporting agencies, as defined in section 603(w) of the FCRA, 15 U.S.C. 1681a(w), to establish a streamlined process for consumers to request annual file disclosures. This streamlined process must include a toll-free telephone number for consumers to make such requests.

II. Burden Statement

Because the FTC shares enforcement authority with the CFPB for subpart N, the two agencies split between them the related estimate of PRA burden for firms under their co-enforcement jurisdiction. Estimated PRA burden, excluding the halving (to be shown at the conclusion of this analysis), are as follows:

A. Requests per Year From Consumers for Free Annual File Disclosures

The Consumer Data Industry Association had once stated that between December 2004 and December

[1] OMB Control No. 3084–0128.

[2] Subpart N sets forth the former FTC's Free Annual File Disclosures Rule that appeared under 16 CFR parts 610 and 698. Rulemaking authority for this and several other FCRA rules was transferred to the CFBP under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). Title X comprises sections 1001–100H (collectively, the ''Consumer Financial Protection Act of 2010'').

2006, the nationwide consumer reporting agencies provided over 52 million free annual file disclosures through the centralized Internet Web site, toll-free telephone number, and postal address required to be established by the FACT Act and subpart N,[3] an annual rate of about 26 million requests per year. When it last sought clearance renewal for the Rule, the FTC had been unable to obtain, through public comment or otherwise, updated information on request volume. As a proxy, it then assumed a volume of 30 million requests per year. We expect that the number of requests for free annual credit reports will rise over the next three years because of increases in the population and consumer awareness that they are entitled to a free annual report. As a proxy, we will now use an estimate of 35 million requests per year as a representative average year to estimate PRA burden for purposes of the instant analysis.

The Commission, however, seeks more recent estimates of the number of requests consumers are making for free annual credit reports. In addition to data on the number of requests, data on how the number of requests has changed over time, and how these requests are being received—by Internet, phone, or by mail—would be most helpful.

B. Annual File Disclosures Provided Through the Internet

Both nationwide and nationwide specialty consumer reporting agencies will likely handle the overwhelming majority of consumer requests through Internet Web sites. The annual file disclosure requests processed through the Internet will not impose any hours burden per request on the nationwide and nationwide specialty consumer reporting agencies. However, consumer reporting agencies periodically will be required to adjust the Internet capacity needed to handle the changing request volume. Consumer reporting agencies likely will make such adjustments by negotiating or renegotiating outsourcing service contracts annually or as conditions change. Trained personnel will need to spend time negotiating and renegotiating such contracts. Commission staff estimates that negotiating such contracts will require a cumulative total of 8,320 hours and $545,126 in labor costs.[4] Such activity is treated as an annual burden of maintaining and adjusting the changing Internet capacity requirements.

C. Annual File Disclosures Requested Over the Telephone

Most of the telephone requests for annual file disclosures will also be handled in an automated fashion, without any additional personnel needed to process the requests. As with the Internet, consumer reporting agencies will require additional time and investment to increase and administer the automated telephone capacity for the expected increase in request volume. The nationwide and nationwide specialty consumer reporting agencies will likely make such adjustments by negotiating or renegotiating outsourcing service contracts annually or as conditions change. Staff estimates that this will require a total of 6,240 hours at a cost of $408,845 in labor costs.[5] This activity also is treated as an annual recurring burden necessary to obtain, maintain, and adjust automated call center capacity.

D. Annual File Disclosures Requiring Processing by Mail

Based on their knowledge of the industry, staff believes that no more than 1% of consumers (1% × 35 million, or 350,000) will request an annual file disclosure through U.S. postal service mail. Staff estimates that clerical personnel will require 10 minutes per request to handle these requests, thereby totaling 58,333 hours of time. [(350,000 × 10 minutes)/60 minutes = 58,333 hours]

In addition, whenever the requesting consumer cannot be identified using an automated method (a Web site or automated telephone service), it will be necessary to redirect that consumer to send identifying material along with the request by mail. Staff estimates that this will occur in about 5% of the new requests (or 1,732,500[6]) that were originally placed over the Internet or telephone. Staff estimates that clerical personnel will require approximately 10 minutes per request to input and process those redirected requests for a cumulative total of 288,750 clerical hours. [(1,732,500 × 10 minutes)/60 minutes = 288,750 hours]

E. Instructions to Consumers

The Rule also requires that certain instructions be provided to consumers. *See* Rule sections 1022.136(b)(2)(iv)(A,B), 1022.137(a)(2)(iii)(A,B). Minimal associated time or cost is involved, however. Internet instructions to consumers are embedded in the centralized source Web site and do not require additional time or cost for the nationwide consumer reporting agencies. Similarly, for telephone requests, the automated phone systems provide the requisite instructions when consumers select certain options. Some consumers who request their credit reports by mail might additionally request printed instructions from the nationwide and nationwide specialty consumer reporting agencies. Staff estimates that there will be a total of 2,082,500 requests each year for free annual file disclosures by mail.[7] Based on their knowledge of the industry, staff estimates that, of the predicted 2,082,500 mail requests, 10% (or 208,250) will request instructions by mail. If printed instructions are sent to each of these consumers by mail, requiring 10 minutes of clerical time per consumer, this will total 34,708 hours. [(208,250 instructions × 10 minutes)/60 minutes per hour].

F. Labor Costs

Labor costs are derived by applying hourly cost figures to the burden hours described above. Staff anticipates that processing of requests for annual file disclosures and instructions will be performed by clerical personnel, and estimates that the processing will require 327,250 hours at a cost of $6,322,459. [(58,333 hours for handling initial mail request + 288,750 hours for handling requests redirected to mail + 34,708 hours for handling instructions

[3] Letter from Stuart K. Pratt, President & CEO, Consumer Data Industry Association, to Rep. Barney Frank, Committee on Financial Services, U.S. House of Representatives (Dec. 1, 2006).

[4] Based on the time necessary for similar activity in the federal government (including at the FTC), staff estimates that such contracting and administration will require approximately 4 full-time equivalent employees (''FTE'') for the web service contracts. Thus, staff estimates that administering the contract will require 4 FTE, which is 8,320 hours per year (4 FTE × 2,080 hours/year). The cost is based on the reported May 2014 Bureau of Labor Statistics (BLS) rate ($65.52) for computer and information systems managers. *See Occupational Employment and Wages—May 2014,* Table 1, *available at http://www.bls.gov/news.release/ocwage.nr0.htm.* Thus, the estimated setup and maintenance cost for an Internet system is $545,126 per year (8,320 hours × $65.52/hour).

[5] Staff estimates that recurring contracting for automated telephone capacity will require approximately 3 FTE, a total of 6,240 hours (3 × 2,080 hours). Applying an hourly wage rate of $65.52 (*see* supra note 4), estimated setup and maintenance cost is $408,845 (6,240 × $65.52) per year.

[6] This figure reflects five percent of all requests, net of the estimated one percent of all requests that might initially be made by mail. That is, .05 × (35,000,000 − 350,000) = 1,732,500.

[7] This figure includes both the estimated 1% of 35 million requests that will be made by mail each year (350,000), and the estimated 1,732,500 requests initially made over the Internet or telephone that will be redirected to the mail process (see *supra* note 6).

mailed to consumers) × $16.56 per hour.[8]]

As elaborated on above, staff estimates that a total of 14,560 labor hours will be needed to negotiate or renegotiate outsourced service contracts annually (or as conditions otherwise change) to increase internet (8,320 hours) and telephone (6,240 hours) capacity requirements for internet web services and the automated telephone call center. This will result in approximately $953,971 per year in labor costs. [14,560 hours × $65.52 per hour [9]]

Thus, estimated cumulative labor will costs are $7,276,430.

G. Capital/Non-Labor Costs

As in the previous PRA clearance analysis, FTC staff believes it is likely that consumer reporting agencies will use third-party contractors (instead of their own employees) to increase the capacity of their systems. Because of the way these contracts are typically established, these costs will likely be incurred on a continuing basis, and will be calculated based on the number of requests handled by the systems. Staff estimates that the total annual amount to be paid for services delivered under these contracts is $11,931,500.[10]

H. Net Burden for FTC, After 50:50 Split

After halving the updated estimates to split the PRA burden with the CFPB regarding the Rule, the FTC's burden totals are 198,176 hours, $3,638,215 in associated labor costs, and $5,965,750 in non-labor/capital costs.

III. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 5, 2015. Write ''Subpart N of Regulation V, PRA Comment, P125403'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is . . . privileged or confidential'' as provided in section 6(f) of the FTC Act 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c).[11] Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/regulationVsubpartNpra,* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Subpart N of Regulation V, PRA Comment, P125403'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW. 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before October 5, 2015. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *http://www.ftc.gov/ftc/privacy.htm.*

David C. Shonka,

Principal Deputy General Counsel.

[FR Doc. 2015–19378 Filed 8–5–15; 8:45 am]

BILLING CODE 6750–01–P

[8] *See Occupational Employment and Wages—May 2014,* Table 1, *available at http://www.bls.gov/news.release/ocwage.nr0.htm* (Office and administrative support workers, general).

[9] *See supra* notes 4 and 5.

[10] This consists of an estimated $7,913,500 for automated telephone cost ($1.33 per request × 5.95 million requests) and an estimated $4,018,000 ($0.14 per request × 28.7 million requests) for Internet web service cost. Per unit cost estimates are based on staff's knowledge of the industry.

[11] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–D–0500] (formerly Docket No. 2004D–0042)

Brief Summary and Adequate Directions for Use: Disclosing Risk Information in Consumer-Directed Print Advertisements and Promotional Labeling for Prescription Drugs; Revised Draft Guidance for Industry (Revision 2); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the reissuance of a revised draft guidance for industry (Revision 2) entitled ''Brief Summary and Adequate Directions for Use: Disclosing Risk Information in Consumer-Directed Print Advertisements and Promotional Labeling for Prescription Drugs.'' We are reissuing the revised draft guidance to incorporate animal prescription drugs. This reissued revised draft guidance, when finalized, will assist manufacturers, packers, and distributors (firms) of human prescription drugs, including biologics, and animal prescription drugs, with meeting the brief summary requirement for prescription drug advertising and the requirement that adequate directions for use be included with promotional labeling for prescription drugs when print materials are directed toward consumers.

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 comments on this reissued revised draft guidance before it

begins work on the final version of the guidance, submit either electronic or written comments on the reissued revised draft guidance by October 5, 2015. Submit either electronic or written comments on the proposed collection of information by October 5, 2015.

ADDRESSES: Submit written requests for single copies of the reissued revised draft 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; to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002; or 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 request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the revised draft guidance document.

Submit electronic comments on the reissued revised draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: *Regarding human prescription drugs:* Julie Chronis, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Silver Spring, MD 20993–0002, 301–796–1200. *Regarding human prescription biological products:* Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911. *Regarding animal prescription drugs:* Thomas Moskal, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl. Rockville, MD 20855–2792, 240–402–6251.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the reissuance of a revised draft guidance for industry entitled ''Brief Summary and Adequate Directions for Use: Disclosing Risk Information in Consumer-Directed Print Advertisements and Promotional Labeling for Prescription Drugs.'' We are reissuing the revised draft guidance to incorporate animal prescription drugs; there are no other revisions to the revised draft guidance for industry issued February 9, 2015 (80 FR 6998).

As stated previously, the revised draft guidance updates prior FDA policy and describes the Agency's current thinking regarding the brief summary requirement for consumer-directed print prescription drug advertisements. Specifically, the revised draft guidance includes recommendations for developing a consumer brief summary and notes that, so long as firms include appropriate information in a print advertisement as outlined in the revised draft guidance, FDA does not intend to object for a failure to include certain other information.

Additionally, the revised draft guidance provides new recommendations regarding the adequate directions for use requirement for consumer-directed print promotional labeling for prescription drug products. Although the requirement in 21 CFR 201.100(d) and 21 CFR 201.105(d) for firms to provide adequate information for use is generally fulfilled by providing the full FDA-approved package insert (PI), the revised draft guidance provides that, in exercising its enforcement discretion, FDA does not intend to object for failure to include the full PI with consumer-directed print promotional labeling pieces if firms include the appropriate information as outlined in the revised draft guidance, *i.e.,* the same information in the consumer brief summary. This recommendation is designed to standardize the information consumers receive in print prescription drug product advertisements and promotional labeling and to make information more understandable to consumers.

FDA issued a draft guidance in the **Federal Register** of February 10, 2004 (69 FR 6308), entitled ''Brief Summary: Disclosing Risk Information in Consumer-Directed Print Advertisements.'' FDA requested comments on whether the draft guidance provided sufficient guidance on the content of the consumer brief summary and also requested research results on potential formats for the consumer brief summary. Comments, suggestions, and research were submitted to Docket No. 2004D–0042 and were carefully analyzed and considered before developing the revised draft guidance.

FDA issued the revised draft guidance in the **Federal Register** of February 9, 2015, giving interested parties an opportunity to submit comments by May 11, 2015. We are reissuing the revised draft guidance to incorporate animal prescription drugs; there are no other revisions to the revised draft guidance issued February 2015.

The revised draft guidance incorporates information from recent social science research, clarifies the risk information that should be included in the consumer brief summary, and recommends several formatting options for this information. The revised draft guidance also recommends the use of consumer-friendly language and visual techniques to improve accessibility for consumers. Additionally, the revised draft guidance recommends that firms not disseminate the full PI to fulfill the requirements in § 201.100(d) for consumer-directed print promotional labeling for prescription drugs. Rather, the revised draft guidance recommends that firms provide the same content and format created for the consumer brief summary. FDA is issuing the revised guidance as a draft to allow for public comment on the recommendations.

The reissued revised draft guidance is being issued consistent with FDA's good guidance practices regulations (21 CFR 10.115). The reissued revised draft guidance, when finalized, will represent FDA's current thinking on the brief summary and adequate directions for use requirements. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document. The revised draft guidance also refers to previously approved collection of information found in FDA regulations.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of information collected on the respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Brief Summary and Adequate Directions for Use: Disclosing Risk Information in Consumer-Directed Print Advertisements and Promotional Labeling for Prescription Drugs.

Description of Respondents: Respondents to this collection of information are manufacturers, packers, and distributors (firms) of human and animal prescription drug products, including biological products for use in humans.

Burden Estimate: The reissued revised draft guidance pertains to the brief summary requirement for prescription drug advertising and the requirement that adequate directions for use be included with promotional labeling for human and animal prescription drugs when print materials are directed toward consumers.

The reissued revised draft guidance, in part, explains FDA's current policy position that FDA does not intend to object for failure to include the entire PI to fulfill the requirements of §§ 201.100(d) and 201.105(d)(1) for promotional labeling pieces directed toward consumers, if firms instead provide information on the most serious and the most common risks associated with the product, while omitting less important information. Specifically, FDA recommends that any Boxed Warning, all Contraindications, certain information regarding Warnings and Precautions (*i.e.,* the most clinically significant information from the Warnings and Precautions section of the PI, information that would affect a decision to prescribe or take a drug, monitoring or laboratory tests that may be needed, special precautions not set forth in other parts of the PI, and measures that can be taken to prevent or mitigate harm), and the most frequently occurring Adverse Reactions should be included.

Furthermore, FDA recommends that information should include the indication for the use being promoted. Information regarding patient directives (such as ''discuss with your health care provider any pre-existing conditions'' or ''tell your health care provider if you are taking any medications'') should also be included. Other types of information may be included if relevant to the drug or specific indication referred to in the promotional material(s). A statement should be included that more comprehensive information can be obtained from various sources, including the firm.

Thus, the reissued revised draft guidance recommends that firms disclose certain information to others in place of the PI to fulfill the requirements in §§ 201.100(d) and 201.105(d). This ''third-party disclosure'' constitutes a ''collection of information'' under the PRA.

FDA estimates that approximately 400 firms subject to § 201.100(d) disseminate 24,000 consumer-directed print promotional labeling pieces annually. FDA estimates that approximately 40 firms subject to § 201.105(d) disseminate 2,000 consumer-directed print promotional labeling pieces annually. FDA estimates that it will take firms approximately 10 hours to compile and draft the information needed to provide the information recommended in the revised draft guidance. Please note that the requirements related to print advertising pieces and the associated burden is already accounted for under the requirements under 21 CFR 202.1 and its approved information collection OMB control number 0910–0686 and, therefore, is not included in the burden estimate reported in table 1.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Adequate information for use: Disclosing risk information in consumer-directed promotional labeling	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Hours per disclosure	Total hours
Disclosures Related to Adequate Information for Use (§ 201.100(d))	400	60	24,000	10	240,000
Disclosures Related to Adequate Information for Use (§ 201.105(d))	40	50	2,000	10	20,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

This reissued revised draft guidance also refers to previously approved collections of information found in FDA regulations with respect to the brief summary requirement for print advertisements. These collections of information are subject to review by OMB under the PRA. The collection of information in § 202.1 has been approved under OMB control number 0910–0686.

III. Comments

In addition to general comments, FDA specifically requests comments on the following issues:

- In the revised draft guidance, FDA provides recommendations regarding the content and format of the consumer brief summary. Is this the most useful information for consumers to use in determining whether to take a medication or seek more information about a product, and if not, what information would be more useful?
- FDA is also interested in relevant research that has been conducted or alternative formats that were developed after we received comments on the 2004 draft guidance.
- In the revised draft guidance, FDA suggests that the adequate directions for use requirement be fulfilled by providing the consumer brief summary rather than the full PI for the product. FDA seeks comments regarding this recommendation.

Persons who commented on the version of the revised draft guidance issued in February 2015 do not need to resubmit their comments. When finalizing the revised draft guidance, we will review comments received on this reissued version, as well as the version issued February 2015.

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It

is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm, http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm,* or *http://www.regulations.gov.*

Dated: July 31, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–19244 Filed 8–5–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Program Expansion for the National Center for Medical Home Implementation Cooperative Agreement at the American Academy of Pediatrics

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of Single-Case Deviation from Competition Requirement for Program Expansion for the National Center for Medical Home Implementation Cooperative Agreement at the American Academy of Pediatrics, Grant Number U43MC09134.

SUMMARY: HRSA announces its intent to award a program expansion supplement in the amount of $300,000 for the National Center for Medical Home Implementation (NCMHI) cooperative agreement. The purpose of the NCMHI cooperative agreement, as stated in the funding opportunity announcement, is to: (1) Support a national resource and technical assistance effort to implement and spread the medical home model to all children and youth, particularly children with special health care needs (CSHCN), children who are vulnerable and/or medically underserved, and pediatric populations served by state public health programs, MCHB, and HRSA; and ( ) support activities of the Healthy Tomorrows Partnership for Children Program (HTPCP) grantees to improve children's health through innovative community-based efforts, and community and statewide partnerships among professionals in health, education, social services, government, and business. The purpose of this notice is to award supplemental funds to develop the Rural IMPACT project to support activities related to child health in rural and underserved communities by the American Academy of Pediatrics, the cooperative agreement awardee who serves as the NCMHI, during the budget period of July 1, 2015, to June 30, 2016. The NCMHI is authorized by the Social Security Act, Title V, Sections 501(a)(1)(D) and 501(a)(2)), (42 U.S.C. 701).

The NCHMI is a national resource to implement and spread the medical home model to all children and youth, particularly children with special health care needs and children who are vulnerable and/or medically underserved. The NCMHI supports activities of the Health Tomorrows Partnership for Children Program grantees to improve children's health through innovative community-based efforts, and community and statewide partnerships among professionals in health, education, social services, government, and business.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: The American Academy of Pediatrics.

Amount of the Non-Competitive Award: $300,000.

CFDA Number: 93.110.

Current Project Period: July 01, 2008–June 30, 2018.

Period of Supplemental Funding: July 1, 2015–June 30, 2016.

Authority: Social Security Act, Title V, sections 501(a)(1)(D) and 501(a)(2), (42 U.S.C. 701).

Justification: The White House Rural Council is leading a Rural Child Poverty Initiative, the Rural IMPACT Project, to support improved well-being and upward economic mobility of children in rural and tribal communities. In collaboration with the White House Rural Council, HRSA, and the Administration for Children and Families, each using its own authority, used fiscal year (FY) 2015 funds to support a cohort of 10 rural and Tribal communities to provide two-generation, bundled services to children and families in need. Utilizing the two-generation approach, the communities will promote problem solving at the community level by encouraging pediatric clinicians' participation and public-private partnership, such as the Early Childhood Comprehensive Systems Initiative, Project Launch, and private sector support for improved collaboration and coordination of and access to mental, oral, and physical health and non-clinical resources (*e.g.* home visiting, early care and education settings such as child care and Head Start, early intervention, child welfare, education) at the community level for children, youth, and their families.

In 2013, following objective review of its application, HRSA awarded to the American Academy of Pediatrics (AAP) cooperative agreement funding for the NCMHI. If approved, this would be the first project expansion supplement for this project.

Through the NCMHI, the AAP is working to link key state and community programs, such as Title V, school-based health centers, Head Start, and Early Intervention, which are critical, natural access points for building and strengthening integrated service delivery systems for women, children, and their families. Working with the Healthy Tomorrows Partnership for Children Program grantees and the AAP Council on Community Pediatrics Rural Health Special Interest Group, the NCMHI supports activities that promote access to quality, patient/family-centered and culturally effective services for children, youth and their families, particularly in rural and underserved communities.

The proposed Rural IMPACT Project activities align with the current project plan, as the NCMHI advances system changes and new initiatives at the community, state, and national levels, building on community partnerships to support family-centered medical home implementation for all children and youth, particularly those underrepresented and from diverse communities (Goal 3). The AAP, working with MCHB, would establish an expert workgroup and operational structure to guide the initiative; develop and issue a solicitation and scoring process and conduct a review of applications to make recommendations for participating communities; develop a quality improvement package; identify systems-level measures to monitor process and progress of individual communities and the initiative as a whole, and provide structured technical assistance to the selected communities.

FOR FURTHER INFORMATION CONTACT: Marie Y. Mann, MD, MPH, FAAP, Division of Services for Children with Special Health Needs, Maternal and Child Health Bureau, Health Resources

and Services Administration, 5600 Fishers Lane, Room 13–103, Rockville, Maryland 20857; *MMann@hrsa.gov.*

Grantee/organization name	Grant No.	State	FY 2015 authorized funding level	FY 2015 estimated supplemental funding
The American Academy of Pediatrics	U43MC09134	IL	$800,031	$300,000

Dated: July 27, 2015.

James Macrae,

Acting Administrator.

[FR Doc. 2015–19260 Filed 8–5–15; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism: Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis; Panel Review of National Research Service Award Applications.

Date: October 7, 2015.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, NIH, 5635 Fishers Lane, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Dr. Beata Buzas, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, NIH, 5635 Fishers Lane; Room 2081, Rockville, MD 20852, (301) 443–2067, *bbuzas@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 92.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Supports Awards, National Institutes of Health, HHS)

Dated: August 3, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–19345 Filed 8–5–15; 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: Glaucoma, Retinopathy and Retinal Degeneration.

Date: August 25, 2015.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Alessandra C. Rovescalli, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Rm 5205 MSC7846, Bethesda, MD 20892, (301) 435–1021, *rovescaa@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Review: Cognition and Perception.

Date: August 28, 2015.

Time: 12:00 p.m. to 1:00 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: Weijia Ni, Ph.D., Chief/Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3100, MSC 7808, Bethesda, MD 20892, (301) 594–3292, *niw@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: August 3, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–19344 Filed 8–5–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism: Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Clinical, Treatment and Health Services Research Review Subcommittee.

Date: October 13, 2015.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, NIH, 5635 Fishers Lane, Terrace Level Conference Room, Rockville, MD 20852.

Contact Person: Katrina L. Foster, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, NIH, 5635 Fishers Lane; Room 2019, Rockville, MD 20852, (301) 443–4032, *katrina@mail.nih.gov.*

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Review Subcommittee.

Date: October 19, 2015.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, NIH, 5635 Fishers Lane, Terrace Level Conference Room, Rockville, MD 20852.

Contact Person: Katrina L. Foster, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, NIH, 5635 Fishers Lane; Room 2019, Rockville, MD 20852, (301) 443–4032, *katrina@mail.nih.gov.*

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Biomedical Research Review Subcommittee.

Date: October 20, 2015.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, NIH, 5635 Fishers Lane, Terrace Level Conference Room, Rockville, MD 20852.

Contact Person: Philippe Marmillot, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, NIH, 5635 Fishers Lane; Room 2019, Rockville, MD 20852, (301) 443–2861, *marmillotp@mail.nih.gov.*

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Neuroscience Review Subcommittee.

Date: October 28–29, 2015.

Time: 8:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIAAA, NIH, 5635 Fishers Lane, Terrace Level Conference Room, Rockville, MD 20852.

Contact Person: Beata Buzas, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, NIH, 5635 Fishers Lane; Room 2081, Rockville, MD 20852, (301) 443–0800, *bbuzas@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 92.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Supports Awards, National Institutes of Health, HHS)

Dated: August 3, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–19346 Filed 8–5–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0076]

Agency Information Collection Activities: Customs Modernization Act Recordkeeping Requirements

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Customs Modernization Act Recordkeeping Requirements. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before October 5, 2015 to be assured of consideration.

ADDRESSES: Written comments may be mailed to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Customs Modernization Act Recordkeeping Requirements.

OMB Number: 1651–0076.

Abstract: The North American Free Trade Agreement Implementation Act, Title VI, known as the Customs Modernization Act (Mod Act) amended title 19 U.S.C. 1508, 1509 and 1510 by revising Customs and Border Protection (CBP) laws related to recordkeeping, examination of books and witnesses, regulatory audit procedures and judicial enforcement. Specifically, the Mod Act expanded the list of parties subject to CBP recordkeeping requirements; distinguished between records which pertain to the entry of merchandise and financial records needed to substantiate the correctness of information contained in entry documentation; and identified a list of records which must be maintained and produced upon request by CBP. The information and records are used by CBP to verify the accuracy of the claims made on the entry documents regarding the tariff status of imported merchandise, admissibility, classification/nomenclature, value and rate of duty applicable to the entered goods. The Mod Act record keeping requirements are provided for by 19 CFR 163 and instructions are available at: *http://www.cbp.gov/document/publications/recordkeeping.*

Current Action: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (with no change).

Affected Public: Businesses.

Estimated Number of Respondents: 5,459.

Estimated Number of Total Annual Responses: 5,459.

Estimated Time per Response: 1,040 hours.

Estimated Annual Burden Hours: 5,677,360.

Dated: July 29, 2015.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2015–19370 Filed 8–5–15; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0018]

Agency Information Collection Activities: Ship's Store Declaration

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Ship's Stores Declaration (CBP Form 1303). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before September 8, 2015 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (80 FR 24268) on April 30, 2015, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Ship's Stores Declaration.

OMB Number: 1651–0018.

Form Number: CBP Form 1303.

Abstract: CBP Form 1303, Ship's Stores Declaration, is used by the carriers to declare articles to be retained on board the vessel, such as sea stores, ship's stores (*e.g.* alcohol and tobacco products), controlled narcotic drugs or bunker fuel in a format that can be readily audited and checked by CBP. This form collects information about the ship, the ports of arrival and departure, and the articles on the ship. CBP Form 1303 is provided for by 19 CFR 4.7, 4.7a, 4.81, 4.85 and 4.87 and is accessible at: *http://www.cbp.gov/sites/default/files/documents/CBP%20Form%201303.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to CBP Form 1303.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 8,000.

Estimated Number of Responses per Respondent: 13.

Estimated Number of Total Annual Responses: 104,000.

Estimated Total Annual Burden Hours: 26,000.

Dated: July 29, 2015.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2015–19368 Filed 8–5–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4217–DR; Docket ID FEMA–2015–0002]

Kentucky; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4217–DR), dated May 1, 2015, and related determinations.

DATES: *Effective date:* July 21, 2015.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 1, 2015.

Rowan County for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2015–19256 Filed 8–5–15; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Establishment of the U.S. Immigration and Customs Enforcement Advisory Committee on Family Residential Centers and Solicitation of Nominations for Membership; Correction

AGENCY: U.S. Immigration and Customs Enforcement, DHS.

ACTION: Notice of establishment of advisory committee and solicitation of membership nominations; correction.

SUMMARY: The Department of Homeland Security (DHS) published a document in the **Federal Register** of July 29, 2015, announcing the establishment of the U.S. Immigration and Customs Enforcement (ICE) Advisory Committee on Family Residential Centers (ACFRC) and inviting the public to nominate individuals for one-year, two-year, and three-year term appointments. The document contained an incorrect date for the nomination submissions.

FOR FURTHER INFORMATION CONTACT: John Amaya, Senior Advisor to the Director, U.S. Immigration and Customs Enforcement, Office of the Director, 500 12th Street SW., 11th Floor, Washington, DC 20536; or by email to *ICE_ACFRC@ice.dhs.gov.*

Correction

In the **Federal Register** of July 29, 2015, in FR Doc. 2015–18581, on page 45227, in the first column, correct the **DATES** caption to read:

DATES: Submit nominations for committee membership by August 7, 2015.

Dated: July 30, 2015.

Sarah R. Saldaña,

Director, U.S. Immigration and Customs Enforcement.

[FR Doc. 2015–19284 Filed 8–5–15; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000.L63340000.DV0000. 15XL1109AF; HAG 15–0196; OROR–68370]

Notice of Public Meeting for Proposed Withdrawal; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: A Notice of Proposed Withdrawal was published in the **Federal Register** (FR) on June 29, 2015, for approximately 5,216.18 acres of Bureau of Land Management (BLM) managed public domain and revested Oregon California Railroad lands and 95,805.53 acres of National Forest System lands (80 FR 37015). The application provides a two-year temporary segregation of the described Federal land from settlement, sale, location, and entry under public land and United States mining laws. The requested withdrawal is to protect lands identified in House Resolution 682 and Senate Bill 346, known as the Southwestern Oregon Watershed and Salmon Protection Act, while Congress considers the merits of the proposed legislation to permanently withdraw those areas.

DATE AND ADDRESS: Public meetings will be held on Wednesday, September 9, 2015, from 5 p.m. to 8 p.m. at Curry County Fairgrounds, Docia Sweet Hall, 29392 Ellensburg Ave., Gold Beach, Oregon 97444, and Thursday, September 10, 2015, from 5 p.m. to 8 p.m., at Anne G. Basker Auditorium, 600 NW. Sixth Street, Grants Pass, Oregon 97526.

FOR FURTHER INFORMATION CONTACT: Jacob Childers, BLM Oregon/Washington State Office, 503–808–6225; Candice Polisky, USFS Pacific Northwest Region, 503–808–2479. Please send email inquiries to *blm_or_wa_withdrawals@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 either of the above individuals. The FIRS is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The **Federal Register** notice published on June 29, 2015 stated that an opportunity for public meeting would be afforded in connection with the proposed withdrawal. The public will have the opportunity to verbally comment or provide written comments at the two public meetings. The publication of the FR notice on June 29, 2015 was the official start of a 90-day public comment period that extends through September 28, 2015. Written comments should be sent to the Bureau of Land Management, Oregon State Office, P.O. Box 2965, Portland, OR 97208–2965, or by email at *blm_or_wa_withdrawals@blm.gov.*

The meeting will be held in accordance with the regulations set forth in 43 CFR part 2310.3–1.

Chris DeWitt,

Acting Chief, Branch of Land, Mineral, and Energy Resources.

[FR Doc. 2015–19324 Filed 8–5–15; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–18585; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Heard Museum, Phoenix, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Heard Museum, in consultation with the Navajo Nation, Arizona, New Mexico & Utah, has determined that the cultural item listed in this notice meets the definition of sacred object and object of cultural patrimony. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request to the Heard Museum. If no additional claimants come forward, transfer of control of the cultural item to the Navajo Nation, Arizona, New Mexico & Utah may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request with information in support of the claim to the Heard Museum at the address in this notice by September 8, 2015.

ADDRESSES: John Bulla, Interim Director/CEO, Heard Museum, 2301 N. Central Avenue, Phoenix, AZ 85004, telephone (602) 346–8188, email *jbulla@heard.org.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item under the control of the

Heard Museum, Phoenix, AZ, that meets the definition of sacred object and object of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item

Around 1974, one cultural item was removed from the Navajo Nation, Arizona, New Mexico & Utah, and in 1979 it was donated to the Heard Museum. The cultural item is a Hochxo Jish (Evil Way Medicine Bundle).

Representatives of the Navajo Nation, Arizona, New Mexico & Utah, examined the cultural item, consulted with museum staff, and identified it as a Navajo Jish that is used in the Hochxo Ceremony (Evil Way), a ceremony that is still widely practiced by members of the Navajo tribe. The Navajo people believe that jish are alive and must be treated with respect. These are sacred objects as well as objects of cultural patrimony and are made by knowledgeable Navajo people. In order to possess jish, one must have the proper ceremonial knowledge with which to care for and utilize them.

Determinations Made by the Heard Museum

Officials of the Heard Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3001(3)(D), the cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Hochxo Jish (Evil Way Medicine Bundle) and the Navajo Nation, Arizona, New Mexico & Utah.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request with information in support of the claim to John Bulla, Interim Director/CEO, Heard Museum, 2301 N. Central Avenue, Phoenix, AZ 85004, telephone (602) 346–8188, email *jbulla@heard.org,* by September 8, 2015. After that date, if no additional claimants have come forward, transfer of control of the Hochxo Jish (Evil Way Medicine Bundle) to the Navajo Nation, Arizona, New Mexico & Utah, may proceed.

The Heard Museum is responsible for notifying the Navajo Nation, Arizona, New Mexico & Utah, that this notice has been published.

Dated: June 29, 2015.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2015–19265 Filed 8–5–15; 8:45 am]

BILLING CODE 4312–50–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–907]

Certain Vision-Based Driver Assistance System Cameras, Components Thereof, and Products Containing the Same: Commission's Determination To Review-in-Part a Final Initial Determination Finding No Violation of Section 337; Request for Written Submissions; Extension of the Target Date

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in-part the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on April 27, 2015, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-captioned investigation. The Commission also extends the target date to October 8, 2015.

FOR FURTHER INFORMATION CONTACT: Amanda P. Fisherow, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2737. 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, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on January 28, 2014, based on a complaint filed by Magna Electronics Inc. of Auburn Hills, Michigan. *See* 79 FR 4490–91 (Jan. 28, 2014). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain vision-based driver assistance system cameras and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 8,116,929 (''the '929 patent'') and 8,593,521 (''the '521 patent''). The complaint further alleges the existence of a domestic industry. Subsequently, the complaint and notice of investigation were amended by adding U.S. Patent Nos. 8,686,840 (''the '840 patent'') and 8,692,659 (''the '659 patent''), and by terminating the investigation inpart as to all claims of the '521 patent. The '929 patent was later terminated from the investigation. The respondent named in the Commission's notice of investigation is TRW Automotive U.S., LLC of Livonia, Michigan (''TRW''). The Office of Unfair Import Investigations (''OUII'') was also named a party in the investigation.

On April 27, 2015, the ALJ issued his final ID. The ALJ found that no violation of section 337 has occurred. Specifically, the ALJ found that the '659 and '840 patents were not indirectly infringed, that the '840 patent is invalid, and that the domestic industry requirement for the '840 patent has not been met. The ALJ also issued his recommendation on remedy and bonding.

On May 11, 2015, Magna and TRW each filed petitions for review. On May 19, 2015, the parties, including OUII, filed responses to the respective petitions for review. On May 28, 2015, Magna filed a corrected response. The Commission has determined to review the ALJ's findings with respect to: (1) Importation; (2) whether the asserted claims of the '659 patent require a

camera; (3) direct infringement of the '659 patent; (4) induced infringement of the '659 and '840 patents; (5) contributory infringement of the '659 and '840 patents; (6) whether the '659 patent satisfies the requirements of 35 U.S.C. 112; (7) anticipation of the '659 patent claims based on Rayner; (8) anticipation of the '659 patent claims based on Batavia; (9) anticipation of the '659 patent claims based on the SafeTrac Prototype; (10) obviousness of the '659 patent based on Rayner in combination with Blank; (11) obviousness of the '659 patent based on Batavia, the SafeTrac Prototype, and the Navlab 1997 Demo; (12) whether the claims are invalid under the America Invents Act § 33(a); and (13) the technical prong of domestic industry for the '659 and '840 patents. The Commission has amended the scope of the investigation to conform to the pleadings of the parties as the ID found.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is interested in only responses to the following questions:

1. Please provide a legal analysis discussing the relevant evidence concerning whether the alleged importation(s), sale for importation, or sale within the United States after importation meets the statutory requirements for finding a violation of section 337 (*i.e.,* do the alleged importations, sales for importation, or sales in the United States after importation by TRW satisfy 19 U.S.C. 1337(a)(1)(B)). Please discuss any relevant case law including Commission precedent. Include in your discussion an analysis for each of the accused products.

2. Please discuss any intrinsic evidence, including the unasserted claims, file history, or related patents and applications (and prosecution histories thereof) that would guide one of ordinary skill in the art in determining whether the asserted claims of the '659 patent require a camera. Include in your discussion any relevant case law (*e.g.,* case law pertaining to construction of ''configured to'' limitations).

3. In making his direct infringement finding for the '659 patent, the ALJ cited several non-admitted physical exhibits. For each of these citations, please identify whether the physical exhibit was converted into a demonstrative exhibit and identify the corresponding demonstrative exhibit, if any.

4. Discuss whether TRW has indirectly infringed the '659 patent in light of the Supreme Court's decision in *Commil USA, LLC* v. *Cisco Sys., Inc.,* 135 S.Ct. 1920 (2015). In your response to this question, please include the following for each of the accused products:

(a) An analysis of whether all of the requirements for both induced and contributory infringement are met.

(b) Please address if the focus of the analysis for determining whether there are substantial non-infringing uses should be directed to: (1) the vehicle having the accused accessory mounting system installed, (2) the accused S-Cams, or (3) the Mobileye EyeQ chip. Please discuss (with citations to the record) whether there are substantial non-infringing uses for: (1) the accused S-Cams; and (2) the Mobileye EyeQ chip. Please cite to any relevant case law to support your position.

(c) Discuss whether Magna must prove that TRW induced infringement of each limitation of the asserted claims before TRW can be held liable for induced infringement.

(d) Please discuss whether, under the proper legal analysis, the relevant inducing acts must be related to the vehicle, the accused S-Cams, or the Mobileye EyeQ chip. Please cite to any relevant case law to support your position.

(e) Are TRW's sales to GM that occurred after issuance of the '659 patent, sufficient acts to give rise to induced infringement liability? Please cite the relevant case law and the record evidence.

5. [[ ]]

6. Should the limitations of ''said structure is configured to accommodate a forward facing camera'' and ''a structure configured for mounting to said plurality of attachment members'' of claims 1, and 90 of the '659 patent be treated as means-plus-function limitations? *See Williamson* v. *Citrix Online, LLC,* No. 2013–1130, 2015 WL 3687459 (Fed. Cir. June 16, 2015). If these limitations are means-plus-function limitations, please discuss where the structure corresponding to the claimed function is disclosed in the specification.

7. Must every limitation of a claimed invention be disclosed in a single embodiment in the specification to meet the written description requirement? Please address this question in the context of the relevant claims of the '659 patent and any relevant case law. *See* TRW Petition for Review at 33–39.

8. Did TRW, in its briefing before the ALJ, meet its burden to prove invalidity of the '659 patent by clear and convincing evidence in arguing a motivation to combine the admitted prior art or Blank with Rayner?

9. Please discuss the record evidence, if any, regarding whether there is a motivation to combine the admitted prior art or Blank with the teachings of Rayner.

10. Did TRW meet its burden, in its briefing before the ALJ, to prove obviousness of the '659 patent by clear and convincing evidence for the combination of Batavia, SafeTrac, and Navlab 1997 Demo references? Discuss whether each of the limitations of the asserted claims is met by the Batavia, SafeTrac, and Navlab 1997 Demo references.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. The complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration.

Complainant is also requested to state the date that the '659 patent expires and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on Friday, August 14, 2015. Reply submissions must be filed no later than the close of business on Monday, August 24, 2015. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. The page limit for the parties' initial submissions is 100 pages. The parties reply submissions, if any, are limited to 50 pages.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 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–907'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (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 the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The Commission extends the target date to October 8, 2015.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: July 31, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015–19287 Filed 8–5–15; 8:45 am]

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INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–522 and 731–TA–1258 (Final)]

Certain Passenger Vehicle and Light Truck Tires From China

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of certain passenger vehicle and light truck tires from China, provided for in subheadings: *4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50* of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (''LTFV'') and subsidized by the government of China.[2] [3]

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)), instituted these investigations effective June 3, 2014, following receipt of petitions filed with the Commission and Commerce by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, Pittsburgh, PA. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of certain passenger vehicle and light truck tires from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and dumped within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on February 24, 2015 (80 FR 9744). The hearing was held in Washington, DC, on June 9, 2015, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on August 3, 2015. The views of the Commission are contained in USITC Publication 4545 (August 2015), entitled *Certain Passenger Vehicle and Light Truck Tires from China: Investigation Nos. 701–TA–522 and 731–TA–1258 (Final).*

By order of the Commission.

Issued: August 3, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015–19319 Filed 8–5–15; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Vice Chairman Dean A. Pinkert and Commissioners Irving A. Williamson and Rhonda K. Schmidtlein voted in the affirmative. They further determine that imports subject to Commerce's affirmative critical circumstances determinations are not likely to undermine seriously the remedial effect of the countervailing and antidumping duty orders on certain passenger vehicle and light truck tires from China.

[3] Chairman Meredith M. Broadbent and Commissioners David S. Johanson and F. Scott Kieff dissenting.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Independent Contractor Registration and Identification

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Independent Contractor Registration and Identification,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before September 8, 2015.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201408-1219-002* (this link will only become active on the

day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Independent Contractor Registration and Identification information collection requirements codified in regulation 30 CFR 45.3(a) and 45.4(a) and (b). Regulations 30 CFR part 45, Independent Contractors, sets forth information requirements and procedures for independent contractors to obtain a MSHA identification number and procedures for service of documents upon independent contractors. The subject information collections support the appropriate assessment of fines for violations by independent contractors and the deterrent effect of MSHA enforcement actions on independent contractors. A contractor may use Form MSHA–7000–52 to register. Federal Mine Safety and Health Act of 1977 sections 101(a) and 103(h) authorize this information collection. *See* 30 U.S.C. 811(a), 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0040.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on August 31, 2015. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 11, 2015 (80 FR 26953).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0040. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Independent Contractor Registration and Identification.

OMB Control Number: 1219–0040.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 13,683.

Total Estimated Number of Responses: 104,919.

Total Estimated Annual Time Burden: 9,539 hours.

Total Estimated Annual Other Costs Burden: $576.

Dated: July 31, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–19291 Filed 8–5–15; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employer Perceptions Study for the Evaluation of Round 4 of the Trade Adjustment Assistance Community College Career Training (TAACCCT) Grants Program

AGENCY: Chief Evaluation Office, Office of the Assistant Secretary for Policy, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that required data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

A copy of the proposed Information Collection Request can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before October 5, 2015.

ADDRESSES: You may submit comments by either one of the following methods: *Email: ChiefEvaluationOffice@dol.gov; Mail or Courier:* Megan Lizik, Chief Evaluation Office, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Contact Megan Lizik by email at *ChiefEvaluationOffice@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. *Background:* The fourth round of the Trade Adjustment Assistance Community College Career Training (TAACCCT) grants program continues to provide community colleges and other eligible institutions of higher education with funds to expand and improve their ability to deliver education and career training programs that can be completed in two years or less and are suited for workers who are eligible for training under the Trade Adjustment Assistance for Workers program. In this round of grants, the solicitation of grant applications highlighted sector strategies and employer engagement as a core element of the TAACCCT grant activities.

The evaluation of Round 4 funded by the Department of Labor will include a study about employers' perceptions of and involvement with the workforce system and TAACCCT grant program. The study will involve the collection of data through a web-based survey and in-depth phone interviews with targeted employers identified as partners by TAACCCT grantees and other employers in selected grantee states or neighboring areas. This study will inform current and future efforts to encourage and support more effective employer engagement by the workforce system under the Workforce Innovation and Opportunity Act and in other Department-sponsored grant programs, such as TAACCCT.

II. *Desired Focus of Comments:* Currently, the Department of Labor is soliciting comments concerning the above data collection as part of the national evaluation of the TAACCCT grants program. Comments are requested to:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* enhance the quality, utility, and clarity of the information to be collected; and

* minimize the burden of the information collection on those who are 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.

III. *Current Actions:* At this time, the Department of Labor is requesting clearance for data collection for the employer perceptions study as part of the evaluation of Round 4 TAACCCT grants program via collection of employer perceptions of the workforce system through an online survey and phone interviews.

Type of review: New information collection request.

OMB Control Number: 1290–0NEW.

Affected Public: Private sector-businesses or other for profits and not for profit institutions (employers involved with TAACCCT grants and other employers in selected grantee states or neighboring areas)

ESTIMATED BURDEN HOURS

Form/activity	Estimated total respondents	Frequency	Total responses	Average time per response (hours)	Estimated total burden hours
Employer survey	310	Once	250	0.5	125
In-depth interviews	30	Once	25	1	25
Totals	340		275		150

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval; they will also become a matter of public record.

Signed: at Washington, DC, this 31st day of July, 2015.

Mary Beth Maxwell,

Principal Deputy Assistant Secretary for Policy, U.S. Department of Labor.

[FR Doc. 2015–19270 Filed 8–5–15; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

Veterans' Employment and Training Administration

DEPARTMENT OF EDUCATION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the U.S. Departments of Labor, Education, Health and Human Services, Agriculture, and Housing and Urban Development (Departments) are proposing a new information collection: Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act (WIOA) (Pub. L. 113–128).

DATES: Interested persons are invited to submit comments on or before October 5, 2015.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ETA–2015–0006 or via postal mail, commercial delivery, or hand delivery. A copy of the proposed information collection request (ICR) with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from *http://www.regulations.gov* or by contacting Heather Fleck by telephone at 202–693–2956, TTY 1–877–889–5627 (these are not toll-free numbers), or by email at *fleck.heather@dol.gov.* Mail and hand delivery/courier: Submit comments to Chief/WIOA State Plan, Division of WIOA Adult Services and Workforce System, Room S–4203, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Due to security-related concerns, there may be a significant delay in the receipt of submissions by United States Mail. You must take this into consideration when preparing to meet the deadline for submitting comments.

Comments submitted in response to this comment request will become a matter of public record and will be summarized and included in the request for Office of Management and Budget approval of the information collection request. In addition, regardless of the delivery method, comments will be posted without change on the *http://www.regulations.gov* Web site; consequently, the Departments recommend commenters not include personal information such as Social Security Number, personal address, telephone number, email address, or confidential business information, that they do not want made public. It is the responsibility of the commenter to determine what to include in the public record and to safeguard personal information.

Authority: 44 U.S.C. 3506(c)(2)(A).

SUPPLEMENTARY INFORMATION: The Departments, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provide the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. The PRA helps the Departments assess the impact of their information collection requirements and minimizes the public's reporting burden. It also helps the public understand the Departments' information collection requirements and provide the requested data in the desired format. The Departments are soliciting comments on the proposed ICR that is described below. The Departments are especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Departments; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Departments enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Departments minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records, and comments posted are viewable by the public.

Title of Collection: Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act.

OMB Control Number: 1205—0NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Respondents: 57.

Total Estimated Number of Annual Responses: 38.

Total Estimated Number of Annual Burden Hours: 3,278.

Total Estimated Annual Burden Cost: $141,707.00.

Abstract: Sections 102 and 103 of the Workforce Innovation and Opportunity Act (WIOA) (29 U.S.C. 3112 and 3113) require a State Governor to submit a Unified or Combined State Plan for approval every four years in order to receive funds under six core workforce development programs, identified below. Modifications to these plans must be submitted at least every two years. The Unified or Combined State Plan requirements are designed to improve service integration and ensure that the State's publicly-funded workforce system helps all jobseekers obtain the skills needed to secure good jobs while providing businesses with the skilled workers they need to compete in the global economy. The Unified or Combined State Plan would describe how the State will develop and implement a unified, integrated service delivery system rather than discuss the State's approach to operating each program individually.

Section 102(a) of WIOA requires each State, at a minimum, to submit a Unified State Plan that fosters strategic alignment of the core programs, which include the Adult, Dislocated Worker, and Youth programs (Title I); the Adult Education and Family Literacy Act program (Title II); the Wagner-Peyser program (Title III); and the Vocational Rehabilitation program (Title IV). In the alternative, Section 103 of WIOA permits a State to submit a Combined State Plan that includes the core programs plus one or more of the optional Federal programs listed in Section 103(b). If the State chooses to submit a Combined State Plan, the plan must incorporate all of the common planning elements required in the Unified State Plan, additional elements describing how the State will coordinate the optional programs with the core programs (WIOA Sec. 103(b)(3)), and elements required by the optional

program(s) that are included in the Combined State Plan.

This consolidated ICR for the Unified or Combined State Plan will replace existing planning information collections for the core programs. For States that choose to submit a Combined State Plan, the existing information collections for the program-specific State plans for the optional programs will continue to exist under their current control numbers. If the Combined State Plan is approved, the State is not required to submit any other plan to receive Federal funding for any optional program covered under that Combined State Plan (WIOA sec. 103(b)(2)). If a State plan for an optional program changes from the one approved under the Combined State Plan, the State may have to submit additional plans to the appropriate Department—such additional plans will be counted under the optional programs' existing information collection requirements.

Some of the optional programs that a State may include in the Combined State Plan currently fulfill their program-specific State planning requirements through a broader information collection administered by the program's appropriate Department. For example, section 103(b)(2) of WIOA specifically allows the employment and training activities carried out under the Community Services Block Grant (CSBG) Act administered by the Department of Health and Human Services and employment and training activities under the Department of Housing and Urban Development to be included in a WIOA Combined State Plan. However, the existing CSBG information collection, for example, includes planning elements for the employment and training activities along with planning elements for other activities under CSBG. Therefore, if States choose to include programs such as these in the Combined Plan, only the portion of the existing planning requirements that address the employment and training activities are included in the Combined State Plan (WIOA sec. 103), and States are still required to separately submit all other required elements of a complete CSBG State Plan directly to the Federal agency that administers the program.

Departmental program-specific State Plan requirements for the optional programs that may be included in the Combined State Plan will continue collecting data under the information collections currently approved by OMB. This Notice is not soliciting comments about these currently approved information collections.

As mentioned above, this ICR is intended to cover the State planning information collection requirements in sections 102 and 103 of WIOA. The notice of proposed rulemaking (NPRM) proposing regulations that would implement those sections was published on April 16, 2015, at 80 FR 20573. The comment period closed on June 15, 2015. The proposed regulations that correspond to these information collection requirements are: 20 CFR part 676 (WIOA Adult, Dislocated Worker, and Youth programs and Wagner-Peyser Act programs); 34 CFR part 361, subpart D (State Vocational Rehabilitation Services Program); and 34 CFR part 463, subpart H (Adult Education and Family Literacy Act programs).

Sec. 102(c)(1)(A) of WIOA requires States to submit their first Unified State Plan to the Secretary of Labor not later than 120 days prior to the commencement of the second full program year after the date of enactment of WIOA, which was July 22, 2014. Therefore, the second full program year commences on July 1, 2016, and the State plans must be submitted no later than March 3, 2016. Approval of this ICR is required so that the States can begin working to develop their plans, a process that requires months of coordination among State agencies and other stakeholders.

The Departments have all worked together to develop this information collection; however, this information collection will initially be approved under a Department of Labor, Employment and Training Administration (ETA) account using the common forms clearance process that allows several agencies to use a single information collection instrument. Burden estimates for all the partner agencies have been included in this Notice, in order to facilitate an understanding of the full impact of the collection; however, in accordance with OMB guidance for common forms, the ICR submitted to OMB will initially identify only the ETA burdens. OMB approval of the ICR will trigger the ability for the other Federal agencies to formally submit requests to sign on the collection; those actions would not require additional notice or public comment. This ICR may receive OMB approval before Final Rules implementing WIOA are published. If this occurs, the Departments will submit another ICR for this collection to OMB to incorporate the Final Rule citations, as required by 5 CFR 1320.11(h). Those citations currently do not exist and, therefore, cannot be included at this time. Additionally, the Departments will review, analyze, and incorporate any comments received on the NPRM that are relevant to this ICR together with comments we receive in response to this **Federal Register** Notice in order to finalize the substantive information collection requirements to the extent legally possible.

Portia Wu,

Assistant Secretary for Employment and Training, U.S. Department of Labor.

Johan E. Uvin,

Acting Assistant Secretary for the Office of Career, Technical, and Adult Education, U.S. Department of Education.

Michael K. Yudin,

Assistant Secretary for the Office of Special Education and Rehabilitative Services, U.S. Department of Education.

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families, U.S. Department of Health and Human Services.

Teresa W. Gerton,

Acting Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor.

Kevin Concannon,

Under Secretary, Food, Nutrition, and Consumer Services, U.S. Department of Agriculture.

Clifford Taffet,

General Deputy Assistant Secretary, Office of Community Planning and Development, U.S. Department of Housing and Urban Development.

Jemine A. Bryon,

General Deputy Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development.

[FR Doc. 2015–19286 Filed 8–5–15; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is soliciting comments concerning a proposed revision to the information collection request (ICR) titled, ''Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the

Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*

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 requirements on respondents can be properly assessed. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before October 5, 2015.

ADDRESSES: You may submit comments identified by Control Number 1235–0001, by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Monty Navarro, Acting Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Materials associated with this information collection may be reviewed at: *http://www.dol.gov/whd/specialemployment/14cpra.htm.* Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. *Background:* The Wage and Hour Division (WHD) of the Department of Labor administers the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.,* which sets the Federal minimum wage, overtime pay, recordkeeping, and youth employment standards of most general application. *See* 29 U.S.C. 206, 207, 211, 212. FLSA section 14(c) provides that the Secretary of Labor, ''to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals'' whose productivity for the work performed is limited by disability at subminimum wages commensurate with the individual's productivity. 29 U.S.C. 214(c). In accordance with section 14(c), the WHD regulates the employment of individuals with disabilities under special certificates and governs the application and approval process for obtaining the certificates. *See* 29 CFR part 525. DOL proposes to revise Form WH–226, the Application for Authority to Employ Workers with Disabilities at Special Minimum Wages, and WH–226A, the Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages. The proposed new information collections on these forms will assist DOL in fulfilling its statutory directive to administer and enforce the section 14(c) program, including the new conditions introduced to section 14(c) certificate holders pursuant to the Workforce Innovation and Opportunity Act (WIOA), which was signed into law on July 22, 2014. Forms WH–226 and WH–226A are the only information collections under Control Number 1235–0001 that DOL proposes to revise at this time.

In addition, section 11(d) of the FLSA authorizes the Secretary of Labor to regulate, restrict, or prohibit industrial homework as necessary to prevent circumvention or evasion of the minimum wage requirements of the Act. 29 U.S.C. 211(d). Pursuant to section 11(d), the WHD issues special certificates governing the employment of individual homeworkers and employers of homeworkers. DOL restricts homework in seven industries (*i.e.,* knitted outwear, women's apparel, jewelry manufacturing, gloves and mittens, button and buckle manufacturing, handkerchief manufacturing, and embroideries) to those employers who obtain certificates. *See* 29 CFR 530.1, 530.2. The DOL may issue individual certificates in those industries for an individual homeworker (1) who is unable to adjust to factory work because of a disability or who must remain at home to care for a person with a disability in the home, and (2) who has been engaged in industrial homework in the particular industry prior to certain specified dates as set forth in the regulations or is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency. *See* 29 CFR 530.3, 530.4. The DOL also allows employers to obtain general (employer) certificates to employ homeworkers in all restricted industries, except women's apparel and hazardous jewelry manufacturing operations. *See* 29 CFR 530.101. Form WH–2, the Application for Special Industrial Homeworker's Certificate, and Form WH–46, the Application for Certificate to Employ Homeworkers, are used in the application process for obtaining these certificates, and Form WH–75, Homeworker Handbook, is used to assist with recordkeeping. No revisions to these forms are proposed at this time.

The FLSA also requires that the Secretary of Labor, to the extent necessary to prevent curtailment of employment opportunities, provide certificates authorizing the employment of full-time students at: (1) Not less than 85 percent of the applicable minimum wage or less than $1.60, whichever is higher, in retail or service establishments or in institutions of higher education (29 U.S.C. 214(b)(1), (3); 29 CFR part 519); and (2) not less than 85 percent of the applicable minimum wage or less than $1.30, whichever is higher, in agriculture (29 U.S.C. 214(b)(2), 29 CFR part 519). The FLSA and the regulations set forth the application requirements as well as the terms and conditions for the employment of full-time students at subminimum wages under certificates and temporary authorization to employ such students at subminimum wages. The forms used to apply for these certificates are WH–200 (retail, service, or agricultural employers seeking to employ full-time students for 10 percent or more of total monthly hours of employment), WH–201 (institution of higher learning seeking to employ its students), and WH–202 (retail, service, or agricultural employers seeking to employ six or fewer full-time students). No revisions to these forms are proposed at this time.

FLSA section 14(a) requires that the Secretary of Labor, to the extent necessary to prevent curtailment of employment opportunities, provide by regulations or order for the employment of learners, apprentices, and messengers who, under special certificates may be

paid less than the statutory minimum wage. *See* 29 U.S.C. 214(a). This section also authorizes the Secretary to set limitations on such employment as to time, number, proportion, and length of service. The regulations at 29 CFR part 520 contain the provisions that implement the section 14(a) requirements. Form WH–205 is the application an employer uses to obtain a certificate to employ student-learners at wages lower than the federal minimum wage. Form WH–209 is the application an employer uses to request a certificate authorizing the employer to employ learners and/or messengers at subminimum wage rates. Regulations issued by the DOL's Office of Apprenticeship no longer permit the payment of subminimum wages to apprentices in an approved program; therefore, DOL has not issued apprentice certificates since 1987. *See* 29 CFR 29.5(b)(5). However, the WHD must maintain the information collection for apprentice certificates in order for the agency to fulfill its statutory obligation under FLSA to maintain this program. No revisions to these forms are proposed at this time.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Enhance the quality, utility, and clarity of the information to be collected;
- 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;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks an approval for the revision of this information collection in order to ensure effective administration of various special employment programs.

Type of Review: Revision.

Agency: Wage and Hour Division.

Title: Information Collections Pertaining to Special Employment Under the Fair Labor Standards Act.

OMB Number: 1235–0001.

Affected Public: Business or other for-profit, Not-for-profit institutions, Farms, State, Local, or Tribal Government.

Agency Numbers: Forms WH–2, WH–46, WH–75, WH–200, WH–201, WH–202, WH–205, WH–209, WH–226, WH–226A.

Total Respondents: 4,355.

Total Annual Responses: 10,300.

Estimated Total Burden Hours: 15,178.

Estimated Time per Response: Ranges from 10 minutes to 120 minutes depending on the form.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operation/maintenance): $3,498.

Dated: July 31, 2015.

Mary Ziegler,

Assistant Administrator for Policy.

[FR Doc. 2015–19272 Filed 8–5–15; 8:45 am]

BILLING CODE 4510–27–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Environmental Research and Education: Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Environmental Research and Education (9487).

Dates: September 16 & 17, 2015: 8 a.m.–5 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Stafford I, Room 1235, Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Diane Pataki, Program Director, National Science Foundation, Suite 655, 4201 Wilson Blvd., Arlington, Virginia 22230. Email: *dpataki@nsf.gov.*

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight concerning support for environmental research and education.

Agenda

Wednesday, September 16, 2015

- Approval of minutes from past meeting
- Updates on recent NSF and other agency environmental activities
- Distribute and discuss the group's new document entitled, America's Future: Environmental Research and Education for a Thriving Century
- Presentation by Ken Calderia
- Meet with NSF Assistant Directors

Thursday, September 17, 2015

- Discuss and refine draft of the Decadal Vision for Environmental Research and Education document (Continued)
- Meet with the NSF Director
- AC Business—Set date for next meeting

Dated: July 31, 2015.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2015–19295 Filed 8–5–15; 8:45 am]

BILLING CODE 7555–01–P

REAGAN-UDALL FOUNDATION FOR THE FOOD AND DRUG ADMINISTRATION

[BAC 416404]

Request for Steering Committee Nominations

ACTION: Request for nominations to the Steering Committee for the Foundation's Big Data for Patients (BD4P) Program.

SUMMARY: The Reagan-Udall Foundation (RUF) for the Food and Drug Administration (FDA), which was created by Title VI of the Food and Drug Amendments of 2007, is requesting nominations for its Big Data for Patients (BD4P) Steering Committee. The Steering Committee will provide oversight and guidance for the BD4P program, and will report to the Reagan-Udall Foundation for the FDA's Board of Directors.

DATES: All nominations must be submitted to the Reagan-Udall Foundation for the FDA by Friday, September 4, 2015. The BD4P Steering Committee members will be selected by the Reagan-Udall Foundation for the FDA's Board of Directors; those selected will be notified by September 30 regarding the Board's decision. See the **SUPPLEMENTARY INFORMATION** section for Steering Committee responsibilities, selection criteria and nomination instructions.

ADDRESSES: The Reagan-Udall Foundation for the FDA is located at 1025 Connecticut Ave. NW., Suite 1000, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Questions should be sent to The Reagan-Udall Foundation for the FDA, 202–828–1205, *BD4P@ReaganUdall.org.*

SUPPLEMENTARY INFORMATION:

I. Background

The Reagan-Udall Foundation for the FDA (the Foundation) is an independent

501(c)(3) not-for-profit organization created by Congress to advance the mission of FDA to modernize medical, veterinary, food, food ingredient, and cosmetic product development; accelerate innovation; and enhance product safety. The Foundation acts as a neutral third party to establish novel, scientific collaborations. With the ultimate goal of improving public health, the Foundation provides a unique opportunity for different sectors (FDA, patient groups, academia, other government entities, and industry) to work together in a transparent way to create exciting new research projects to advance regulatory science.

Big Data for Patients (BD4P), a new program led by the Foundation, will bring together multiple stakeholder groups to leverage collective knowledge, technical expertise, funding, and other resources, to create a state-of-the-art patient training program and online community focused on the opportunities and challenges posed by Big Data.

BD4P will empower patients and advocates with the language and concepts of data science, as well as critical appraisal skills, so they can effectively and actively participate in health research involving Big Data. Given the high profile of health research and initiatives using Big Data, combined with the growing efforts to make healthcare and medical research more patient-centered, it is critical that patients have a voice and active role in this work. It is still not completely understood how Big Data research will impact patient health care and medical decision making. BD4P presents an opportunity to ensure that patients are adequately informed and prepared to participate in this work, rather than being left out or left behind.

Development of the program will be a fully collaborative process, with patients and key stakeholders involved in shaping the program every step of the way—from prioritizing topics for program content and input on program design, to actually taking the training program and providing feedback to evaluate the program and make improvements. We will ensure that the focus is not only on the impact of Big Data on patients, but also the impact that patients can have on Big Data research. For additional information on the BD4P program, visit the Reagan-Udall Foundation Web site: *http://bit.ly/1HkhSOq.*

II. BD4P Steering Committee Roles and Responsibilities

The BD4P Steering Committee will provide guidance on the operation of the BD4P program, in conjunction with the RUF Board, project staff, and others. The Steering Committee will provide overall programmatic oversight to ensure a focus on the long-term vision of the program.

The BD4P Steering Committee will be charged with several responsibilities, including:

- Reviewing and approving the BD4P Program Charter
- Monitoring adherence to the BD4P Program mission and operational principles in the Charter
- Developing metrics and evaluating the project at various milestones
- Reviewing and approving the BD4P Program Development Plan, including program curriculum, stakeholder engagement plan, and long-term sustainability plan.
- Reviewing partnership and collaboration proposals submitted to the project team

The BD4P Steering Committee Chair must be able to complete additional responsibilities, including:

- Defining the BD4P Steering Committee's meeting agendas and facilitating those meetings
- Recommending for termination, as necessary, any BD4P Steering Committee members demonstrating dereliction of duties as specified in the BD4P Charter
- Other responsibilities as required upon implementation of BD4P program

A full list of BD4P Steering Committee responsibilities, as well as responsibilities of the Chair, may be found on the Reagan-Udall Foundation Web site: *http://bit.ly/1KEoNTN.*

III. BD4P Steering Committee Positions and Selection Criteria

RUF is seeking nominations for 7 voting members of the BD4P Steering Committee, comprised of the following 5 categories:

- Patient Advocate: 3 members
- Pharmaceutical sector: 1 member
- Technology sector: 1 member
- Academia/Research Institute: 1 member
- At Large: 1 member

The BD4P Steering Committee will also have 1 member from the FDA (appointed by the FDA), 1 member from the National Institutes of Health (appointed by the National Institutes of Health), and 1 member from the Patient Centered Outcomes Research Institute (appointed by PCORI). These 3 individuals will be non-voting members.

Nominees for the voting positions will be evaluated by the RUF Board based on the following required criteria for each of the 7 positions:

- Ability to complete Steering Committee responsibilities, listed above
- Currently employed by/volunteering for stakeholder field (*e.g.,* pharmaceutical, academia, patient advocate, etc.) with several years of relevant experience
- Leading expert in their relevant field (based on position, publications, or other experience)
- Working knowledge of at least one of the following areas: Adult education, data sharing, data science, health informatics, learning health care systems, partnerships, patient advocacy, patient engagement, patient-centered/patient-focused drug development, patient-centered outcomes research, patient reported outcomes, precision medicine, science/health communication.
- Prior experience serving on a related or similar governance body
- Understanding of the landscape and the impact on the stakeholder group they are representing with their seat

IV. Terms of Service

- The BD4P Steering Committee meets in-person at least twice per year, with teleconferences in between meetings as deemed necessary by the Chair
- Members will serve two or three year, staggered terms, as determined by the RUF Board
- Members do not receive compensation from RUF
- Members can be reimbursed by RUF for actual and reasonable expenses incurred in support of BD4P in accordance with applicable law and their specific institutional policies
- Members are subject to the BD4P Conflict of Interest policies (additional information can be accessed on the Reagan-Udall Foundation Web site at: *http://bit.ly/1KEoNTN.*

V. Nomination Instructions

- The nomination form can be accessed on the Reagan-Udall Foundation Web site: *http://bit.ly/1KEoNTN*
- Individuals may be nominated for 1 or more of the 5 stakeholder categories
- Individuals may nominate themselves or others
- The nomination deadline is September 4, 2015.

Dated: July 31, 2015.

Jane Reese-Coulbourne,

Executive Director, Reagan-Udall Foundation for the FDA.

[FR Doc. 2015–19285 Filed 8–5–15; 8:45 am]

BILLING CODE 4164–04–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75578; File No. SR–NYSE–2015–26]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Granting Approval of a Proposed Rule Change Making Permanent the Rules of the NYSE New Market Model Pilot and the NYSE Supplemental Liquidity Providers Pilot

July 31, 2015.

I. Introduction.

On June 4, 2015, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to make permanent the rules of the Exchange's New Market Model (''NMM'') Pilot (''NMM Pilot'') and the Supplemental Liquidity Providers (''SLP'') Pilot (''SLP Pilot,'' and together with the NMM Pilot, the ''Pilots''). The proposed rule change was published in the **Federal Register** on June 17, 2015.[3] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

A. Background of the Proposal

In October 2008, the Exchange implemented the NMM, under which the Exchange's market currently operates. Historically, NYSE specialists were responsible for overseeing the execution of all orders coming into the Exchange, for conducting auctions on the NYSE Floor (the ''Floor''), and for maintaining an orderly market in all assigned securities.[4] Price discovery on the Exchange took place almost exclusively on the Floor in the form of face-to-face interactions among NYSE Floor brokers (''Floor brokers'') and specialists.[5] In 2006, the Exchange began operating under the NYSE HYBRID MARKET, under which Exchange systems assumed the function of matching and executing electronically entered orders and the Exchange programmed its systems to provide its specialists with an order-by-order advance ''look'' at incoming orders.[6] By 2008, however, the increase in electronic executions on the Exchange, as well as the increase in the use of smart order-routing engines by market participants, had reduced the advantages once enjoyed by Floor brokers and specialists.[7] According to the Exchange at the time, informational advantages had shifted from Floor brokers and specialists to market participants trading electronically ''upstairs.'' [8]

In response to the increased prevalence of electronic trading and the aforementioned shift in informational advantages among the Exchange's market participants, the Exchange proposed the NMM.[9] Among other things, the NMM: (1) Eliminated the function of the Exchange's specialists and created a new category of market participant, Designated Market Makers (''DMMs'') under NYSE Rule 104; (2) implemented the DMM Capital Commitment Schedule (''CCS'') under NYSE Rule 1000; (3) and modified the Exchange's priority rules under NYSE Rule 72.[10] In a subsequent filing and in connection with the NMM Pilot,[11] the Exchange created an additional category of market participant, SLPs, under NYSE Rule 107B. The NMM Pilot was originally scheduled to end on October 1, 2009,[12] and the SLP Pilot was originally scheduled to be a six-month pilot program.[13] The Exchange filed to extend the operation of the Pilots on several occasions, most recently to extend the Pilot periods to July 31, 2015.[14] In this proposal, the Exchange seeks to make the Pilots permanent.

B. Description of the Exchange Rules Subject to the Pilots

1. *NYSE Rule 72*

The Exchange's rules governing the priority of bids and offers, and the allocation of executions, are set forth in NYSE Rule 72. Under NYSE Rule 72(a), when a bid or offer, including pegging interest,[15] is established as the only displayable [16] bid or offer made at a particular price, and that bid or offer is the only displayable interest when its price is or becomes the Exchange Best Bid or Offer (''BBO''), that bid or offer is designated as the ''setting interest'' and is entitled to priority for allocation of executions at that price, as described in NYSE Rule 72 and subject to certain provisions set forth in NYSE Rule 72(a)(ii).

NYSE Rule 72(b) sets forth the provisions governing how setting interest retains its priority. Specifically, once priority is established by setting interest, that setting interest retains its priority for any execution at its price when that price is at the Exchange BBO. If executions decrement the setting interest to an odd-lot size,[17] the remaining portion of the setting interest retains its priority. For any execution of setting interest that occurs when the price of the setting interest is not the Exchange BBO, the setting interest does not have priority and is executed on ''parity,'' as described below.[18]

NYSE Rule 72(c) sets forth the Exchange's rules for the allocation of executions. An automatically executing order will trade first with displayable bids or offers and, if there is insufficient displayable volume to fill the order, will trade next with non-displayable interest. Displayable interest will trade on parity with other displayable interest, and non-displayable interest will trade on parity with other non-displayable

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 75153 (June 11, 2015), 80 FR 3417 (''Notice'').

[4] *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379, 64739 (October 29, 2008) (SR–NYSE–2008–46) (''NMM Approval Order'').

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id* at 64379–80.

[9] *See id.*

[10] *See id.* at 64380–87.

[11] *See* Securities Exchange Act Release No. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108) (''SLP Notice'').

[12] *See* NMM Approval Order, *supra* note 4, 73 FR at 64389.

[13] *See* SLP Notice, *supra* note 11, 73 FR at 6904.

[14] *See* Securities Exchange Act Nos. 73919 (December 23, 2014), 79 FR 78930 (December 31, 2014) (SR–NYSE–2014–71) (citing prior filings to extend the NMM Pilot and extending the NMM Pilot until the earlier of Commission approval to make the NMM Pilot permanent or July 31, 2015) and 73945 (December 24, 2014), 80 FR 58 (January 2, 2015) (SR–NYSE–2014–72) (citing prior filings to extend the SLP Pilot and extending the SLP Pilot until the earlier of Commission approval to make the SLP Pilot permanent or July 31, 2015).

[15] *See* NYSE Rule 13(f)(3). In 2012, the Exchange amended Rule 72(a) to specify that pegging interest may be a setting interest. *See* Securities Exchange Act Release No. 68302 (November 27, 2012), 77 FR 71658 (December 3, 2012) (SR–NYSE–2012–65).

[16] As used in NYSE Rule 72, the term ''displayable'' means that portion of interest that could be published as, or as part of, the Exchange BBO, including pegging interest. Displayable odd-lot orders are published as part of the Exchange BBO if, when aggregated with other interest available for execution at that price point, the sum of the odd-lot order and other interest available at that price point would be equal to or greater than a round lot. The term ''displayed interest'' includes that part of an order that is published as, or as part of, the Exchange BBO, which may include one or more odd-lot orders. *See* NYSE Rule 72(a)(i).

[17] NYSE Rule 72(a)(ii)(A) precludes odd lot orders from qualifying as a setting interest.

[18] *See infra,* notes 20–21 and accompanying text. Furthermore, priority of setting interest is not retained after the close of trading on the Exchange or following the resumption of trading in a security after a trading halt has been invoked pursuant to NYSE Rule 123D or NYSE Rule 80B. Priority of the setting interest is not retained on any portion of the priority interest that is routed to an away market and is returned unexecuted unless the priority interest is greater than a round lot and the only other interest at the price point is odd-lot orders, the sum of which is less than a round lot. *See* NYSE Rule 72(b)(iii).

interest.[19] For the purpose of share allocation among market participants in an execution, (1) the DMM in a security counts as one ''participant,'' (2) each NYSE Floor broker counts as a participant, and (3) orders represented in Exchange systems, including those of SLPs, collectively constitute a single participant (referred to as the ''Book Participant''). The orders represented in the Book Participant are allocated shares among themselves by time priority with respect to entry.

In any execution at the Exchange BBO, a participant who has established priority as the setting interest receives 15% of the volume of the executed amount or a minimum of one round lot, whichever is greater, until the setting interest has received a complete execution of its eligible priority interest. Setting interest that is decremented to an odd-lot size receives 15% of the volume of the incoming interest rounded up to the size of the setting interest, or the size of the incoming interest, whichever is less. Following the allocation of an execution to setting interest as provided above, the remainder of the executed volume is allocated to each participant on parity. In general, parity provides all market participants the ability to receive executions on an equal basis with other interest available at that price.[20] The participant with the setting interest is also included in the parity allocation.

If there is no setting interest for an execution at the Exchange BBO, allocation of the executed volume is on parity by participant, except as otherwise set forth in NYSE Rule 72. When an execution occurs at the Exchange BBO, interest that is displayed in the Exchange BBO is allocated before any interest that is not displayed. In allocating an execution that involves setting interest, whether the execution takes place at the Exchange BBO or otherwise, the volume allocated to the setting interest is allocated to the interest in the setting interest that is entitled to priority first.

Shares are allocated among participants in round lots or the size of the order if less than a round lot. If the number of shares to be executed at a price point is insufficient to allocate round lots to all the participants eligible to receive an execution at that price point, or the size of the order is less than a round lot, Exchange systems create an allocation wheel of the eligible participants at that price point, and the available round-lot shares are distributed to the participants in turn. If an odd-lot-sized portion of the incoming order remains after allocating all eligible round lots, the remaining shares are allocated to the next eligible participant.

On each trading day, the allocation wheel for each security is set to begin with the participant whose interest is entered or retained first in time. Thereafter, participants are added to the wheel as their interest joins existing interest at a particular price point. If a participant cancels its interest and then rejoins, that participant joins as the last position on the wheel at that time. If an odd-lot allocation completely fills the interest of a participant, the wheel moves to the next participant. The allocation wheel also moves to the next participant when Exchange systems execute remaining displayable odd-lot interest prior to replenishing the displayable quantity of a participant.[21]

When an execution occurs outside the Exchange BBO, the interest that is displayable is allocated before any interest that is non-displayable. All interest that is displayable is on parity with other individual participants' displayable interest. Similarly, all interest that is non-displayable is on parity with other individual participants' non-displayable interest. Incoming orders eligible for execution at price points between the Exchange BBO trade with all available interest at the price of the execution in between the Exchange BBO. All NYSE interest available to participate in the execution (*e.g.,* d-quotes, s-quotes, Reserve Orders, Mid-Point Passive Liquidity (''MPL'') Orders, and CCS interest) will trade on parity with other such interest.[22]

DMM interest added intra day to participate in a verbal transaction with a Floor broker or during a slow quote is allocated shares only after all other interest eligible for execution at the price point is executed in full. DMM interest added at the time of the slow quote, or when verbally trading with a Floor broker, that is not executed during the transaction will be cancelled.[23] However, s-Quotes, if any, representing DMM interest present at the price point prior to the verbal transaction with a Floor broker or during a slow quote receive an allocation on parity as described above. An order that is modified to reduce the size of the order retains the time stamp of original order entry. An order modified in any other way, such as increasing the size or changing the price of the order, receives a new time stamp.

Under NYSE Rule 72(d), when a member has an order to buy and an order to sell an equivalent amount of the same security, and both orders are ''block'' orders (*i.e.,* orders of at least 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less)[24]—and are not for the account of the member or member organization, an account of an associated person, or an account with respect to which the member, member organization, or associated person thereof exercises investment discretion—then the member may ''cross'' those orders at a price at or within the Exchange BBO.[25] The member's bid or offer shall be entitled to priority at the cross price, irrespective of pre-existing displayed bids or offers

[19] After the Exchange filed this proposal and it was noticed for public comment, the Commission approved a separate proposed rule change under which the Exchange amended its rules governing order types and modifiers. *See* Securities Exchange Act Release No. 75444 (July 13, 2015), 80 FR 42575 (July 17, 2015) (SR–NYSE–2015–15) (''NYSE Order Type Approval Order''). In the NYSE Order Type Approval Order, the Commission approved amendments to NYSE Rule 72(c)(i) that: (1) Replaced the term ''reserve interest'' with the term ''non-displayable interest'' so that the rule now provides that all non-displayable interest, which includes certain types of reserve interest and Mid-Point Passive Liquidity (''MPL'') Orders, trades on parity in accordance with the order allocation provisions of NYSE Rule 72; and (2) changed the phrase ''the displayed bid (offer)'' to ''displayable bids (offers)'' and changed the phrase ''displayed volume'' to ''displayable volume'' to specify that an automatically executing order will trade first with displayable bids (offers) and, if there is insufficient displayable volume to fill the order, will trade next with non-displayable interest. *See* NYSE Order Type Approval Order, 80 FR at 42577.

[20] *See* NMM Approval Order, *supra* note 4, 73 FR at 64384. In NYSE Rule 72(c)(iv) and (viii), the Exchange provides examples of how orders are executed on parity.

[21] NYSE Rule 72(c)(viii) provides examples of how the Exchange's allocation wheel sets execution priority.

[22] In the NYSE Order Type Approval Order, the Commission approved a change to NYSE Rule 72(c)(x) that added MPL Orders to the list of orders identified as being eligible to trade at price points between the Exchange BBO. *See* NYSE Order Type Approval Order, *supra* note 19, 80 FR at 42577.

[23] When the Exchange adopted the NMM Pilot in 2008, all DMM interest was allocated on parity. In 2009, the Exchange amended NYSE Rule 72 to eliminate parity allocations for DMM interest added intra day during a slow quote or when verbally trading with Floor brokers at the point of sale. *See* Securities Exchange Act Release No. 60287 (July 10, 2009), 74 FR 34817 (July 17, 2009) (SR–NYSE–2009–69).

[24] *See* NYSE Rule 72.10.

[25] In 2011, the Exchange amended NYSE Rule 72(d) regarding agency cross transactions and added NYSE Rule 72.10 to: (1) Change the minimum size of a block order under the rule from 25,000 shares or more to 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less; and (2) conform NYSE Rule 72(d) to NYSE Rule 90 to permit a Floor broker to represent an NYSE Rule 72(d) crossing transaction on behalf of an unaffiliated member or member organization. *See* Securities Exchange Act Release No. 64334 (April 25, 2011), 76 FR 24078 (April 29, 2011) (SR–NYSE–2011–18).

on the Exchange at that price. NYSE Rule 72(d) also sets forth the rules and procedures for executing these types of transactions.

2. NYSE Rule 104

NYSE Rule 104 sets forth the obligations of DMMs. Under NYSE Rule 104(a), DMMs registered in one or more securities traded on the Exchange are required to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable. NYSE Rule 104(a) also enumerates specific responsibilities and duties of a DMM, including: (1) A continuous two-sided quoting requirement, which mandates that each DMM maintain a bid or an offer at the National Best Bid (''NBB'') and National Best Offer (''NBO,'' together the ''NBBO'') for a certain percentage of the trading day [26] and (2) the facilitation of openings, re-openings, the Exchange's Midday Auction, and the close of trading for the DMM's assigned securities, all of which may include supplying liquidity as needed.[27] NYSE Rule 104(e) further provides that DMM units must provide contra-side liquidity as needed for the execution of odd-lot quantities that are eligible to be executed as part of the opening, re-opening, and closing transactions but that remain unpaired after the DMM has paired all other eligible round lot sized interest.

NYSE Rule 104(b) permits DMM units to use algorithms for quoting and trading, sets forth the provisions governing how a DMM unit's systems may employ algorithms, and lists the order types that a DMM unit may not enter.[28] Furthermore, under NYSE Rule 104(d), a DMM unit may provide algorithmically generated price improvement to all or part of an incoming order that can be executed at or within the Exchanges BBO through the use of CCS interest under Rule 1000.[29]

Under NYSE Rule 104(c), a DMM unit may maintain reserve interest consistent with Exchange rules governing Reserve Orders,[30] and such reserve interest is eligible for execution in manual transactions.

NYSE Rule 104(f) sets forth the functions of DMMs, such as: (1) Mandating that a DMM maintain, insofar as reasonably practicable, a fair and orderly market on the Exchange in the stocks in which he or she is so acting and (2) stating that DMMs are designated as market makers on the Exchange for all purposes under the Act and the rules and regulations thereunder.

NYSE Rule 104(g) governs transactions by DMMs. NYSE Rule 104(g) states that transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. NYSE Rule 104(g) describes certain permitted transactions, including neutral transactions and Non-Conditional Transactions, as defined therein. NYSE Rule 104(g)(A)(III) provides that, except as otherwise permitted by NYSE Rule 104, during the last ten minutes prior to the close of trading, a DMM with a long or short position in a security is prohibited from making a purchase or sale, respectively, in such security that results in a new high or low price, respectively, on the Exchange for the day at the time of the DMM's transaction. Furthermore, NYSE Rule 104(h) addresses DMM transactions in securities that establish or increase the DMM's position. NYSE Rule 104(h)(ii) permits certain ''Conditional Transactions'' [31] without restriction as to price if they are followed by appropriate re-entry on the opposite side of the market commensurate with the size of the DMM's transaction.[32] However, NYSE Rule 104(h)(iv) permits certain other Conditional Transactions without restriction as to price, and NYSE Rule 104(i) provides that re-entry obligations following such Conditional Transactions would be the same as the re-entry obligations for Non-Conditional Transactions pursuant to NYSE Rule 104(g).

NYSE Rule 104(j), which was added in 2013,[33] permits a DMM to perform the following Trading Floor functions:

- Maintain order among Floor brokers manually trading at the DMM's assigned panel;
- bring Floor brokers together to facilitate trading, which may include the DMM as a buyer or seller;
- assist a Floor broker with respect to an order by providing information regarding the status of a Floor broker's orders, helping to resolve errors or questioned trades, adjusting errors, and canceling or inputting Floor broker agency interest on behalf of a Floor broker; and
- research the status of orders or questioned trades on his or her own initiative or at the request of the Exchange or a Floor broker when a Floor broker's handheld device is not operational, when there is activity indicating that a potentially erroneous order was entered or a potentially erroneous trade was executed, or when there otherwise is an indication that improper activity may be occurring.[34]

Finally, NYSE Rule 104(k) provides that in the event of an emergency, such as the absence of the DMM, or when the volume of business in the particular stock or stocks is so great that it cannot be handled by the DMMs without assistance, an NYSE Floor Governor may authorize a member of the Exchange, who is not registered as a DMM in such stock, to act as temporary DMM for that day only.

[26] *See* NYSE Rule 104(a)(1). NYSE Rule 104(a)(1) requires the DMM to maintain a bid or offer at the NBB and NBO at least 15% of the trading day for securities in which the DMM unit is registered with a consolidated average daily volume (''CADV'') of less than one million shares, and at least 10% of the trading day for securities in which the DMM unit is registered with a CADV equal to or greater than one million shares.

[27] *See* NYSE Rule 104(a)(2)–(3). In 2015, the Exchange implemented its Trading Collar price protection under Rule 1000(c) and simultaneously eliminated liquidity replenishment points (''LRP'') and the ''gap'' quote procedures. *See* Securities Exchange Act Release No. 74063 (January 15, 2015), 80 FR 3269 (January 22, 2015) (SR–NYSE–2015–01). The Exchange also amended NYSE Rule 104(a) to eliminate a DMM's obligations to facilitate trading when an LRP was reached or the gap quote procedure was being used. *See id.*

[28] In the NYSE Order Type Approval Order, the Commission approved the following changes to NYSE Rule 104(b): (1) The addition of text stating that the Exchange systems will prevent incoming DMM interest from trading with resting DMM interest; and (2) the addition of text specifying the order types and modifiers that a DMM unit may not enter, such as Market Orders, as defined under NYSE Rule 13. *See* NYSE Order Type Approval Order, *supra* note 19, 80 FR 42577–78.

[29] *See infra* Section II.B.3 for a discussion of a DMM's CCS interest.

[30] *See* NYSE Rule 13(d)(2). Reserve interest is the portion of a Reserve Order that is not displayed. *See* NYSE Rule 13(d)(2)(C).

[31] Under NYSE Rule 104(h)(i), a Conditional Transaction is a DMM's transaction in a security that establishes or increases a position and reaches across the market to trade as the contra-side to the Exchange published bid or offer.

[32] NYSE Rule 104(h)(iii) sets forth the Exchange's re-entry obligations for Conditional Transactions.

[33] *See* Securities Exchange Act Release No. 71175 (December 23, 2013), 78 FR 79534 (December 30, 2013) (SR–NYSE–2013–21).

[34] NYSE Rule 104(j)(ii) permits the Exchange to make systems available to a DMM at the post displaying the following information about securities in which the DMM is registered: (1) Aggregated buying and selling interest; (2) the price and size of any individual order or Floor broker agency interest file and the entering and clearing firm information for such order, except that the display excludes any order or portion thereof that a market participant has elected not to display to a DMM; and (3) post-trade information. A DMM may not use any such information in a manner that would violate Exchange rules or federal securities laws or regulations. Under NYSE Rule 104(j)(iii), a DMM may provide market information that is available to the DMM at the post to (1) respond to an inquiry from a Floor broker in the normal course of business or (2) visitors to the Trading Floor for the purpose of demonstrating methods of trading. However, a Floor broker may not submit an inquiry pursuant to NYSE Rule 104(j)(iii) by electronic means and the DMM may not use electronic means to transmit market information to a Floor broker in response to a Floor broker's inquiry pursuant to NYSE Rule 104(j)(iii).

In addition to making the current provisions of NYSE Rule 104 permanent, the Exchange also proposes to: (1) Replace the reference to ''NYSE Regulation's Division of Market Surveillance'' in Rule 104(k) with a reference to ''the Exchange'' because, pursuant to NYSE Rule 0, Exchange Rules that refer to NYSE Regulation, Inc. (''NYSE Regulation''), NYSE Regulation staff or departments, Exchange staff, and Exchange departments should be understood as also referring to the Financial Industry Regulatory Authority (''FINRA'') staff and FINRA departments acting on behalf of the Exchange pursuant to the regulatory services agreement between the Exchange and FINRA, as applicable; (2) delete the Supplementary Material to NYSE Rule 104—NYSE Rule 104.05—because NYSE Rule 104.05 states that its provisions apply ''until no later than October 31, 2009;'' and (3) delete NYSE Rule 104T, which, by its express terms, sets forth the rule for dealings by DMMs until no later than ten weeks after the Commission issued the NMM Approval Order.[35]

3. The DMM Capital Commitment Schedule

The provisions of NYSE Rule 1000 relating to the CCS, and which are operating as part of the NMM Pilot, are set forth in NYSE Rules 1000(d)—1000(g). In general, the CCS allows a DMM to create a schedule of additional non-displayed liquidity at various price points at which the DMM is willing to interact with other trading interest (*i.e.,* outside, at, and inside the Exchange BBO) and provide price improvement to orders in the Exchange's systems. CCS interest is separate and distinct from other DMM interest and the Exchange characterizes CCS interest as ''generally interest of last resort.'' [36]

Under NYSE Rule 1000(d), a DMM unit may, for each security in which it is registered, place within Exchange systems a pool of liquidity—the CCS—to be available to fill or partially fill [37] incoming orders in automatic executions.[38] NYSE Rule 1000(d) also provides that CCS interest is used to trade at the Exchange BBO, at prices better than the Exchange BBO, and at prices outside the Exchange BBO. CCS interest must be for a minimum of one round lot of a security and entered at price points that are at, inside, or away from the Exchange BBO. NYSE Rule 1000(e) governs executions at and outside the Exchange BBO and specifies how CCS interest would interact with such executions.

NYSE Rule 1000(f) specifies how CCS interest may provide price improvement inside the Exchange BBO with interest arriving in the Exchange market that: (1) Will be eligible to trade at or through the Exchange BBO; (2) will be eligible to trade at the price of interest in Exchange systems representing non-displayable reserve interest of Reserve Orders and Floor broker agency interest files reserve interest (''hidden interest'') or MPL Orders; or (3) will be eligible to route to away market interest for execution, if the total volume of CCS interest, plus d-Quote interest in Floor broker agency interest files, plus any interest represented by hidden interest, would be sufficient to fully complete the arriving interest at a price inside the Exchange BBO. In such an instance, the Exchange systems determine the price point inside the BBO at which the maximum volume of CCS interest will trade, taking into account the volume, if any, available from Floor broker d-Quotes and hidden interest. The arriving interest is executed at that price, with all interest trading on parity.

Under NYSE Rule 1000(g), CCS interest may trade with non-marketable [39] interest if the non-marketable interest betters the Exchange BBO (or cancels in the case of an arriving IOC order) and if the incoming interest may be executed in full by all available trading interest on the Exchange, including CCS interest and d-quotes. Such a trade would take place at the limit price of the arriving non-marketable interest. All interest trading with the incoming interest trades on parity.

4. NYSE Rule 107B

NYSE Rule 107B sets forth the rules governing SLPs. Under NYSE Rule 107B(a), an SLP is defined as a member organization that electronically enters proprietary orders or quotes from off the Floor into the systems and facilities of the Exchange and is obligated: (1) To maintain a bid or an offer at the NBB or NBO in each assigned security in round lots for at least 10% of the trading day, on average, and for all assigned SLP securities; [40] and (2) to add liquidity of an average daily volume (''ADV'') of more than a specified percentage of CADV in all NYSE-listed securities, as set forth in the Exchange's Price List, on a monthly basis.[41] An SLP can be either a proprietary trading unit of a member organization (''SLP-Prop'') or a registered market maker at the Exchange (''SLMM'').[42]

Under NYSE Rule 107B(b), when an SLP posts liquidity on the Exchange and that liquidity is executed against an inbound order, the SLP receives a financial rebate for the executed transaction as set forth in the Exchange's Price List, subject to the non-regulatory penalty provision described in NYSE Rule 107B(k).[43] The SLP receives credit toward the financial rebate for executions of displayed and

[35] Additionally, in NYSE Rules 104 and 1000, the Exchange proposes to replace all references to the term ''Display Book'' with references either to the term (1) ''Exchange systems'' when use of the term refers to the Exchange systems that receive and execute orders, or (2) ''Exchange book'' when use of the term refers to the interest that has been entered and ranked in Exchange systems. The Exchange represents that it has retired the actual system referred to as the ''Display Book,'' but not the functionality associated with the Display Book. *See* Notice, *supra* note 3, 80 FR 34717 n.9.

[36] *See* Notice, *supra* note 3, 80 FR at 34718.

[37] The original NMM Pilot permitted CCS to participate only if it would fill an incoming order. In 2009, the Exchange amended Rule 1000 to provide that Exchange systems would access CCS interest to participate in executions when the incoming order would only be partially executed. *See* Securities Exchange Act Release No. 60671 (September 15, 2009), 74 FR 48327 (September 22, 2009) (SR–NYSE–2009–71).

[38] CCS interest supplements displayed and non-displayed interest of the DMM in Exchange systems.

[39] Under NYSE Rule 1000(g)(1), ''non-marketable'' means trading interest (*i.e.,* displayable and non-displayable) that is at a price higher than the current Exchange bid (but below the current Exchange offer) or lower than the current Exchange offer (but above the current Exchange bid), including better bids and offers on other market centers. *See* NYSE Rule 1000(g)(1).

[40] The SLP Pilot originally required an SLP to maintain a bid or offer at the NBB or NBO in each assigned security averaging at least 5% of the trading day. Effective September 25, 2010, the Exchange increased this quoting requirement to require SLPs to maintain a bid or offer at the NBB or NBO in each assigned security averaging at least 10% of the trading day. *See* Securities Exchange Act Release No. 62791 (August 30, 2010) 75 FR 54411 (September 7, 2010) (SR–NYSE–2010–60) (''SLP 2010 Filing'').

[41] In the SLP 2010 Filing, the Exchange introduced a monthly volume requirement for SLPs of an ADV of more than 10 million shares. *See* SLP 2010 Filing, *supra* note 40. Effective September 1, 2012, the Exchange amended the monthly volume requirement to require instead that SLPs meet an ADV that is more than a specified percentage of the NYSE CADV and amended the Exchange's Price List to specify the applicable percentage of NYSE CADV for the monthly volume requirement. *See* Securities Exchange Act Release No. 67759 (August 30, 2012), 77 FR 54939 (September 6, 2012) (SR–NYSE–2012–38).

[42] The SLP Pilot was originally available only for a proprietary trading unit of a member organization. In 2012, the Exchange amended NYSE Rule 107B to add the SLMMs as a class of SLPs that are registered as market makers on the Exchange and subject to the market-wide equity market maker quoting obligations. *See* Securities Exchange Act Release No. 67154 (June 7, 2012), 77 FR 35455 (June 13, 2012) (SR–NYSE–2012–10).

[43] Currently, NYSE Rule 107B(b) incorrectly references subparagraph (j) when referring to the non-regulatory penalties provisions of NYSE Rule 107B. The Exchange proposes to correct that errant cross-reference by changing the reference to subparagraph (k) of NYSE Rule 107B.

non-displayed liquidity posted in round lots in its assigned securities only.

NYSE Rule 107B(c) sets forth the criteria to qualify as an SLP-Prop, which includes having a quoting and volume performance that demonstrates an ability to meet the SLP's quoting requirements under NYSE Rule 107B(a). Under NYSE Rule 107B(d), a member organization may register as an SLMM in one or more securities traded on the Exchange in order to assist in the maintenance of a fair and orderly market insofar as reasonably practicable. If approved as an SLMM, the member organization must: (1) Maintain continuous, two-sided trading interest in assigned securities and meet certain pricing obligations as set forth in NYSE Rule 107B; (2) maintain minimum net capital in accordance with SEC Rule 15c3–1;[44] and (3) maintain unique mnemonics specifically dedicated to SLMM activity, which may not be used for trading in securities other than SLP securities assigned to the SLMM. NYSE Rule 107B(e) sets forth the application process for SLPs, and NYSE Rule 107B(f) describes how an SLP may voluntarily withdraw from such status.

NYSE Rules 107B(g) and (h) set forth how the Exchange calculates whether an SLP is meeting its 10% quoting requirement and monthly volume requirements under NYSE Rule 107B(a), respectively. For instance, under NYSE Rule 107B(g)(1)(D)(ii), an SLP may post non-displayed liquidity, but such liquidity is not counted as credit toward the 10% quoting requirement.

NYSE Rule 107B(i) governs the how securities are assigned to SLPs. NYSE Rule 107B(j) provides that SLPs may only enter orders electronically from off the Floor and may only enter such orders directly into Exchange systems and facilities designated for this purpose. NYSE Rule 107B(j) further provides that SLMM quotes and orders may be for the account of the SLMM in either a proprietary or principal capacity on behalf of an affiliated or unaffiliated person and SLP-Prop orders must only be for the proprietary account of the SLP-Prop member organization. NYSE Rule 107B(k) sets forth non-regulatory penalties that apply if an SLP fails to meet its quoting requirements. Among other things, the rule provides that if an SLP fails to meet its 10% quoting requirement for three consecutive calendar months in any assigned security, the SLP will be in danger of losing its SLP status. The rule also sets forth the reapplication process for member organizations whose SLP applications have been denied or who have been disqualified as an SLP. Rule 107B(l) sets forth provisions for appealing non-regulatory penalties.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[45] which requires, among other things, that an exchange have rules that are designed to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest and that are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[46] The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[47] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

A. NMM Pilot

When the Commission approved the NMM, it approved the following key provisions on a pilot basis:[48] (i) the changes to NYSE's priority and order allocation structure under NYSE Rule 72; (ii) the dealings and responsibilities of DMMs, including the affirmative obligation to market quality, the quoting obligation, the re-entry requirements following certain transactions for a DMM's own account, and, implicitly, the elimination of the ''negative obligation''[49] set forth in NYSE Rule 104; and (iii) the provisions related to DMM CCS interest set forth in NYSE Rule 1000.

The Commission approved these provisions on a pilot basis, stating that, ''to be able to take any further action on an NYSE proposal with regard to the [NMM] Pilot, NYSE must provide to [the Commission] on a regular, ongoing basis, statistics relating to market quality and trading activity'' and that analysis of the requested statistics would assist the Commission ''in evaluating the effects of the [NMM] Pilot provisions on NYSE's market quality, and in determining whether the [NMM] Pilot should be permanently approved . . . consistent with the Act.''[50] By requiring the Exchange to submit statistics relating to market quality and trading activity throughout the duration of the NMM Pilot, the Commission sought to determine whether implementation of the NMM Pilot would have a detrimental effect on investors or other market participants.[51]

Since it first adopted the Pilots, the Exchange has provided the Commission, on an ongoing basis, with statistics relating to market quality and trading activity. Furthermore, in its current proposal, the Exchange has provided its own analysis, based on those statistics, of the effect of the Pilots on market quality for investors and other market participants.[52] The Exchange also asserts that the Pilots have enabled the Exchange to remain competitive and to maintain relatively stable market share over the past six years, which, the Exchange notes, have been a period during which traded volume for equities securities has generally shifted away from registered exchanges.[53]

1. NYSE's Priority and Order Allocation Structure Under NYSE Rule 72

As explained above,[54] under the NMM Pilot, all market participants receive executions on parity. The setting

[44] *See* 17 CFR 240.15c3–1.

[45] 15 U.S.C. 78f(b)(5).

[46] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[47] 15 U.S.C. 78f(b)(8).

[48] *See* NMM Approval Order, *supra* note 4, 73 FR at 64390.

[49] The ''negative obligation'' was set forth in the prior version of NYSE Rule 104(a). As the Commission noted in the NMM Approval Order, former ''NYSE Rule 104(a) reflect[ed] NYSE's adoption of the negative obligation and state[d] that 'no specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he or his member organization . . . is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market . . . .'' *See* NMM Approval Order, *supra* note 4, 73 FR at 64379 n.10.

[50] *See* NMM Approval Order, *supra* note 4, 73 FR at 64390. Specifically, the Commission required the Exchange to provide the following monthly data during the term of the NMM Pilot: (1) DMM time at the NBBO by security; (2) the effective spread by security; (3) the DMM volume broken out by ''DMM interest type'' (*e.g.,* CCS, s-Quote) and the total shares traded expressed in twice total volume where both the buy and the sell shares are counted for each trade; (4) the average depth at the NBBO by market participant (DMMs, Floor brokers, and orders represented in the Exchange's book); (5) the ratio of (i) shares not executed in Exchange systems due to DMM execution to (ii) the shares executed by the DMM; and (6) effective spread for (i) orders that involve DMM liquidity provisions and (ii) orders that are executed without DMM liquidity (for similar order size categories). *See id.* at 64387.

[51] *See* NMM Approval Order, *supra* note 4, 73 FR at 64391.

[52] *See* Notice, *supra* note 3, 80 FR at 34722–25.

[53] *See* Notice, *supra* note 3, 80 FR at 34723.

[54] *See supra* Section II.B.1.

interest that establishes the Exchange BBO is entitled to priority and receives the first 15% of any incoming order (subject to a minimum of one round lot) in advance of the regular allocation of that order. For executions outside the Exchange BBO, all displayable interest is executed before any non-displayable interest. Also, under the NMM Pilot, DMMs no longer yield to off-Floor participants. More importantly, while the DMM and each Floor Broker are counted as separate market participants, all off-Floor participants and SLPs are aggregated together and counted as a single market participant.

In the NMM Approval Order, the Commission raised questions about the effects that the Exchange's parity rule might have on market quality, book depth, and execution rates of public customer orders.[55] In seeking to make the Pilots permanent, the Exchange asserts that the monthly statistics provided by the Exchange to the Commission demonstrate that the NMM Pilot has improved market quality by numerous measures.[56] Specifically, based on the statistics the Exchange assembled for the Commission, the Exchange asserts that the rules under the NMM Pilot have been effective at improving the Exchange's spread on marketable orders and the percentage of time that DMMs quote at the NBBO.[57] Additionally, the Exchange argues that, among registered exchanges in what has become a fragmented equity market, the Exchange continues to be a leading liquidity provider because of the diverse population of market participants under the Pilots (*i.e.,* DMMs, SLPs, Floor Brokers, and other off-Floor market participants).[58] In support of these assertions, the Exchange's proposal provides statistics for, and analysis of, six market quality metrics for NYSE-listed Securities, such as the average quoted spread, displayed shares at the NBBO, and time alone at the NBBO.[59]

The Commission has reviewed the data analysis provided by the Exchange and believes that the Exchange has shown that the NMM Pilot, which includes the parity provisions under NYSE Rule 72, has produced sufficient execution quality to attract volume and sufficient incentives to liquidity providers to supply this execution quality. Accordingly, the Commission finds that making the parity rules under NYSE Rule 72 permanent is consistent with the requirements of the Act.

2. Dealings and Responsibilities of DMMs and the Provisions Related to DMM CCS Interest

As explained above,[60] under the NMM Pilot, specialists on the NYSE were eliminated and DMMs were introduced as market participants on the Exchange. DMMs have an affirmative obligation to engage in a course of dealings for their own accounts to assist in the maintenance, so far as reasonably practicable, of a fair and orderly market. Specifically, DMMs have an obligation to use their own capital to contribute to the maintenance of a fair and orderly market, are subject to depth guidelines, and must maintain a bid or an offer at the NBB and NBO for a certain percentage of the trading day. Further, DMMs are required to facilitate transactions in their assigned securities during the opening, reopening, NYSE Midday Auction, and closing transactions. DMMs are no longer given the advance ''look'' at incoming orders that the Exchange's prior Hybrid Market provided to specialists.

In return for incurring these obligations, DMMs are permitted to trade freely for their own accounts on parity with other market participants. Further, the CCS—in which a DMM sets forth additional liquidity that it commits to provide in its assigned securities at specific price points—allows DMMs to trade in their assigned securities with incoming orders at a price inside the Exchange BBO with minimal risk and without contributing to visible depth of the market.[61] Because the NMM provides DMMs with the advantages of being on parity with market participants and of CCS executions, the Commission, in approving these aspects of the NMM as a pilot program, noted that it was ''seeking further evidence that the benefits proposed for DMMs are not disproportionate to their obligations.'' [62]

As noted above, in seeking to make the NMM Pilot permanent, the Exchange asserts that the monthly statistics provided by the Exchange to the Commission demonstrate that the NMM Pilot has improved market quality by numerous measures.[63] Specifically, the Exchange asserts that the NMM Pilot has allowed the Exchange's former specialists and new DMMs to compete, and to contribute to market quality, in a fully electronic trading environment despite challenging conditions over the past several years. The Exchange notes that, between 2009 and 2014, there was a significant decrease in trading volume in the cash equities markets, which resulted in thinner profit margins for market makers and caused turnover among the Exchange's new DMMs and former specialists.[64] The Exchange also argues that the operation of the NMM Pilot has been instrumental in attracting new DMMs to the Exchange at a time when former specialists were exiting the Exchange's market maker business.[65]

Additionally, the Exchange asserts that DMMs—as well as SLPs—have been important contributors to the Exchange's ability to set the NBBO. The Exchange represents that, during 2014, DMMs quoted at the inside of the NBBO almost 30% of the time on average and that, during the same period, an average of 8.3% of DMM execution volume improved the NBBO at the time the executed quotes were entered.[66] Further, the Exchange asserts that its statistics and analysis demonstrate that the rules under the NMM Pilot have been effective at improving the percentage of time that DMMs quote at the NBBO and the percentage of DMM participation in total trading volume.[67]

The Commission has reviewed the data analysis provided by the Exchange and believes that the Exchange has shown that the NMM Pilot, which includes the DMM dealings and responsibilities provisions and the CCS interest provisions of NYSE Rules 104 and 1000, respectively, has produced sufficient execution quality to attract volume and sufficient incentives to liquidity providers to supply this execution quality. Accordingly, the Commission finds that making NYSE Rule 104 and the CCS provisions under NYSE Rule 1000 permanent is consistent with the requirements of the Act.

B. SLP Pilot

The Exchange represents that it adopted the SLP Pilot to encourage an additional pool of liquidity at the Exchange following the approval of the NMM Pilot.[68] As explained above,[69]

[55] *See* NMM Approval Order, *supra* note 4, 73 FR at 64389.

[56] *See* Notice, *supra* note 3, 80 FR at 34726.

[57] *See* Notice, *supra* note 3, 80 FR at 34725.

[58] *See* Notice, *supra* note 3, 80 FR at 34724.

[59] *See id.*

[60] *See supra* Sections II.B.2 & .3.

[61] *See* NMM Approval Order, *supra* note 4, 73 FR at 64389.

[62] *See id.*

[63] *See* Notice, *supra* note 3, 80 FR at 34726.

[64] *See* Notice, *supra* note 3, 80 FR at 34723–24.

[65] *See id.* at 34724.

[66] *See id.*

[67] *See id.* at 34725. Specifically, the Exchange represents that the percentage of the time that DMMs were quoting at the NBBO, which ranged from 9.9% to 19% from August to December 2008, have exceeded 20% since that time and ranged from 31.3% to 39.2% in the period from November 2013 to November 2014. *See id.*

[68] *See* Notice, *supra* note 3, 80 FR at 34722.

[69] *See supra* Section II.B.4.

SLPs are obligated to: (1) Maintain a bid or an offer at the NBB or NBO in each assigned security in round lots at least 10% of the trading day on average; and (2) add a certain volume of liquidity for all assigned SLP securities. SLMMs have continuous two-sided quoting obligations and must meet certain pricing obligations for those quotes. As a benefit for incurring these obligations, SLPs receive a financial rebate for each transaction when liquidity that the SLP posts on the Exchange is executed against an inbound order. When it adopted the SLP Pilot, the Exchange represented that it would use the SLP Pilot period to identify and address any administrative or operational problems prior to expanding it.[70] The Exchange also opined that the Pilot period would provide SLPs with ''essential practical experience with the new program and enable the SLPs to become proficient in the SLP role before expanding the assigned securities to all NYSE-listed securities.'' [71]

In seeking to make the SLP Pilot permanent, the Exchange has explained that the number of stocks quoted by at least one SLP has increased substantially since it first launched the SLP Pilot.[72] The Exchange represents that: (1) Through December 2014, SLPs represented 25.2% of liquidity-providing execution; and (2) SLPs currently account for 13.3% of the liquidity-providing volume in issues outside of the Exchange's 1,000 most active issues.[73] The Exchange also states that SLPs—along with DMMs—have been important contributors to the Exchange's ability to set the NBBO.[74]

The Commission has reviewed the data analysis provided by the Exchange and believes that the Exchange has shown that the SLP Pilot, as part of the NMM Pilot, has produced sufficient execution quality to attract volume and sufficient incentives to liquidity providers to supply this execution quality. Accordingly, the Commission finds that making the provisions governing SLPs set forth in NYSE Rule 107B permanent is consistent with the requirements of the Act.

C. Additional Proposed Rule Changes

The Exchange proposes to delete: (1) NYSE Rule 104T, which is no longer operative because the Commission approved the NMM Pilot; (2) NYSE Rule 104.05, which was only intended to be effective through October 31, 2009; and (3) a related reference to NYSE Rule 104.05. The Commission finds that these proposed deletions from the Exchange's rule text are consistent with the Act because they remove text from the Exchange's rulebook that is extraneous, particularly now that the Commission is approving the NMM and SLP programs on a permanent basis.

Furthermore, the Exchange proposes to: (1) Replace the term ''Display Book'' with either the term ''Exchange systems'' or ''Exchange book'' throughout NYSE Rules 104 and 1000; (2) in NYSE Rule 104(k), replace the term ''NYSE Regulation's Division of Market Surveillance'' with the term ''the Exchange'' pursuant to NYSE Rule 0; and (3) correct an errant cross reference in NYSE Rule 107B(b). The Commission finds that these additional changes are consistent with the Act because they will provide additional clarity and consistency throughout the current NMM rules.

IV. Conclusion

It is therefore ordered that, pursuant to Section 19(b)(2) of the Act,[75] the proposed rule change (SR–NYSE–2015–26) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–19288 Filed 8–5–15; 8:45 am]

BILLING CODE 8011–01–P

[70] *See* SLP Notice, *supra* note 11, 73 FR at 65905.

[71] *See id.*

[72] *See* Notice, *supra* note 3, 80 FR at 34725. The Exchange represents that when it first launched the SLP Pilot, only 497 symbols were covered by an SLP and that, by the end of September 2014, ''nearly every Exchange symbol, including operating companies, preferred stocks, warrants, rights and all other issue types, had at least once SLP quoting in it.'' *See id.*

[73] *See id.*

[74] *See id.* at 34724.

[75] 15 U.S.C. 78s(b)(2).

[76] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75582; File No. SR–CME–2015–014]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand Performance Bond Collateral Program To Include Australian Government Debt, Singapore Government Debt, and Ontario and Quebec Canadian Provincial Debt

July 31, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2015, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared primarily by CME. CME filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(4)(ii) thereunder,[4] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME is proposing to announce via Advisory Notice the expansion of its collateral program to include Australian Government debt, Singapore Government debt, and Ontario and Quebec Provincial debt. More specifically, CME is proposing to issue a CME Clearing Advisory Notice to clearing member firms announcing an expansion of its performance bond collateral program for Base, IRS and CDS Guaranty Fund products to include certain discount bills, notes and bonds issued by the Australian Government (''AGBs''), Singapore Government (''SGBs''), and the Canadian Provinces of Ontario and Quebec (''CPBs''). The text of the proposed rule change is below. Italicized text indicates additions; bracketed text indicates deletions.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

CME Group Advisory Notice

TO: Clearing Member, Firms Chief Financial Officers, Back Office Managers

FROM: CME Clearing.

SUBJECT: Canadian provincial debt, Australian sovereign debt and Singapore sovereign debt.

DATE: May 27, 2015.

CME Clearing (CME) announces the addition of Australia and Singapore to our list of acceptable foreign sovereign debt. CME also announces the addition of Canadian provincial debt from Ontario and Quebec. Australian and Singapore sovereign debt, and Canadian provincial debt are acceptable for Base, CDS, and IRS performance bond requirements and are part of Category 4 assets for Base and IRS and Category 3 assets for CDS. These additions to our acceptable collateral list will be effective July 20, 2015, pending regulatory approval. Please see the applicable haircuts and limits below.

Asset class	Description	Haircut schedule		Notes
		Time to maturity		
		0 to ≤ 5 years	>5 to ≤10 years	
Foreign Sovereign Debt	Discount Bills from the following countries: • Australia • Singapore	5%		• Australian debt is capped at $250 million USDE per clearing member.
	Notes and Bonds from the following countries: • Australia • Singapore	6%	7.5%	• Singapore debt is capped at $100 million USDE per clearing member.
Canadian Provincials	Discount Bills from the following provinces: • Ontario • Quebec	25%		• Canadian Provincial debt is capped at $100 million USDE per clearing member.
	Notes and Bonds from the following provinces: • Ontario • Quebec	25%		• Provincials that exceed 5 years time to maturity are not acceptable.

For questions regarding these new collateral types, please contact the Financial Unit at (312) 207–2594 or Collateral Services at (312) 648–3775.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filings with the Commission, CME included statements concerning the purpose and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CME is registered as a derivatives clearing organization with the Commodity Futures Trading Commission (''CFTC'') and operates a substantial business clearing futures and swaps contracts subject to the jurisdiction of the CFTC. CME is proposing to announce via Advisory Notice the expansion of its collateral program to include Australian Government debt, Singapore Government debt, and Ontario and Quebec Provincial debt. More specifically, CME is proposing to issue a CME Clearing Advisory Notice to clearing member firms announcing an expansion of its performance bond collateral program for Base, IRS and CDS Guaranty Fund products to include certain discount bills, notes and bonds issued by the Australian Government (''AGBs''), Singapore Government (''SGBs''), and the Canadian Provinces of Ontario and Quebec (''CPBs'').

AGBs

CME continues to seek diversification of both its clearing member and collateral bases where appropriate. Acceptance of AGBs will diversify CME's performance bond collateral base and enable posting of high-quality assets widely held by participants in Australia, where CME obtained local regulatory authorization to offer direct clearing services. CME's credit team evaluated AGBs as eligible performance bond collateral pursuant to requests from market participants and recommended their acceptance to CME's clearing house risk committee (''CHRC''). The decision to accept AGBs is reflective of the global nature of the IRS swaps market as these instruments are likely to be held by, or accessible to, AUD IRS participants. We believe high quality foreign sovereign debt subject to prudent limits will increase the likelihood that high quality financial institutions from foreign jurisdictions will consider clearing membership at CME. Additional clearing members from foreign jurisdictions will add an increased element of geographic diversification to CME's membership base and potentially mitigate the negative impact of systemic events through reduced geographic concentration.

CME deemed AGBs with a time to maturity of 10 years or less as eligible collateral after reaching a favorable determination regarding these instruments' liquidity profile in a stressed market environment. The AGBs will be category 4 assets for products supported by the Base and IRS guaranty funds and Category 3 assets for products supported by the CDS guaranty fund. Assets in these categories are capped per clearing firm at a level established to ensure such assets are convertible into cash on a same-day basis via pledge to CME's credit facility. To better ensure liquidity is available to CME in times of market stress, the AGBs are further subject to a sub-limit restricting clearing firms from posting more than $250 million of AGBs at any one time.

All clearing members will be eligible to post AGBs as performance bond but CME expects such collateral to originate

primarily if not exclusively from Australian market participants in OTC IRS markets due to their natural access to AGBs. Currently, CME has a limited number of indirect Australian IRS participants and no direct Australian IRS participants. As such, the per-clearing member cap on AGBs should result in these instruments accounting for a de minimis portion of CME's overall collateral holdings. As a comparative example, CME accepts as performance bond debt instruments issued by the Japanese government with per-firm limits at four times than the proposed limits for AGBs (*i.e.,* up to $1B per clearing member for JPY debt). Currently, only 0.5% of the overall limit for JPY debt is being utilized. Initially, we expect similarly de minimis amounts of AGBs.

Acceptance of AGBs will not impact the overall nature and level of risk presented by CME as the level of margin collected will remain the same; only the constitution of CME's collateral holdings may change. CME analysis indicates the AGBs satisfy each of the characteristics for high-quality liquid assets the Bank for International Settlements (BIS) has created for collateral evaluation, and thus exhibit minimal credit, market and liquidity risk. The risk profile and haircut schedule for AGBs are consistent with those for similarly rated foreign-issued debt accepted by CME as performance bond collateral.

SGBs

Acceptance of SGBs will diversify CME's performance bond collateral base and enable posting of high-quality assets widely held by participants in Singapore, where CME is seeking regulatory authorization to offer direct clearing services. CME's credit team evaluated SGBs as eligible performance bond collateral pursuant to requests from market participants and recommended their acceptance to CME's clearing house risk committee. The decision to accept SGBs is reflective of the global nature of the CME's markets as these instruments are likely to be held by, or accessible to, Singaporean participants. We believe high quality foreign sovereign debt subject to prudent limits will increase the likelihood that high quality financial institutions from foreign jurisdictions will consider clearing membership at CME. Additional clearing members from foreign jurisdictions will add an increased element of geographic diversification to its membership base and potentially mitigate the negative impact of systemic events through reduced geographic concentration.

CME deemed SGBs with a time to maturity of 10 years or less as eligible collateral after reaching a favorable determination regarding these instruments' liquidity profile in a stressed market environment. The SGBs will be category 4 assets for products supported by the Base and IRS guaranty funds and Category 3 assets for products supported by the CDS guaranty fund. Assets in these categories are capped per clearing firm at a level established to ensure such assets are convertible into cash on a same-day basis via pledge to CME's credit facility. To better ensure liquidity is available to CME in times of market stress, the SGBs are further subject to a sub-limit restricting clearing firms from posting more than $100 million of SGBs at any one time.

All clearing members will be eligible to post SGBs as performance bond but CME expects such collateral to originate primarily if not exclusively from Singapore market participants due to their natural access to SGBs. Currently, CME has a limited number of indirect Singapore participants and no direct Singapore clearing members. As such, the per-clearing member cap on SGBs should result in these instruments accounting for a de minimis portion of CME's overall collateral holdings. As a comparative example, CME accepts as performance bond debt instruments issued by the Japanese government with per-firm limits at ten times than the proposed limits for SGBs (*i.e.,* up to $1B per clearing member for JPY debt). Currently, only 0.5% of the overall limit for JPY debt is being utilized. Initially, we expect similarly de minimis amounts of SGBs.

Acceptance of SGBs will not impact the overall nature and level of risk presented by CME as the level of margin collected will remain the same; only the constitution of CME's collateral holdings may change. CME analysis indicates the SGBs satisfy each of the characteristics for high-quality liquid assets the Bank for International Settlements (BIS) has created for collateral evaluation, and thus exhibit minimal credit, market and liquidity risk. The risk profile and haircut schedule for SGBs are consistent with those for similarly rated foreign-issued debt accepted by CME as performance bond collateral.

CPBs

Acceptance of CPBs will diversify CME's performance bond collateral base and enable posting of high-quality assets widely held by participants in Ontario and Quebec, where CME has local regulatory authorization to offer direct clearing services. CME's credit team evaluated CPBs as eligible performance bond collateral pursuant to requests from market participants and recommended their acceptance to CME's clearing house risk committee (''CHRC''). The decision to accept CPBs is reflective of the global nature of the CME's markets as these instruments are likely to be held by, or accessible to, Canadian clearing members and market participants. We believe high quality foreign sovereign debt subject to prudent limits will increase the likelihood that high quality financial institutions from foreign jurisdictions will consider clearing membership at CME. Additional clearing members from foreign jurisdictions will add an increased element of geographic diversification to CME's membership base and potentially mitigate the negative impact of systemic events through reduced geographic concentration.

CME deemed CPBs with a time to maturity of 5 years or less as eligible collateral after reaching a favorable determination regarding these instruments' liquidity profile in a stressed market environment. The CPBs will be category 4 assets for products supported by the Base and IRS guaranty funds and Category 3 assets for products supported by the CDS guaranty fund. Assets in these categories are capped per clearing firm at a level established to ensure such assets are convertible into cash on a same-day basis via pledge to CME's credit facility. To better ensure liquidity is available to CME in times of market stress, the CPBs are further subject to a sub-limit restricting clearing firms from posting more than $100 million of CPBs at any one time.

All clearing members will be eligible to post CPBs as performance bond but CME expects such collateral to originate primarily if not exclusively from Canadian market participants due to their natural access to CPBs. The per-clearing member cap on CPBs should result in these instruments accounting for a de minimis portion of CME's overall collateral holdings. As a comparative example, CME accepts as performance bond debt instruments issued by the Japanese government with per-firm limits at ten times than the proposed limits for CPBs (*i.e.,* up to $1B per clearing member for JPY debt). Currently, only 0.5% of the overall limit for JPY debt is being utilized. Initially, we expect similarly de minimis amounts of CPBs.

Acceptance of CPBs will not impact the overall nature and level of risk presented by CME as the level of margin collected will remain the same; only the constitution of CME's collateral

holdings may change. CME analysis indicates the CPBs satisfy each of the characteristics for high-quality liquid assets the Bank for International Settlements (BIS) has created for collateral evaluation, and thus exhibit minimal credit, market and liquidity risk. The risk profile and haircut schedule for CPBs are consistent with those for similarly rated foreign-issued debt accepted by CME as performance bond collateral.

* * * * *

A summary of the changes described in the Advisory Notice is set forth in the following chart:

Asset class	Description	Haircut schedule		Notes
		Time to maturity		
		0 to ≤5 years	>5 to ≤10 years	
Foreign Sovereign Debt	Discount Bills from the following countries: • Australia • Singapore	5%		• Australian debt is capped at $250 million USDE per clearing member
	Notes and Bonds from the following countries: • Australia • Singapore	6%	7.5%	• Singapore debt is capped at $100 million USDE per clearing member
Canadian Provincials	Discount Bills from the following provinces: • Ontario • Quebec	25%		• Canadian Provincial debt is capped at $100 million USDE per clearing member
	Notes and Bonds from the following provinces:. • Ontario • Quebec	25%		• Provincials that exceed 5 years time to maturity are not acceptable

* * * * *

The proposed rule changes that are described in this filing are limited to CME's business as a derivatives clearing organization clearing products under the exclusive jurisdiction of the Commodity Futures Trading Commission (''CFTC''). CME has not cleared security based swaps and does not plan to and therefore the proposed rule changes do not impact CME's security-based swap clearing business in any way. The proposed changes would become effective immediately. CME notes that it has also submitted the proposed rule changes that are the subject of this filing to its primary regulator, the CFTC, in CME Submission Numbers 15–228R, 15–229RR, and 15–230R.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition. The proposed changes involve expanding its collateral program to include Australian Government debt, Singapore Government debt, and Ontario and Quebec Provincial debt. More specifically, CME is proposing to issue a CME Clearing Advisory Notice to clearing member firms announcing an expansion of its performance bond collateral program for Base, IRS and CDS Guaranty Fund products to include certain discount bills, notes and bonds issued by the Australian Government (''AGBs''), Singapore Government (''SGBs''), and the Canadian Provinces of Ontario and Quebec (''CPBs'').

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A) [5] of the Act and Rule 19b–4(f)(4)(ii) [6] thereunder. CME has designated that this proposal constitutes a change in an existing service of CME that (a) primarily affects the clearing operations of CME with respect to products that are not securities, including futures that are not security futures, and swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards; and (b) does not significantly affect any securities clearing operations of CME or any rights or obligations of CME with respect to securities clearing or persons using such securities-clearing service, which renders the proposed change effective upon filing.

CME believes that the proposal does not significantly affect any securities clearing operations of CME because CME recently filed a proposed rule change that clarified that CME has decided not to clear security-based swaps, except in a very limited set of circumstances.[7] The rule filing reflecting CME's decision not to clear security-based swaps removed any ambiguity concerning CME's ability or intent to perform the functions of a clearing agency with respect to security-based swaps. Therefore, this proposal will have no effect on any securities clearing operations of CME.

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.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(4)(ii).

[7] *See* Securities Exchange Act Release No. 73615 (Nov. 17, 2014), 79 FR 69545 (Nov. 21, 2014) (SR–CME–2014–49). The only exception is with regards to Restructuring European Single Name CDS Contracts created following the occurrence of a Restructuring Credit Event in respect of an iTraxx Component Transaction. The clearing of Restructuring European Single Name CDS Contracts will be a necessary byproduct after such time that CME begins clearing iTraxx Europe index CDS.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*), or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–CME–2015–014 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–CME–2015–014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on CME's Web site at *http://www.cmegroup.com/market-regulation/rule-filings.html.*

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–CME–2015–014 and should be submitted on or before August 27, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–19290 Filed 8–5–15; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75581; File No. SR–FINRA–2015–015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Provide a Web-Based Delivery Method for Completing the Regulatory Element of the Continuing Education Requirements

July 31, 2015

I. Introduction

On June 4, 2015, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to change the method of delivery for the Regulatory Element of the Continuing Education (''CE'') program. The proposed rule change was published for comment in the **Federal Register** on June 17, 2015.[3] The Commission received four comment letters on the proposed rule change.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

A. Web-Based Delivery

As FINRA described in the Notice, the CE requirements under FINRA Rule 1250 consist of a Regulatory Element and a Firm Element. The Regulatory Element applies to registered persons and consists of periodic computer-based training on regulatory, compliance, ethical, and supervisory subjects and sales practice standards, which must be completed within prescribed timeframes.[5] There are four Regulatory Element programs: (1) The S106 for Investment Company and Variable Contracts Representatives; (2) the S201 for registered principals and supervisors; (3) the S901 for Operations Professionals; and (4) the S101 for all other registration categories. Currently, the Regulatory Element may be administered in a test center or at a firm that meets the requirements in Rule 1250 for in-firm delivery of CE.[6]

FINRA proposed to amend FINRA Rule 1250 to provide that the Regulatory Element program will be administered through Web-based delivery or such other technological manner and format as specified by FINRA, and to eliminate the requirements for in-firm delivery of the Regulatory Element.[7] FINRA proposed to implement Web-based delivery for the S106, S201, and S901 Regulatory Element programs on October 1, 2015, and to implement Web-based delivery for the S101 Regulatory Element program on January 4, 2016. FINRA also proposed to phase-out test-center delivery by no later than six months after January 4, 2016.[8]

In proposing these changes, FINRA noted that Web-based delivery will provide registered persons the flexibility to complete the Regulatory Element at a location of their choosing and at any time during their 120-day window for completion of the Regulatory Element, consistent with their firm's requirements. In addition, there will be no three and a half hour time limitation, as there is currently. FINRA also noted that the Web-based format will include safeguards to authenticate the identity of the CE candidate (*e.g.,* by asking the candidate to provide a portion of his

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 75154 (June 11, 2015), 80 FR 34777 (''Notice'').

[4] *See* letters from Kevin Zambrowicz, Associate General Counsel & Managing Director and Stephen Vogt, Assistant Vice President & Assistant General Counsel, Securities Industry and Financial Markets Association, dated July 7, 2015 (''SIFMA Letter''); Daniel Kosowsky, Chief Compliance Officer, Morgan Stanley Smith Barney LLC and Rose-Anne Richter, Chief Compliance Officer, Morgan Stanley & Co. LLC, dated July 8, 2015 (''Morgan Stanley Letter''); David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, dated July 8, 2015 (''FSI Letter''); and Michele Van Tassel, President, Association of Registration Management, dated July 8, 2015 (''ARM Letter'').

[5] *See* Notice, *supra* note 3 at 34778 (describing the Regulatory Element in more detail, including the timeframes for completing the Regulatory Element). Currently, candidates have three and a half hours to complete their CE session.

[6] *See id.* at n. 8 (describing in-firm delivery procedures).

[7] FINRA also proposed to delete Incorporated NYSE Rule 345A (Continuing Education for Registered Persons) and Incorporated NYSE Rule Interpretation 345A (Continuing Education for Registered Persons). According to FINRA, these rules are substantially similar to FINRA Rule 1250.

[8] Under the proposal, firms will not be able to establish new in-firm delivery programs after October 1, 2015. Firms that have pre-existing in-firm delivery programs that are established before October 1, 2015 will not be able to use that delivery method for the S106, S201, and S901 Regulatory Element programs after October 1, 2015, and they will not be able to use that delivery method for the S101 Regulatory Element program after January 4, 2016.

Social Security Number (''SSN'') and date of birth). Before commencing a Web-based session, each candidate must agree to the Rules of Conduct for Web-based delivery. If FINRA discovers that a candidate has violated the Rules of Conduct, the candidate will forfeit the results of the session and may be subject to disciplinary action by FINRA. FINRA considers violations of the Rules of Conduct to be conduct inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.

B. Proctor Registration

Currently, NASD Rule 1043 requires an associated person who is designated by a firm as a proctor for the purposes of in-firm delivery of the Regulatory Element to be registered as a Proctor with FINRA through the filing of a Form U4 (Uniform Application for Securities Industry Registration or Transfer).[9] In light of the Web-based delivery proposal, FINRA proposed to eliminate NASD Rule 1043, and to automatically terminate the Proctor registration category in the CRD system on January 4, 2016.

C. Fee for Web-Based Delivery

Currently, the fee for test-center and in-firm deliveries is $100 per session, although in-firm deliveries receive a three-dollar rebate per session.[10] FINRA proposed to establish a $55 fee for each candidate who completes the Regulatory Element via the Web-based delivery method.[11] However, FINRA is not proposing any changes to the session fees for test-center and in-firm deliveries until it has completed the phase-out process.

III. Comment Letters

The Commission received four comment letters that supported the proposed rule change.[12] In particular, the commenters noted that the proposal would modernize FINRA's CE requirements,[13] remove burdens associated with the test center delivery method (*e.g.,* the time spent traveling to a test center),[14] and reduce the fees and other costs associated with the Regulatory Element.[15] Commenters also supported the flexibility associated with Web-based delivery.[16] Moreover, two commenter supported FINRA's proposed timeline for implementing Web-based delivery.[17] One of these commenters stated that a phased approach will provide firms with the flexibility needed to address technology, operations, and process issues that may arise.[18] This commenter additionally requested that, if FINRA proposes materially new technology, delivery platforms, or other measures in the future, FINRA solicit comments on the proposed changes through a Regulatory Notice and seek and receive FINRA Board approval of the changes before implementing the changes.[19]

IV. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letters, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.[20] Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[21] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest as it changes the delivery method for CE to make it more flexible and efficient, as well as, less costly for the industry. In addition, it will provide candidates the amount of time that they feel they need to complete their CE session, enabling them to use the resource material included in the CE program. Having additional time to take the CE session may result in better learning outcomes, which should enhance investor protection.

FINRA stated in the Notice that it has provided safeguards to preserve the integrity of the CE program.[22] Moreover, as FINRA and the commenters noted, the proposed rule change would provide flexibility with respect to completing the Regulatory Element by eliminating the need to go to a test center to complete a Regulatory Element session.[23] The proposal also will reduce the fees and other costs associated with the Regulatory Element.[24] In addition, FINRA stated that Web-based delivery of the Regulatory Element will improve its ability to update the content in response to rule changes and other industry demands.[25] Specifically, FINRA will be able to update the Regulatory Element content directly and more efficiently because the update will no longer involve a multi-layered release and quality control process, which is required when FINRA employs vendors to deliver CE.[26] The ability to update the content of the Regulatory Element directly will make the process

[9] Currently, an associated person who is already registered in another registration category may be designated as a proctor by a firm without having to register as a Proctor with FINRA.

[10] There are also additional fees for taking the session outside of the United States, failing to appear on time for an appointment, or cancelling or rescheduling an appointment. *See* Section 4 of Schedule A to the FINRA By-Laws. *See also* Notice, *supra* note 3 at 34779.

[11] FINRA also proposed to amend its fee schedule to clarify that registered persons will not be required to complete the Regulatory Element in a test center or in-firm during the phase-out period.

[12] *See supra* note 4. These commenters also provided comments relating to the implementation of this proposed rule change. In particular, one commenter requested that FINRA continue to make CE training data and test results available to firms. *See* FSI Letter at 1 and 3. Two commenters requested that FINRA provide clarification on the level of information that will be available to firms regarding an individual's initiation of, and progress on, a particular CE session. *See* SIFMA Letter at 5 and ARM Letter at 2. Commenters also requested that FINRA consider the use of identifiers other than the SSN for candidates who do not have an SSN. *See* SIFMA Letter at 5, Morgan Stanley Letter at 1, and ARM Letter at 2–3. Two commenters requested that FINRA provide firms with an appropriate degree of flexibility with respect to individual CE deadlines if they encounter unexpected but demonstrated technical difficulties. *See* SIFMA Letter at 4 and ARM Letter at 2. In addition, these two commenters requested that FINRA provide guidance on the implementation of Web-based delivery, including clarification regarding how it will handle reasonably foreseeable technology and operational issues that may arise with the implementation and use of the Web-based CE program. *See* SIFMA Letter at 5 and ARM Letter at 2. One commenter suggested that FINRA provide help guides, user instructions, and frequently asked questions to minimize confusion about completing the CE requirements through the new process, and conduct information sessions for FINRA member firms to better prepare for questions and issues about the new CE delivery method and related completion process. *See* ARM Letter at 2. The Commission understands that FINRA will provide guidance on these issues. Finally, one commenter encouraged FINRA to continue to review its rulebook, interpretations, and fees. *See* SIFMA Letter at 6.

[13] *See* SIFMA Letter at 4, Morgan Stanley Letter at 1, FSI Letter at 1–3, and ARM Letter at 3.

[14] *See* SIFMA Letter at 4, Morgan Stanley Letter at 1, FSI Letter at 1–3, and ARM Letter at 1 and 3.

[15] *See* SIFMA Letter at 4, Morgan Stanley Letter at 1, FSI Letter at 2, and ARM Letter at 1 and 3.

[16] *See* SIFMA Letter at 4 and FSI Letter at 2.

[17] *See* SIFMA Letter at 4 and ARM Letter at 2.

[18] *See* SIFMA Letter at 4.

[19] *See id. See also* ARM Letter at 3.

[20] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78*o*-3(b)(6).

[22] *See* Notice, *supra* note 3 at 34779–80. The Commission notes that under FINRA's Sanction Guidelines, the recommended penalty for cheating on the Regulatory Element is a bar. *See id.* at n. 17. The Commission expects both FINRA and its member firms to take appropriate measures to avoid any abuse that could be associated with Web-based delivery of CE. As FINRA noted in the Notice, firms may impose conditions on their associated persons regarding completion of their CE requirements in a Web-based environment. *See id.* at n. 14.

[23] *See id.* at 34780 and *supra* notes 14 and 16.

[24] *See* Notice, *supra* note 3 at 34780 and *supra* notes 14–15.

[25] *See* Notice, *supra* note 3 at 34780.

[26] *See id.*

more efficient for FINRA and should promote better education of associated persons and consequently enhance investor protection.[27]

For the reasons stated above, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–FINRA–2015–015) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–19289 Filed 8–5–15; 8:45 am]

BILLING CODE 8011–01–P

[27] FINRA stated that the proposed rule change would ''allow FINRA to adopt different delivery methods in the future based on technology changes without having to amend the rule each time.'' *See id.* at 34779. This statement was based on the addition of the phrase ''or such other technological manner and format as specified by FINRA,'' to Rule 1250(a)(6). The Commission notes, however, that FINRA must comply with the requirements of Section 19(b) of the Act.

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 9213]

Culturally Significant Objects Imported for Exhibition Determinations: ''Kongo: Power and Majesty'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Kongo: Power and Majesty,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the imported objects at The Metropolitan Museum of Art, New York, New York, from on or about September 18, 2015, until on or about January 3, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Dated: July 27, 2015.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2015–19338 Filed 8–5–15; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9214]

Culturally Significant Objects Imported for Exhibition Determinations: ''Berlin Metropolis: 1918–1933'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Berlin Metropolis: 1918–1933,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Neue Galerie New York, New York, New York, from on or about October 1, 2015, until on or about January 4, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Dated: July 30, 2015.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2015–19339 Filed 8–5–15; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9212]

Culturally Significant Objects Imported for Exhibition Determinations: ''Breguet: Art and Innovation in Watchmaking'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Breguet: Art and Innovation in Watchmaking,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Fine Arts Museums of San Francisco, Legion of Honor, San Francisco, California, from on or about September 19, 2015, until on or about January 10, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Dated: July 27, 2015.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2015–19337 Filed 8–5–15; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9203]

60-Day Notice of Proposed Information Collection: U.S. Passport Application Drop-Off List

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to October 5, 2015.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the Internet may use the Federal Docket Management System (FDMS) to comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering Docket Number: DOS–2015–0034 in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: PPTFormsOfficer@state.gov.*
- *Mail:* PPT Forms Officer, U.S. Department of State, Bureau of Consular Affairs, Passport Services, Office of Legal Affairs and Law Enforcement Liaison, 2201 C Street NW., Washington, DC 20520.
- *Fax:* (202) 485–6496 (include a cover sheet addressed to ''PPT Forms Officer'' referencing the DS form number, information collection title, and OMB control number).
- *Hand Delivery or Courier:* PPT Forms Officer, U.S. Department of State, Bureau of Consular Affairs, Passport Services, Office of Legal Affairs and Law Enforcement Liaison, 2201 C Street NW., Washington, DC 20520.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to PPT Forms Officer, U.S. Department of State, Bureau of Consular Affairs, Passport Services, Office of Legal Affairs and Law Enforcement Liaison, 44132 Mercure Cir, P.O. Box 1227, Sterling, Virginia 20166–1227, who may be reached on (202) 485–6373 or at *PPTFormsOfficer@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* U.S. Passport Application Drop-Off List.
- *OMB Control Number:* 1405–XXXX.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, Office of Legal Affairs and Law Enforcement Liaison (CA/PPT/S/L).
- *Form Number:* DS–4283.
- *Respondents:* Business or Other For-Profit.
- *Estimated Number of Respondents:* 1,000 respondents per year.
- *Estimated Number of Responses:* 216,000 responses per year.
- *Average Time per Response:* 10 minutes.
- *Total Estimated Burden Time:* 36,000 hours per year.
- *Frequency:* Daily.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public records. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of proposed collection: The information collected on the DS–4283 is used to facilitate the issuance of passports to U.S. nationals with imminent travel plans who hire private courier companies to deliver their applications to one of the Department's domestic passport agencies. Out of the twenty-seven Department's domestic passport agencies, only twelve are currently participating. The Department asks courier company employees to complete the DS–4283 and submit the form with passport applications delivered in bulk to passport agencies in a designated drop-off box. Passport agencies use the form to track the submission of applications that a courier drops off. The form serves as a record of receipt of documents submitted to the Department and as an acknowledgment of who delivered these documents. The DS–4283 is part of a Department effort to facilitate the delivery of passport applications by private courier companies while maintaining the integrity of the passport application process.

Methodology: This form is used to track the processing of passport applications delivered in bulk to passport agencies by private courier companies. Courier employees are asked to attach the form onto sealed envelopes or packages containing passport applications which they deliver in bulk to designated drop-off facilities at one of twelve passport agencies for processing.

Additional Information:

Dated: July 16, 2015.

Brenda S. Sprague,

Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2015–19336 Filed 8–5–15; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2015–3323]

Notice of Public Meetings for Unmanned Aircraft Systems Test Sites and Center of Excellence

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

ACTION: Notice of public meetings.

SUMMARY: The FAA will support seven public meetings during August and September, 2015. These meetings will be hosted by the six unmanned aircraft system (UAS) Test Sites and UAS Center of Excellence (COE). The purpose of these meetings is to discuss innovation and opportunities at the Test Sites and COE.

DATES: Please see below for the date, time, and location of the meetings.

FOR FURTHER INFORMATION CONTACT: The Unmanned Aircraft Systems Integration Office, AFS–80, Federal Aviation

Administration at: *9-AFS-UAS-Inquiries@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 30, 2013, the FAA selected six UAS Test Sites. This selection was Congressionally-mandated by section 332 of the FAA Modernization and Reform Act of 2012 (Pub. L. 112–95). The FAA is working closely with the Test Sites to guide research programs toward specific goals such as System Safety & Data Gathering, Aircraft Certification, Command & Control Link Issues, Control Station Layout & Certification, Ground & Airborne Sense & Avoid, and Environmental Impacts that will help the FAA safely integrate UAS into the national airspace system.

On May 8, 2015, the FAA selected a Mississippi State University team as the FAA's Center of Excellence for Unmanned Aircraft Systems (COE UAS). The COE will focus on research, education, and training in areas critical to safe and successful integration of UAS into the nation's airspace.

Purpose of the Public Meetings

The purpose of these meetings is to discuss innovation and opportunities at the Test Sites and COE. The Test Sites and COE will host and set the agenda for each public meeting. The meetings will aid both public and private sector stakeholders to better understand the value the Test Sites and COE provide in furthering UAS integration through research, development, and operational testing.

Public Meeting Dates, Times, and Locations

The meetings will be held on the following dates. Please contact the UAS Test Sites or COE through the individuals listed below for further details on location, time, and event logistics.

Site	Date, time, and location of meeting	Point of contact	Web site
UAS Test Sites			
Virginia Polytechnic Institute and State University Test Site.	Monday, August 24, 2015, 1pm–3pm (local), Virginia Tech Executive Briefing Center, 900 N. Glebe Road, Arlington, VA.	Jennifer Tomlin, Program Manager, Mid-Atlantic Aviation Partnership, (540) 231–8890, *tomlinja@exchange.vt.edu.*	*www.maap.ictas.vt.edu.*
University of Alaska Test Site	Thursday, August 27, 2015, 11am–1 pm (local), Murie Auditorium, 103 Murie Bldg., 982 Koyukuk Drive, University of Alaska Fairbanks, Fairbanks, AK.	Diana Campbell, Public Relations Assistant/Event Coordinator for the Geophysical Institute, (907) 474–5229, *dlcampbell@alaska.edu..*	*www.uasalaska.org.*
State of Nevada Test Site	Thursday, September 17, 2015 [1]	Thomas A. Wilczek, Aerospace & Defense Industry Representative, (775) 687–9900, *tawilczek@diversifynevada.com.*	*www.diversifynevada.com.*
North Dakota Department of Commerce Test Site.	Wednesday, September 23, 2015, 1:30pm–3:30pm (local), Alerus Convention Center, 1200 42nd Street South, Grand Forks, ND.	Brian Opp, Manager, Aerospace Business Development, (701) 328–5300, *blopp@nd.gov.*	*www.nduas.com.*
Texas A&M University—Corpus Christi Test Site.	Friday, September 25, 2015, 9am–11am (local), University Center, Texas A&M University, 6300 Ocean Drive, Corpus Christi, TX.	Jerry Hendrix, Chief Engineer Texas A&M—Corpus Christi Lone Star UAS Center of Excellence and Innovation, (361) 825–4104, *jhendrix@camber.com.*	*www.lsuasc.tamucc.edu.*
Griffiss International Airport Test Site	Tuesday, September 29, 2015, 2pm–4pm (local), Mohawk Valley Community College, 1101 Sherman Drive, Payne Hall 331, Utica, NY.	Russell Stark, NUAIR Executive Director, (315) 736–4171, *rstark@ocgov.net.*	*www.nuairalliance.org.*
UAS Center of Excellence			
Mississippi State University	Tuesday, September 15, 2015, 11:00am–1:00pm (local), First hour [2] 11:00 am –12:00 pm: Enology Lab, 130 Foil Road, Starkville, MS, Second hour 12:00 pm–1:00 pm: Palmeiro Center, 675 Collegeview St., Starkville, MS.	James O. Poss, Executive Director of ASSURE FAA Center of Excellence for Unmanned Systems, (228) 688–6988, *jposs@hpc.msstate.edu.*	*www.ASSUREuas.org.*

[1] Time and location are to be determined. Please contact the individual listed as the Point of Contact for time and location details.
[2] Transportation will be provided between the two meeting sites.

Participation at the Public Meetings

The UAS Test Sites and COE will advertise their respective public meetings in multiple ways, including but not limited to:

— Local newspapers and media.
— Public radio.
— Social media.
— University newsletters.
— Public service announcements.

Public Meeting Procedures

The UAS Test Sites and COE will host and set the agenda for their respective meetings. Meetings will be held for two hours. Presenters and/or panelists will be chosen by the Test Sites/COE and may include representatives from the Test Sites/COE, their respective research organization(s), and/or any subject matter experts the Test Sites or COE designate.

The meetings will be open to all persons, subject to availability of space

in the meeting room(s). The Test Sites and COE will make every effort to accommodate all persons wishing to attend. At a minimum, one regional FAA representative will be present at each meeting.

Issued in Washington, DC, on August 3, 2015.

Stephen M. George,

Acting Assistant Manager, Unmanned Aircraft Systems Integration Office.

[FR Doc. 2015–19375 Filed 8–3–15; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Alexander, Johnson, Massac, Pulaski, and Union Counties, Illinois; Ballard and McCracken Counties, Kentucky; and Cape Girardeau, Scott, and Mississippi Counties, Missouri

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that a Tier 1 Environmental Impact Statement (EIS) will not be prepared for the 66 Corridor Project in Alexander, Johnson, Massac, Pulaski, and Union Counties, Illinois; Ballard and McCracken Counties, Kentucky; and Cape Girardeau, Scott, and Mississippi Counties, Missouri.

FOR FURTHER INFORMATION CONTACT: Catherine A. Batey, Division Administrator, Federal Highway Administration, 3250 Executive Park Drive, Springfield, Illinois 62703, Phone: (217) 492–4600. Jeffrey L. Keirn, P.E., Deputy Director of Highways, Region Five Engineer, Illinois Department of Transportation, State Transportation Building, 2801 W. Murphysboro, P.O. Box 100, Carbondale, Illinois 62903, (618) 549–2171.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Illinois Department of Transportation (IDOT), published a notice of intent to prepare a Tier 1 EIS in the **Federal Register** dated May 21, 2014 (Volume 79, Number 98, pp. 29261–29262) to evaluate the need for an improved transportation system between Paducah, Kentucky and I–55 in Missouri.

The project is being cancelled and no further activities will occur for the 66 Corridor Project at this time.

Comments or questions concerning this notice should be directed to FHWA or IDOT at the addresses provided above.

Issued on: July 30, 2015.

Catherine A. Batey,

Division Administrator, Springfield, Illinois.

[FR Doc. 2015–19320 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0233]

Agency Information Collection Activities; Extension of a Currently-Approved Information Collection Request: Annual Report of Class I and Class II Motor Carriers of Property (OMB 2139–0004)

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's announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The FMCSA requests approval to revise and extend an ICR titled, *''Annual Report of Class I and Class II Motor Carriers of Property (formerly OMB 2139–0004).* This ICR is necessary to ensure that motor carriers comply with FMCSA's financial and operating statistics requirements at chapter III of title 49 CFR part 369 entitled, *''Reports of Motor Carriers.''*

DATES: We must receive your comments on or before October 5, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket Number FMCSA–2015–0233 by 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, 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/pdfE8-794.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. Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone: 202–385–2367; email *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background: Section 14123 of title 49 of the United States Code (U.S.C.) requires certain for-hire motor carriers of property and household goods to file annual financial reports. The annual reporting program was implemented on December 24, 1938 (3 FR 3158), and it was subsequently transferred from the Interstate Commerce Commission (ICC) to the U.S. Department of Transportation's (DOT) Bureau of Transportation Statistics (BTS) on January 1, 1996. The Secretary of DOT delegated to BTS the responsibility for the program on December 17, 1996 (61

FR 68162). Annual financial reports are filed on Form M (for-hire property carriers, including household goods carriers) and Form MP–1 (for-hire passenger carriers). Responsibility for collection of the reports was transferred from BTS to FMCSA on August 17, 2004 (69 FR 51009), and the regulations were redesignated as 49 CFR part 369 on August 10, 2006 (71 FR 45740). FMCSA has continued to collect carriers' annual reports and to furnish copies of the reports requested under the Freedom of information Act. Motor carriers (including interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.[1]

Under the Financial and Operating Statistics (F&OS) program, FMCSA collects from Class I and Class II property carriers balance sheet and income statement data along with information on safety needs, tonnage, mileage, employees, transportation equipment, and other related data. FMCSA may also ask carriers to respond to surveys concerning their operations. The data and information collected would be made publicly available and used by FMCSA to determine a motor carrier's compliance with the F&OS program requirements prescribed at chapter III of title of 49 CFR part 369.

Title: Annual Report of Class I and Class II Motor Carriers of Property (formerly OMB Control Number 2139–0004).

New OMB Control Number: 2126–0032.

Type of Request: Extension of a currently-approved information collection.

Respondents: Class I and Class II Motor Carriers of Property and Household Goods.

Estimated Number of Respondents: 308.

Estimated Time per Response: 9 hours.

Expiration Date: January 31, 2016.

Frequency of Response: Annually.

Estimated Total Annual Burden: 2,772 hours [308 respondents × 9 hours to complete form = 2,772].

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 agency to perform its mission; (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: July 28, 2015.

G. Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2015–19332 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–EX–P

[1] For purposes of the Financial and Operating Statistics (F&OS) program, carriers are classified into the following three groups: (1) Class I carriers are those having annual carrier operating revenues (including interstate and intrastate) of $10 million or more after applying the revenue deflator formula as set forth in Note A of 49 CFR 369.2; and (2) Class II carriers are those having annual carrier operating revenues (including interstate and intrastate) of at least $3 million, but less than $10 million after applying the revenue deflator formula as set forth in 49 CFR 369.2.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0064]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 46 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before September 8, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2015–0064 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. 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 for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or 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. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Charles A. Horan, III, Director, Carrier, Driver and Vehicle Safety Standards, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 46 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the

exemption will achieve the required level of safety mandated by statute.

II. Qualifications of Applicants

Earl H. Andreas

Mr. Andreas, 54, has had ITDM since 1995. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Andreas understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Andreas meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Pennsylvania.

Kristopher K. Bitting

Mr. Bitting, 40, has had ITDM since 2013. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bitting understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bitting meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Pennsylvania.

Eric A. Bouldin

Mr. Bouldin, 47, has had ITDM since 2011. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bouldin understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bouldin meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Texas.

Joel K. Bredeson

Mr. Bredeson, 54, has had ITDM since 1985. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bredeson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bredeson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Wyoming.

Clinton L. Carlaw, III

Mr. Carlaw, 58, has had ITDM since 2014. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Carlaw understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Carlaw meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Victor Carranza

Mr. Carranza, 56, has had ITDM since 1999. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Carranza understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Carranza meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Iowa.

Steven A. Casavant

Mr. Casavant, 60, has had ITDM since 2014. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Casavant understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Casavant meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Rhode Island.

Justin M. Coffey

Mr. Coffey, 24, has had ITDM since 2002. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coffey understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coffey meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Kentucky.

Steven W. Conrad, Jr.

Mr. Conrad, 50, has had ITDM since 1996. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function

that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Conrad understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Conrad meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Jeremy L. Demar

Mr. Demar, 43, has had ITDM since 1982. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Demar understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Demar meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Minnesota.

Anthony C. Eavenson

Mr. Eavenson, 21, has had ITDM since 2014. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Eavenson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Eavenson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from New Mexico.

Markie Q. Elsey

Mr. Elsey, 31, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Elsey understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Elsey meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Maryland.

Michael W. Finnegan

Mr. Finnegan, 39, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Finnegan understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Finnegan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from New Jersey.

Gale A. Gallagher

Ms. Gallagher, 69, has had ITDM since 2014. Her endocrinologist examined her in 2015 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Gallagher understands diabetes management and monitoring has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Gallagher meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2015 and certified that she does not have diabetic retinopathy. She holds an operator's license from Illinois.

Scott E. Gallagher

Mr. Gallagher, 50, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Gallagher understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Gallagher meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Virginia.

David L. Hareland

Mr. Hareland, 50, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hareland understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hareland meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

J. Dale Hogrefe

Mr. Hogrefe, 48, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hogrefe understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hogrefe meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that

he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Moazzam Imtiaz

Mr. Imtiaz, 32, has had ITDM since 1999. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Imtiaz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Imtiaz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Florida.

Brian C. Kennerson

Mr. Kennerson, 55, has had ITDM since 1972. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kennerson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kennerson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from New Hampshire.

Garrett P. Lockwood

Mr. Lockwood, 28, has had ITDM since 2006. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lockwood understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lockwood meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Indiana.

Sean P. McNally

Mr. McNally, 49, has had ITDM since 1999. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McNally understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McNally meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Arizona.

Ryan A. McNaught

Mr. McNaught, 27, has had ITDM since 1991. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McNaught understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McNaught meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Florida.

James S. Miller

Mr. Miller, 50, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Miller understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Miller meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Pennsylvania.

Paul R. Monfils

Mr. Monfils, 59, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Monfils understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Monfils meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Rhode Island.

Bryan Moser

Mr. Moser, 56, has had ITDM since 1968. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Moser understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Moser meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Arkansas.

Richard G. Murman

Mr. Murman, 65, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting

in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Murman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Murman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Pennsylvania.

Anthony J. Nault

Mr. Nault, 29, has had ITDM since 1993. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Nault understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nault meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Hampshire.

Sammie J. Nazzise

Mr. Nazzise, 64, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Nazzise understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nazzise meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Utah.

Doyle C. Owens

Mr. Owens, 43, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Owens understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Owens meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Mexico.

Alvin W. Peck, Jr.

Mr. Peck, 67, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Peck understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Peck meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Dakota.

Roy R. Phelps

Mr. Phelps, 59, has had ITDM since 2005. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Phelps understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Phelps meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from California.

Loran L. Ragar

Mr. Ragar, 63, has had ITDM since 2014. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ragar understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ragar meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Missouri.

Larry W. Reed

Mr. Reed, 56, has had ITDM since 2013. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Reed understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Reed meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Tennessee.

Joey D. Renfrow

Mr. Renfrow, 49, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Renfrow understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Renfrow meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Phillip J. Rigling

Mr. Rigling, 79, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rigling understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rigling meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Tennessee.

Kenneth W. Romjue

Mr. Romjue, 43, has had ITDM since 2013. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Romjue understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Romjue meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oklahoma.

Robert T. Scott

Mr. Scott, 51, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Scott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Scott meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Larry Sherman

Mr. Sherman, 71, has had ITDM since 2015. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sherman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sherman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Arkansas.

John Smeal

Mr. Smeal, 74, has had ITDM since 2013. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smeal understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smeal meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Ronald G. Smeltzer

Mr. Smeltzer, 69, has had ITDM since 2010. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smeltzer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smeltzer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Indiana.

Randy E. Smith

Mr. Smith, 52, has had ITDM since 2013. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Curtis G. Taylor

Mr. Taylor, 37, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Taylor understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Taylor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Washington.

Jacob F.M. Tucker

Mr. Tucker, 21, has had ITDM since 2002. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Tucker understands diabetes management and monitoring, has stable control of his diabetes using

insulin, and is able to drive a CMV safely. Mr. Tucker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds an operator's license from Utah.

Jeremy D. Urbanosky

Mr. Urbanosky, 25, has had ITDM since 1999. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Urbanosky understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Urbanosky meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2015 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Texas.

Joseph T. Webb, Jr.

Mr. Webb, 70, has had ITDM since 2012. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Webb understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Webb meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Hampshire.

Douglas L. Zerkle

Mr. Zerkle, 64, has had ITDM since 2014. His endocrinologist examined him in 2015 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Zerkle understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Zerkle meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2015 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

III. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

IV. Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2015–0064 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2015–0064 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: July 24, 2015.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2015–19334 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0238]

Parts and Accessories Necessary for Safe Operation; Application for an Exemption From TowMate, LLC.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) requests public comment on an application for exemption from TowMate, LLC (TowMate) to allow motor carriers to operate rechargeable wireless temporary stop, turn, and tail lighting systems during temporary emergency towing operations in lieu of hard-wired temporary stop, tail, and turn signal lighting systems. Rechargeable wireless temporary emergency stop, turn, and tail lighting systems do not meet the power supply requirements for lamps in the Federal Motor Carrier Safety Regulations (FMCSR) which require all required lamps, with the exception of battery-powered lamps used on projecting loads, to be powered by the electrical system of the motor vehicle. Based on improvements in light-emitting diode (LED) technology, coupled with advancements in battery technologies, TowMate believes that rechargeable wireless tow lighting systems will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption. TowMate is requesting the temporary exemption in advance of petitioning FMCSA to conduct a rulemaking to amend 49 CFR 393.23.

DATES: Comments must be received on or before September 8, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2015–0238 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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *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. Luke Loy, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, (202) 366–0676, 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 2 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)).

TowMate's Application for Exemption

TowMate has applied for an exemption from 49 CFR 393.23 to allow motor carriers to operate rechargeable wireless temporary stop, turn, and tail lighting systems during temporary emergency towing operations. Such systems do not comply with the requirement that all required lamps, with the exception of battery powered lamps used on projecting loads, must be powered by the electrical system of the motor vehicle. A copy of the application is included in the docket referenced at the beginning of this notice.

Section 393.23 of the FMCSRs, ''Power Supply for lamps,'' provides ''All required lamps must be powered by the electrical system of the motor vehicle with the exception of battery powered lamps used on projecting loads.''

In its application, TowMate states:

> TowMate is making this request because the use of conventional hard wired temporary stop, turn, and tail lights has many drawbacks that wireless tow lights solve. These include broken connections, frayed wires, burnt out incandescent bulbs, and the potential to be snagged or pulled from the tow light receptacle due to improper running of wires, and road hazards, along with the safety hazard of increasing the amount of time spent on the roadside or the scene of an accident by stringing wired lighting systems between vehicles and securing the wires.

With the advent of LED technology coupled with advancements in battery technologies, wireless tow lights are more reliable and better equipped for the rigors of daily temporary use.

Temporary wireless stop, turn, tail lighting systems can operate for 10+ hours of continuous use on a full charge, and in-cab wire-less monitoring systems give the driver constant information on the functioning of the system, displaying state of charge of the battery inside the unit, displaying the functioning of the system during operation, and warning the driver if the unit is no longer functioning. In this sense, wireless tow lights provide a level of safety and redundancy that is not currently required on wired temporary lighting systems. In an emergency situation with a drained battery, power can be directly connected to the temporary wireless stop, turn, and tail lighting system from a standard 4 pin or 7 pin electrical connection.

Without the proposed temporary exemption, tow and haul away operators will be forced to continue to use cumbersome wired temporary towing light systems, placing an unnecessary burden on their daily operations. The current temporary lighting requirements for stop, tail, and turn lamps require that the lamps receive their power from a direct wired connection to the towing vehicle with no ascertainable benefit from doing such. Wireless tow lights afford benefits that wired systems are unable to, such as redundancies like monitoring the status of the unit in real time, thus assuring their proper operation at all times.

The exemption would apply to all motor carriers using rechargeable wireless temporary stop, turn, and tail lighting systems. TowMate believes that use of rechargeable wireless tow lighting systems will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on TowMate's application for an exemption from 49 CFR 393.23. 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 also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Issued on: July 24, 2015.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2015–19333 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2015–0173]

Pipeline Safety: Meeting of the Gas Pipeline Safety Advisory Committee and the Liquid Pipeline Safety Advisory Committee

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of advisory committee meeting.

SUMMARY: This notice announces a public meeting of the Gas Pipeline Advisory Committee (GPAC), also known as the Technical Pipeline Safety Standards Committee, and the Liquid Pipeline Advisory Committee (LPAC), also known as the Technical Hazardous Liquid Pipeline Safety Standards Committee.

DATES: The committees will meet in joint sessions on Tuesday, August 25, 2015, from 1:00 p.m. to 5:00 p.m. and on Wednesday, August 26, 2015, from 9:00 a.m. to 5:00 p.m., EST.

The meetings will not be web cast; however, presentations will be available on the meeting Web site and posted on the E-Gov Web site: *http://www.regulations.gov* under docket number PHMSA–2015–0173 within 30 days following the meeting.

ADDRESSES: The meeting will be held at the Crystal City Marriott at Reagan National Airport, 1999 Jefferson Davis Highway, Arlington, VA 22202. A limited block of rooms is available at the government rate of $162 per night. The deadline to book a room in the block is August 6, 2015, or when the block is filled, whichever comes first. However, the advisory committee members have priority for the room block. More information and a link to reserve a room is available on the meeting Web site. You can also call the hotel directly at 1–703–413–5500 and ask for the ''U.S. Department of Transportation Meeting'' block.

The agenda and any additional information will be published on the following pipeline advisory committee meeting and registration page at *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=105.*

Comments: Comments on the meeting may be submitted to the docket 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.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590–001.

Hand Delivery: Room W12–140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on Federal holidays.

Instructions: Identify the docket number PHMSA–2015–0173 at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that 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.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or view the Privacy Notice at *http://www.regulations.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on PHMSA–2015–0173.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

Privacy Act Statement

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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to seek special assistance at the meeting, please contact Cheryl Whetsel at 202–366–4431 by August 18, 2015.

FOR FURTHER INFORMATION CONTACT: For information about the meeting, contact Cheryl Whetsel by phone at 202–366–4431 or by email at *cheryl.whetsel@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Meeting Details

The Pipeline and Hazardous Materials Safety Administration will hold meetings of the GPAC and LPAC. Topics to be discussed will include the regulatory agenda, agency State and stakeholder priorities and safety management systems. The committee members will not be considering any proposed rules at this meeting.

Members of the public may attend and make a statement during the advisory committee meeting. If you intend to make a statement, please notify PHMSA in advance by forwarding an email to *cheryl.whetsel@dot.gov* by August 18, 2015.

II. Committee Background

The GPAC and LPAC are statutorily mandated advisory committees that advise PHMSA on proposed safety standards, risk assessments, and safety policies for natural gas pipelines and for hazardous liquid pipelines. Both committees were established under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 1) and the pipeline safety law (49 U.S.C. Chap. 601). Each committee consists of 15 members—with membership evenly divided among the Federal and state government, the regulated industry, and the public. The committees advise PHMSA on the technical feasibility, practicability, and cost-effectiveness of each proposed pipeline safety standard.

III. Agenda

The Agenda will be published on the PHMSA Web site.

Issued in Washington, DC, on July 31, 2015, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Deputy Associate Administrator for Policy and Programs.

[FR Doc. 2015–19296 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Survey of Foreign Ownership of U.S. Securities as of June 30, 2015

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice, the Department of the Treasury is informing the public that it is conducting a mandatory survey of foreign ownership of U.S. securities as of June 30, 2015. This mandatory survey is conducted under the authority of the International Investment and Trade in Services Survey Act (22 U.S.C. 3101 *et seq.*) This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. Additional copies of the reporting forms SHLA (2015) and instructions may be printed from the Internet at: *http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-sh.aspx.*

Definition: A U.S. person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: The panel for this survey is based primarily on the level of foreign resident holdings of U.S. securities reported on the June 2014 benchmark survey of foreign resident holdings of U.S. securities, and on the Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents (TIC SLT) report as of December 2014, and will consist mostly of the largest reporters. Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What To Report: This report will collect information on foreign resident holdings of U.S. securities, including equities, short-term debt securities (including selected money market instruments), and long-term debt securities.

How To Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, may be obtained at the Web site address given above in the Summary, or by contacting the survey staff of the Federal Reserve Bank of New York at (212) 720–6300 or (646) 720–6300, email: *SHLA.help@ny.frb.org.* The mailing address is: Federal Reserve Bank of New York, Statistics Function, 4th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can also be made to the Federal Reserve Board of Governors, at (202) 452–3476, or to Dwight Wolkow, at (202) 622–1276, or by email: *comments2TIC@do.treas.gov.*

When To Report: Data should be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by August 31, 2015.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0123. 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 OMB. The estimated average annual burden associated with this collection of information is 486 hours per report for the largest custodians of securities, and 110 hours per report for the largest issuers of securities that have data to report and are not custodians. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Office of International Affairs, Attention Administrator, International Portfolio Investment Data Reporting Systems, Room 5422, Washington, DC 20220, and to OMB, Attention Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2015–19236 Filed 8–5–15; 8:45 am]

BILLING CODE 4810–25–P

FEDERAL REGISTER

Vol. 80 Thursday,

No. 151 August 6, 2015

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2016; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1624–F]

RIN 0938–AS45

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2016

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the prospective payment rates for inpatient rehabilitation facilities (IRFs) for federal fiscal year (FY) 2016 as required by the statute. As required by section 1886(j)(5) of the Act, this rule includes the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodologies and data used in computing the prospective payment rates for FY 2016. This final rule also finalizes policy changes, including the adoption of an IRF-specific market basket that reflects the cost structures of only IRF providers, a 1-year phase-in of the revised wage index changes, a 3-year phase-out of the rural adjustment for certain IRFs, and revisions and updates to the quality reporting program (QRP).

DATES: *Effective Date:* These regulations are effective on October 1, 2015.

Applicability Dates: The updated IRF prospective payment rates are applicable for IRF discharges occurring on or after October 1, 2015, and on or before September 30, 2016 (FY 2016). The updated quality measures and reporting requirements under the IRF QRP are effective for IRF discharges occurring on or after October 1, 2016.

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Charles Padgett, (410) 786–2811, for information about the quality reporting program.

Kadie Thomas, (410) 786–0468, or Susanne Seagrave, (410) 786–0044, for information about the payment policies and rates.

Catherine Kraemer, (410) 786–0179, for information about the revised wage index.

Bridget Dickensheets, (410) 786–8670, or Heidi Oumarou, (410) 786–7942, for information about the IRF-specific market basket.

SUPPLEMENTARY INFORMATION: The IRF PPS Addenda along with other supporting documents and tables referenced in this final rule are available through the Internet on the CMS Web site at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/*.

Executive Summary

A. Purpose

This final rule updates the prospective payment rates for IRFs for FY 2016 (that is, for discharges occurring on or after October 1, 2015, and on or before September 30, 2016) as required under section 1886(j)(3)(C) of the Social Security Act (the Act). As required by section 1886(j)(5) of the Act, this rule includes the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodologies and data used in computing the prospective payment rates for FY 2016. This final rule also finalizes policy changes, including the adoption of an IRF-specific market basket that reflects the cost structures of only IRF providers, a 1-year phase-in of the revised wage index changes, a 3-year phase-out of the rural adjustment for certain IRFs, and revisions and updates to the quality measures and reporting requirements under the IRF QRP.

B. Summary of Major Provisions

In this final rule, we use the methods described in the FY 2015 IRF PPS final rule (79 FR 45872) to propose updates to the federal prospective payment rates for FY 2016 using updated FY 2014 IRF claims and the most recent available IRF cost report data, which is FY 2013 IRF cost report data. We are also finalizing an IRF-specific market basket that reflects the cost structures of only IRF providers. The IRF-specific market basket will be used to update the IRF PPS base payment rate and to determine the FY 2016 labor-related share. We are also phasing in the revised wage index changes, phasing out the rural adjustment for certain IRFs and revising and updating quality measures and reporting requirements under the IRF QRP.

C. Summary of Impacts

Provision description	Transfers
FY 2016 IRF PPS payment rate update	The overall economic impact of this final rule is an estimated $135 million in increased payments from the Federal government to IRFs during FY 2016.
Provision description	**Costs**
New quality reporting program requirements	The total costs in FY 2016 for IRFs as a result of the new quality reporting requirements are estimated to be $24,042,291.01.

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

Table of Contents

I. Background
- A. Historical Overview of the IRF PPS
- B. Provisions of the Affordable Care Act Affecting the IRF PPS in FY 2012 and Beyond
- C. Operational Overview of the Current IRF PPS

II. Summary of Provisions of the Proposed Rule

III. Analysis and Responses to Public Comments

IV. Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2016

V. Continued Use of FY 2014 Facility-Level Adjustment Factors

VI. FY 2016 IRF PPS Payment Update
- A. Background
- B. Overview of the 2012-Based IRF Market Basket
- C. Creating an IRF-Specific Market Basket
- D. FY 2016 Market Basket Update and Productivity Adjustment
- E. Labor-Related Share for FY 2016
- F. Wage Adjustment
- G. Description of the IRF Standard Payment Conversion Factor and Payment Rates for FY 2016
- H. Example of the Methodology for Adjusting the Federal Prospective Payment Rates

VII. Update to Payments for High-Cost Outliers Under the IRF PPS
- A. Update to the Outlier Threshold Amount for FY 2016
- B. Update to the IRF Cost-to-Charge Ratio Ceiling and Urban/Rural Averages

VIII. ICD–10–CM Implementation for IRF PPS

IX. Revisions and Updates to the IRF QRP
- A. Background and Statutory Authority

B. General Considerations Used for Selection of Quality, Resource Use, and Other Measures for the IRF QRP
C. Policy for Retention of IRF QRP Measures Adopted for Previous Payment Determinations
D. Policy for Adopting Changes to IRF QRP Measures
E. Quality Measures Previously Finalized for and Currently Used in the IRF QRP
F. Quality Measures Previously Adopted for IRF QRP for the FY 2018 Payment Determination and Subsequent Years
G. Additional IRF QRP Quality Measures for the FY 2018 Payment Determination and Subsequent Years
H. IRF QRP Quality Measures and Measure Concepts Under Consideration for Future Years
I. Form, Manner, and Timing of Quality Data Submission for the FY 2018 Payment Determination and Subsequent Years
J. Timing for New IRFs To Begin Submitting Quality Data Under the IRF QRP for the FY 2018 Payment Determination and Subsequent Years
K. IRF QRP Data Completion Thresholds for the FY 2016 Payment Determination and Subsequent Years
L. Suspension of the IRF QRP Data Validation Process for the FY 2016 Payment Determination and Subsequent Years
M. Previously Adopted and Proposed IRF QRP Submission Exception and Extension Requirements for the FY 2017 Payment Determination and Subsequent Years
N. Previously Adopted and Proposed IRF QRP Reconsideration and Appeals Procedures for the FY 2017 Payment Determination and Subsequent Years
O. Public Display of Quality Measure Data for the IRF QRP
P. Method for Applying the Reduction to the FY 2016 IRF Increase Factor for IRFs That Fail To Meet the Quality Reporting Requirements
X. Miscellaneous Comments
XI. Provisions of the Final Regulations
XII. Collection of Information Requirements
A. Statutory Requirements for Solicitation of Comments
B. Collection of Information Requirements for Updates Related to the IRF QRP
XIII. Regulatory Impact Analysis
A. Statement of Need
B. Overall Impacts
C. Detailed Economic Analysis
D. Alternatives Considered
E. Accounting Statement
F. Conclusion

Acronyms, Abbreviations, and Short Forms

Because of the many terms to which we refer by acronym, abbreviation, or short form in this final rule, we are listing the acronyms, abbreviation, and short forms used and their corresponding terms in alphabetical order.

The Act Th e Social Security Act
ADC Average Daily Census
The Affordable Care Act Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010)
AHA American Hospital Association
AHE Average Hourly Earnings
AHIMA American Health Information Management Association
ASAP Assessment Submission and Processing
ASCA Administrative Simplification Compliance Act (Pub. L. 107–105, enacted on December 27, 2002)
BEA Bureau of Economic Analysis
BLS U.S. Bureau of Labor Statistics
CAH Critical Access Hospitals
CARE Continuity Assessment Record and Evaluation
CAUTI Catheter-Associated Urinary Tract Infection
CBSA Core-Based Statistical Area
CCR Cost-to-Charge Ratio
CDC The Centers for Disease Control and Prevention
CDI *Clostridium difficile* Infection
CFR Code of Federal Regulations
CMG Case-Mix Group
CMS Centers for Medicare & Medicaid Services
CPI Consumer Price Index
DSH Disproportionate Share Hospital
DSH PP Disproportionate Share Patient Percentage
ECI Employment Cost Index
EHR Electronic Health Record
ESRD End-Stage Renal Disease
FFS Fee-for-Service
FR Federal Register
FY Federal Fiscal Year
GDP Gross Domestic Product
HAI Healthcare Associated Infection
HCP Health Care Personnel
HHS U.S. Department of Health & Human Services
HIE Health Information Exchange
HIPAA Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996)
HOMER Home Office Medicare Records
ICD–9–CM International Classification of Diseases, 9th Revision, Clinical Modification
ICD–10–CM International Classification of Diseases, 10th Revision, Clinical Modification
IGI IHS Global Insight
IMPACT Act Improving Medicare Post-Acute Care Transformation Act of 2014 (Pub. L. 113–185, enacted on October 6, 2014)
I–O Input-Output
IPF Inpatient Psychiatric Facility
IQR Inpatient Quality Reporting Program
IRF Inpatient Rehabilitation Facility
IRF–PAI Inpatient Rehabilitation Facility-Patient Assessment Instrument
IRF PPS Inpatient Rehabilitation Facility Prospective Payment System
IRF QRP Inpatient Rehabilitation Facility Quality Reporting Program
IRVEN Inpatient Rehabilitation Validation and Entry
LIP Low-Income Percentage
LOS Length of Stay
LPN Licensed Practical Nurse
LTCH Long-Term Care Hospital
MAC Medicare Administrative Contractor
MAP Measure Applications Partnership
MA (Medicare Part C) Medicare Advantage
MedPAC Medicare Payment Advisory Commission
MDS Minimum Data Set
MFP Multifactor Productivity
MLN Medicare Learning Network
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007)
MRSA Methicillin-Resistant *Staphylococcus aureus*
MSA Metropolitan Statistical Area
MUC Measures under Consideration
NAICS North American Industry Classification System
NHSN National Healthcare Safety Network
NPP National Priorities Partnership
NPUAP National Pressure Ulcer Advisory Panel
NQF National Quality Forum
OMB Office of Management and Budget
ONC Office of the National Coordinator for Health Information Technology
OT Occupational Therapists
PAC Post-Acute Care
PAI Patient Assessment Instrument
PLI Professional Liability Insurance
POA Present on Admission
PPI Producer Price Index
PPS Prospective Payment System
PRA Paperwork Reduction Act of 1995 (Pub. L. 104–13, enacted on May 22, 1995)
PRRB Provider Reimbursement Review Board
PT Physical Therapist
QIES Quality Improvement Evaluation System
QM Quality Measure
QRP Quality Reporting Program
RIA Regulatory Impact Analysis
RIC Rehabilitation Impairment Category
RFA Regulatory Flexibility Act (Pub. L. 96–354, enacted on September 19, 1980)
RN Registered Nurse
RPL Rehabilitation, Psychiatric, and Long-Term Care market basket
RSRR Risk-standardized readmission rate
SDTI Suspected Deep Tissue Injuries
SIR Standardized Infection Ratio
SLP Speech-Language Pathologist
SOC Standard Occupational Classification System
SNF Skilled Nursing Facilities
SRR Standardized Risk Ratio
SSI Supplemental Security Income
TEP Technical Expert Panel

I. Background

A. Historical Overview of the IRF PPS

Section 1886(j) of the Act provides for the implementation of a per-discharge PPS for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (collectively, hereinafter referred to as IRFs). Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs), but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and

other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing below a general description of the IRF PPS for FYs 2002 through 2015.

Under the IRF PPS from FY 2002 through FY 2005, as described in the FY 2002 IRF PPS final rule (66 FR 41316), the federal prospective payment rates were computed across 100 distinct case-mix groups (CMGs). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget-neutral conversion factor). For a detailed discussion of the budget-neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted federal prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRFs' unadjusted federal prospective payment rates.

For cost reporting periods that began on or after January 1, 2002, and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the federal IRF PPS rate and the payment that the IRFs would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the federal IRF PPS rate.

We established a CMS Web site as a primary information resource for the IRF PPS which is available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index.html*. The Web site may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the Office of Management and Budget's (OMB) Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, revision and rebasing of the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments was a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments would continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the federal prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF federal prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA), amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act required the Secretary to develop an increase factor to update the IRF federal prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 federal prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF federal prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007, and on or before March 31, 2008; and the revised FY 2008 IRF federal prospective payment rates were effective for discharges occurring on or after April 1, 2008, and on or before September 30, 2008. The revised FY 2008 federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html*.

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of ''New England deemed'' counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent

(the ''60 percent rule'') and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent market basket increase factor for FY 2009 in accordance with section 115 of the MMSEA. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF federal prospective payment rates.

In the FY 2010 IRF PPS final rule (74 FR 39762) and in correcting amendments to the FY 2010 IRF PPS final rule (74 FR 50712) that we published on October 1, 2009, we updated the federal prospective payment rates, the CMG relative weights, the average length of stay values, the rural, LIP, teaching status adjustment factors, and the outlier threshold; implemented new IRF coverage requirements for determining whether an IRF claim is reasonable and necessary; and revised the regulation text to require IRFs to submit patient assessments on Medicare Advantage (MA) (Medicare Part C) patients for use in the 60 percent rule calculations. Any reference to the FY 2010 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For more information on the policy changes implemented for FY 2010, please refer to the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712), in which we published the final FY 2010 IRF federal prospective payment rates.

After publication of the FY 2010 IRF PPS final rule (74 FR 39762), section 3401(d) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), as amended by section 10319 of the same Act and by section 1105 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010) (collectively, hereafter referred to as ''The Affordable Care Act''), amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 to 2019.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act defined the adjustments that were to be applied to the market basket increase factors in FYs 2010 and 2011. Under these provisions, the Secretary was required to reduce the market basket increase factor in FY 2010 by a 0.25 percentage point adjustment. Notwithstanding this provision, in accordance with section 3401(p) of the Affordable Care Act, the adjusted FY 2010 rate was only to be applied to discharges occurring on or after April 1, 2010. Based on the self-implementing legislative changes to section 1886(j)(3) of the Act, we adjusted the FY 2010 federal prospective payment rates as required, and applied these rates to IRF discharges occurring on or after April 1, 2010, and on or before September 30, 2010. Thus, the final FY 2010 IRF federal prospective payment rates that were published in the FY 2010 IRF PPS final rule (74 FR 39762) were used for discharges occurring on or after October 1, 2009, and on or before March 31, 2010, and the adjusted FY 2010 IRF federal prospective payment rates applied to discharges occurring on or after April 1, 2010, and on or before September 30, 2010. The adjusted FY 2010 federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html*.

In addition, sections 1886(j)(3)(C) and (D) of the Act also affected the FY 2010 IRF outlier threshold amount because they required an adjustment to the FY 2010 RPL market basket increase factor, which changed the standard payment conversion factor for FY 2010. Specifically, the original FY 2010 IRF outlier threshold amount was determined based on the original estimated FY 2010 RPL market basket increase factor of 2.5 percent and the standard payment conversion factor of $13,661. However, as adjusted, the IRF prospective payments are based on the adjusted RPL market basket increase factor of 2.25 percent and the revised standard payment conversion factor of $13,627. To maintain estimated outlier payments for FY 2010 equal to the established standard of 3 percent of total estimated IRF PPS payments for FY 2010, we revised the IRF outlier threshold amount for FY 2010 for discharges occurring on or after April 1, 2010, and on or before September 30, 2010. The revised IRF outlier threshold amount for FY 2010 was $10,721.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act also required the Secretary to reduce the market basket increase factor in FY 2011 by a 0.25 percentage point adjustment. The FY 2011 IRF PPS notice (75 FR 42836) and the correcting amendments to the FY 2011 IRF PPS notice (75 FR 70013) described the required adjustments to the FY 2011 and FY 2010 IRF PPS federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after April 1, 2010, and on or before September 30, 2011. It also updated the FY 2011 federal prospective payment rates, the CMG relative weights, and the average length of stay values. Any reference to the FY 2011 IRF PPS notice in this final rule also includes the provisions effective in the correcting amendments. For more information on the FY 2010 and FY 2011 adjustments or the updates for FY 2011, please refer to the FY 2011 IRF PPS notice (75 FR 42836 and 75 FR 70013).

In the FY 2012 IRF PPS final rule (76 FR 47836), we updated the IRF federal prospective payment rates, rebased and revised the RPL market basket, and established a new quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act. We also revised regulation text for the purpose of updating and providing greater clarity. For more information on the policy changes implemented for FY 2012, please refer to the FY 2012 IRF PPS final rule (76 FR 47836), in which we published the final FY 2012 IRF federal prospective payment rates.

The FY 2013 IRF PPS notice (77 FR 44618) described the required adjustments to the FY 2013 federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after October 1, 2012, and on or before September 30, 2013. It also updated the FY 2013 federal prospective payment rates, the CMG relative weights, and the average length of stay values. For more information on the updates for FY 2013, please refer to the FY 2013 IRF PPS notice (77 FR 44618).

In the FY 2014 IRF PPS final rule (78 FR 47860), we updated the federal prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also updated the facility-level adjustment factors using an enhanced estimation methodology, revised the list of diagnosis codes that count toward an IRF's 60 percent rule compliance calculation to determine ''presumptive compliance,'' revised sections of the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI), revised requirements for acute care hospitals that have IRF units, clarified the IRF regulation text regarding limitation of review, updated references to previously changed sections in the regulations text, and revised and updated quality measures and reporting requirements under the IRF quality reporting program. For more information on the policy changes implemented for FY 2014, please refer to the FY 2014 IRF PPS final rule (78 FR

47860), in which we published the final FY 2014 IRF federal prospective payment rates.

In the FY 2015 IRF PPS final rule (79 FR 45872), we updated the federal prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also further revised the list of diagnosis codes that count toward an IRF's 60 percent rule compliance calculation to determine ''presumptive compliance,'' revised sections of the IRF–PAI, and revised and updated quality measures and reporting requirements under the IRF quality reporting program. For more information on the policy changes implemented for FY 2015, please refer to the FY 2015 IRF PPS final rule (79 FR 45872) and the FY 2015 IRF PPS correction notice (79 FR 59121).

B. Provisions of the Affordable Care Act Affecting the IRF PPS in FY 2012 and Beyond

The Affordable Care Act included several provisions that affect the IRF PPS in FYs 2012 and beyond. In addition to what was previously discussed, section 3401(d) of the Affordable Care Act also added section 1886(j)(3)(C)(ii)(I) (providing for a ''productivity adjustment'' for fiscal year 2012 and each subsequent fiscal year). The productivity adjustment for FY 2016 is discussed in section VI.D. of this final rule. Section 3401(d) of the Affordable Care Act requires an additional 0.2 percentage point adjustment to the IRF increase factor for FY 2016, as discussed in section VI.D. of this final rule. Section 1886(j)(3)(C)(ii)(II) of the Act notes that the application of these adjustments to the market basket update may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year.

Section 3004(b) of the Affordable Care Act also addressed the IRF PPS program. It reassigned the previously designated section 1886(j)(7) of the Act to section 1886(j)(8) and inserted a new section 1886(j)(7), which contains requirements for the Secretary to establish a quality reporting program for IRFs. Under that program, data must be submitted in a form and manner and at a time specified by the Secretary. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the application of a 2 percentage point reduction of the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved.

Under section 1886(j)(7)(D)(i) and (ii) of the Act, the Secretary is generally required to select quality measures for the IRF quality reporting program from those that have been endorsed by the consensus-based entity which holds a performance measurement contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). So long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization, section 1886(j)(7)(D)(ii) of the Act authorizes the Secretary to select non-endorsed measures for specified areas or medical topics when there are no feasible or practical endorsed measure(s).

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF PPS quality reporting data available to the public. In so doing, the Secretary must ensure that IRFs have the opportunity to review any such data prior to its release to the public.

C. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule, upon the admission and discharge of a Medicare Part A Fee-for-Service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument (PAI), designated as the IRF–PAI. In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Part C (Medicare Advantage) patient, as described in the FY 2010 IRF PPS final rule. All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the Grouper software. The Grouper software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The Grouper software produces a 5-character CMG number. The first character is an alphabetic character that indicates the comorbidity tier. The last 4 characters are numeric characters that represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the Grouper software, are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html*.

Once a Medicare Fee-for-Service Part A patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996) (HIPAA) compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (Pub. L. 107–105, enacted on December 27, 2002) (ASCA) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-character CMG number and sends it to the appropriate Medicare Administrative Contractor (MAC). In addition, once a Medicare Advantage patient is discharged, in accordance with the Medicare Claims Processing Manual, chapter 3, section 20.3 (Pub. 100–04), hospitals (including IRFs) must submit an informational-only bill (TOB 111), which includes Condition Code 04 to their MAC. This will ensure that the Medicare Advantage days are included in the hospital's Supplemental Security Income (SSI) ratio (used in calculating the IRF low-income percentage adjustment) for Fiscal Year 2007 and beyond. Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amends section 1862(a) of the Act by adding paragraph (22), which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services ''for which a claim is submitted other than in an electronic form specified by the Secretary.'' Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial ''in such unusual cases as the Secretary finds appropriate.'' For more information, see the ''Medicare Program; Electronic Submission of Medicare Claims'' final rule (70 FR 71008). Our instructions for the limited number of Medicare claims submitted on paper are available at *http://www.cms.gov/manuals/downloads/clm104c25.pdf*.

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards

and code sets codified in 45 CFR, parts 160 and 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered health care providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the CMS program claim memoranda at *http://www.cms.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The MAC processes the claim through its software system. This software system includes pricing programming called the ''Pricer'' software. The Pricer software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

II. Summary of Provisions of the Proposed Rule

In the FY 2016 IRF PPS proposed rule (80 FR 23332), we proposed to update the IRF federal prospective payment rates for FY 2016, adopt an IRF-specific market basket that will be used to determine the market basket update and labor-related share, phase in the revised wage index changes for all IRFs, phase out the rural adjustment for certain IRFs, and revise and update quality measures and reporting requirements under the IRF QRP.

The proposed updates to the IRF federal prospective payment rates for FY 2016 were as follows:

- Update the FY 2016 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section III of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23337 through 23341).
- Describe the continued use of FY 2014 facility-level adjustment factors as discussed in section IV of the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23341).
- Adopt the proposed IRF-specific market basket, as discussed in section V of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23341 through 23358).
- Update the FY 2016 IRF PPS payment rates by the proposed market basket increase factor, based upon the most current data available, with a 0.2 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act and a proposed productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23355 through 23356).
- Update the FY 2016 IRF PPS payment rates by the FY 2016 wage index and the labor-related share in a budget-neutral manner and discuss the proposed wage adjustment transition as discussed in section V of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23356 through 23357).
- Describe the calculation of the IRF standard payment conversion factor for FY 2016, as discussed in section V of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23364 through 23365).
- Update the outlier threshold amount for FY 2016, as discussed in section VI of the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23367).
- Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2016, as discussed in section VI of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23367 through 23368).
- Discuss implementation of International Classification of Diseases, 10th Revision, Clinical Modification (ICD–10–CM) for the IRF PPS as discussed in section VII of the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23368).
- Describe proposed revisions and updates to quality measures and reporting requirements under the quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act, as discussed in section VIII of the FY 2016 IRF PPS proposed rule (80 FR 23332, 23368 through 23389).

III. Analysis and Responses to Public Comments

We received 85 timely responses from the public, many of which contained multiple comments on the FY 2016 IRF PPS proposed rule (80 FR 23332). We received comments from various trade associations, inpatient rehabilitation facilities, individual physicians, therapists, clinicians, health care industry organizations, and health care consulting firms. The following sections, arranged by subject area, include a summary of the public comments that we received, and our responses.

IV. Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2016

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care, as well as provider efficiency.

In the FY 2016 IRF PPS proposed rule (80 FR 23332, 23337 through 23341), we proposed to update the CMG relative weights and average length of stay values for FY 2016. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. For FY 2016, we proposed to use the FY 2014 IRF claims and FY 2013 IRF cost report data. These data are the most current and complete data available at this time. Currently, only a small portion of the FY 2014 IRF cost report data are available for analysis, but the majority of the FY 2014 IRF claims data are available for analysis.

In the FY 2016 IRF PPS proposed rule, we proposed to apply these data using the same methodologies that we have used to update the CMG relative weights and average length of stay values each fiscal year since we implemented an update to the methodology to use the more detailed CCR data from the cost reports of IRF subprovider units of primary acute care hospitals, instead of CCR data from the associated primary care hospitals, to calculate IRFs' average costs per case, as discussed in the FY 2009 IRF PPS final rule (73 FR 46372). In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights for this final rule is as follows:

Step 1. We estimate the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2016 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the FY 2015 IRF PPS final rule (79 FR 45872).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we proposed to update the CMG relative weights for FY 2016 in such a way that total estimated aggregate payments to IRFs for FY 2016 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate budget neutrality factor for use in updating the FY 2016 CMG relative weights, we use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2016 (with no changes to the CMG relative weights).

Step 2. Calculate the estimated total amount of IRF PPS payments for FY 2016 by applying the changes to the CMG relative weights (as discussed in this final rule).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor (.9981) that would maintain the same total estimated aggregate payments in FY 2016 with and without the changes to the CMG relative weights.

Step 4. Apply the budget neutrality factor (.9981) to the FY 2015 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section VI.G. of this final rule, we discuss the use of the existing methodology to calculate the standard payment conversion factor for FY 2016.

In Table 1, ''Relative Weights and Average Length of Stay Values for Case-Mix Groups,'' we present the CMGs, the comorbidity tiers, the corresponding relative weights, and the average length of stay values for each CMG and tier for FY 2016. The average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment.

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS

CMG	CMG description M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0101	Stroke M>51.05	0.8080	0.7077	0.6589	0.6304	10	9	9	8
0102	Stroke M>44.45 and M<51.05 and C>18.5.	1.0165	0.8904	0.8290	0.7931	11	10	10	10
0103	Stroke M>44.45 and M<51.05 and C<18.5.	1.1428	1.0010	0.9320	0.8916	12	13	12	11
0104	Stroke M>38.85 and M<44.45.	1.2349	1.0817	1.0071	0.9635	13	13	12	12
0105	Stroke M>34.25 and M<38.85.	1.4494	1.2696	1.1820	1.1309	14	15	14	14
0106	Stroke M>30.05 and M<34.25.	1.6160	1.4155	1.3179	1.2609	16	16	15	15
0107	Stroke M>26.15 and M<30.05.	1.8101	1.5855	1.4762	1.4122	18	17	17	17
0108	Stroke M<26.15 and A>84.5.	2.2978	2.0126	1.8739	1.7927	23	23	21	21
0109	Stroke M>22.35 and M<26.15 and A<84.5.	2.0953	1.8353	1.7088	1.6348	21	20	19	19
0110	Stroke M<22.35 and A<84.5.	2.7602	2.4177	2.2511	2.1536	28	27	24	24
0201	Traumatic brain injury M>53.35 and C>23.5.	0.8012	0.6584	0.5941	0.5613	9	9	8	8
0202	Traumatic brain injury M>44.25 and M<53.35 and C>23.5.	1.0535	0.8656	0.7812	0.7380	11	11	10	9
0203	Traumatic brain injury M>44.25 and C<23.5.	1.2056	0.9906	0.8940	0.8445	11	13	10	11
0204	Traumatic brain injury M>40.65 and M<44.25.	1.3292	1.0922	0.9856	0.9311	13	13	12	12
0205	Traumatic brain injury M>28.75 and M<40.65.	1.5900	1.3064	1.1790	1.1138	15	16	14	13
0206	Traumatic brain injury M>22.05 and M<28.75.	1.8962	1.5580	1.4060	1.3282	17	18	17	16
0207	Traumatic brain injury M<22.05.	2.5238	2.0737	1.8714	1.7679	30	24	20	19
0301	Non-traumatic brain injury M>41.05.	1.1171	0.9325	0.8551	0.7979	10	11	10	10
0302	Non-traumatic brain injury M>35.05 and M<41.05.	1.3867	1.1576	1.0615	0.9906	13	13	12	12
0303	Non-traumatic brain injury M>26.15 and M<35.05.	1.6159	1.3489	1.2370	1.1543	16	15	14	14
0304	Non-traumatic brain injury M<26.15.	2.1493	1.7942	1.6453	1.5353	22	20	18	17
0401	Traumatic spinal cord injury M>48.45.	0.9696	0.8252	0.7557	0.6985	10	10	9	9
0402	Traumatic spinal cord injury M>30.35 and M<48.45.	1.4217	1.2100	1.1081	1.0242	14	14	13	13

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0403	Traumatic spinal cord injury M>16.05 and M<30.35.	2.2684	1.9306	1.7679	1.6342	28	22	20	19
0404	Traumatic spinal cord injury M<16.05 and A>63.5.	3.9720	3.3805	3.0957	2.8615	47	37	33	34
0405	Traumatic spinal cord injury M<16.05 and A<63.5.	3.5415	3.0141	2.7602	2.5514	43	39	28	27
0501	Non-traumatic spinal cord injury M>51.35.	0.8672	0.6911	0.6417	0.5890	9	7	8	8
0502	Non-traumatic spinal cord injury M>40.15 and M<51.35.	1.1393	0.9079	0.8430	0.7738	11	11	10	10
0503	Non-traumatic spinal cord injury M>31.25 and M<40.15.	1.4419	1.1491	1.0669	0.9794	14	13	13	12
0504	Non-traumatic spinal cord injury M>29.25 and M<31.25.	1.6555	1.3192	1.2249	1.1244	15	16	14	13
0505	Non-traumatic spinal cord injury M>23.75 and M<29.25.	1.9346	1.5417	1.4315	1.3140	19	17	16	16
0506	Non-traumatic spinal cord injury M<23.75.	2.7197	2.1673	2.0123	1.8472	27	24	22	21
0601	Neurological M>47.75	1.0412	0.8216	0.7667	0.6928	10	10	9	9
0602	Neurological M>37.35 and M<47.75.	1.3339	1.0525	0.9822	0.8875	12	12	11	11
0603	Neurological M>25.85 and M<37.35.	1.6581	1.3083	1.2209	1.1031	15	14	13	13
0604	Neurological M<25.85	2.1767	1.7175	1.6028	1.4482	20	18	17	16
0701	Fracture of lower extremity M>42.15.	0.9659	0.8088	0.7660	0.6958	11	9	9	9
0702	Fracture of lower extremity M>34.15 and M<42.15.	1.2529	1.0491	0.9936	0.9025	13	12	12	11
0703	Fracture of lower extremity M>28.15 and M<34.15.	1.5022	1.2579	1.1913	1.0821	14	14	14	13
0704	Fracture of lower extremity M<28.15.	1.9534	1.6357	1.5492	1.4071	18	18	17	16
0801	Replacement of lower extremity joint M>49.55.	0.8034	0.6328	0.5741	0.5302	8	8	7	7
0802	Replacement of lower extremity joint M>37.05 and M<49.55.	1.0561	0.8318	0.7547	0.6970	10	10	9	9
0803	Replacement of lower extremity joint M>28.65 and M<37.05 and A>83.5.	1.4245	1.1220	1.0180	0.9401	13	13	12	11
0804	Replacement of lower extremity joint M>28.65 and M<37.05 and A<83.5.	1.2739	1.0033	0.9103	0.8407	12	11	11	10
0805	Replacement of lower extremity joint M>22.05 and M<28.65.	1.5355	1.2094	1.0973	1.0134	15	14	12	12
0806	Replacement of lower extremity joint M<22.05.	1.9083	1.5031	1.3637	1.2594	17	16	15	14
0901	Other orthopedic M>44.75.	0.9563	0.7692	0.7050	0.6426	10	9	9	8
0902	Other orthopedic M>34.35 and M<44.75.	1.2714	1.0226	0.9372	0.8544	13	12	11	11
0903	Other orthopedic M>24.15 and M<34.35.	1.5876	1.2770	1.1704	1.0669	15	14	13	13
0904	Other orthopedic M<24.15.	2.0060	1.6135	1.4788	1.3480	19	18	16	16
1001	Amputation, lower extremity M>47.65.	1.0684	0.9367	0.8341	0.7526	11	11	10	10

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
1002	Amputation, lower extremity M>36.25 and M<47.65.	1.3349	1.1704	1.0421	0.9404	13	13	12	11
1003	Amputation, lower extremity M<36.25.	1.9160	1.6798	1.4958	1.3497	18	19	17	16
1101	Amputation, non-lower extremity M>36.35.	1.3933	1.3933	1.1068	1.0400	14	14	12	12
1102	Amputation, non-lower extremity M<36.35.	1.8119	1.8119	1.4393	1.3524	16	20	15	16
1201	Osteoarthritis M>37.65	0.9863	0.9576	0.8720	0.8135	9	11	10	10
1202	Osteoarthritis M>30.75 and M<37.65.	1.2107	1.1755	1.0704	0.9986	12	14	13	12
1203	Osteoarthritis M<30.75	1.4934	1.4500	1.3203	1.2318	14	16	15	14
1301	Rheumatoid, other arthritis M>36.35.	1.1791	0.9716	0.9161	0.8365	9	11	10	10
1302	Rheumatoid, other arthritis M>26.15 and M<36.35.	1.4946	1.2315	1.1612	1.0603	14	14	13	13
1303	Rheumatoid, other arthritis M<26.15.	1.9625	1.6171	1.5248	1.3923	21	18	16	16
1401	Cardiac M>48.85	0.9069	0.7453	0.6740	0.6065	9	9	8	8
1402	Cardiac M>38.55 and M<48.85.	1.2018	0.9877	0.8932	0.8037	11	11	11	10
1403	Cardiac M>31.15 and M<38.55.	1.4475	1.1896	1.0757	0.9680	13	13	12	12
1404	Cardiac M<31.15	1.8371	1.5098	1.3653	1.2286	17	17	15	14
1501	Pulmonary M>49.25	1.0526	0.8479	0.7807	0.7512	11	10	9	9
1502	Pulmonary M>39.05 and M<49.25.	1.3349	1.0754	0.9901	0.9527	12	12	11	11
1503	Pulmonary M>29.15 and M<39.05.	1.6150	1.3010	1.1978	1.1526	15	13	13	13
1504	Pulmonary M<29.15	2.0063	1.6163	1.4881	1.4319	21	17	15	15
1601	Pain syndrome M>37.15	1.1376	0.8365	0.8218	0.7556	11	10	10	9
1602	Pain syndrome M>26.75 and M<37.15.	1.4940	1.0985	1.0792	0.9923	14	13	12	12
1603	Pain syndrome M<26.75	1.9109	1.4050	1.3803	1.2692	15	15	15	15
1701	Major multiple trauma without brain or spinal cord injury M>39.25.	1.0705	0.9081	0.8286	0.7711	10	10	11	9
1702	Major multiple trauma without brain or spinal cord injury M>31.05 and M<39.25.	1.3897	1.1788	1.0756	1.0010	13	14	12	12
1703	Major multiple trauma without brain or spinal cord injury M>25.55 and M<31.05.	1.5913	1.3498	1.2317	1.1463	19	15	14	14
1704	Major multiple trauma without brain or spinal cord injury M<25.55.	2.0891	1.7721	1.6169	1.5048	21	20	18	17
1801	Major multiple trauma with brain or spinal cord injury M>40.85.	1.2783	0.9685	0.8849	0.7874	14	12	11	10
1802	Major multiple trauma with brain or spinal cord injury M>23.05 and M<40.85.	1.8807	1.4248	1.3019	1.1584	18	17	15	14
1803	Major multiple trauma with brain or spinal cord injury M<23.05.	3.0933	2.3435	2.1413	1.9054	32	27	22	21
1901	Guillain Barre M>35.95	1.1826	1.0281	0.9998	0.8741	16	11	12	11
1902	Guillain Barre M>18.05 and M<35.95.	2.2408	1.9481	1.8945	1.6563	26	22	21	20
1903	Guillain Barre M<18.05	3.7479	3.2583	3.1687	2.7703	52	32	27	32
2001	Miscellaneous M>49.15	0.9252	0.7603	0.7013	0.6348	9	9	9	8
2002	Miscellaneous M>38.75 and M<49.15.	1.2002	0.9863	0.9097	0.8234	11	11	10	10
2003	Miscellaneous M>27.85 and M<38.75.	1.4943	1.2280	1.1327	1.0253	14	14	13	12
2004	Miscellaneous M<27.85	1.9243	1.5814	1.4586	1.3203	18	18	16	15

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
2101	Burns M>0	1.7151	1.7151	1.3313	1.2915	18	18	15	15
5001	Short-stay cases, length of stay is 3 days or fewer.	.....	.....	.....	0.1556	.....	.....	.....	2
5101	Expired, orthopedic, length of stay is 13 days or fewer.	.....	.....	.....	0.7236	.....	.....	.....	8
5102	Expired, orthopedic, length of stay is 14 days or more.	.....	.....	.....	1.6315	.....	.....	.....	17
5103	Expired, not orthopedic, length of stay is 15 days or fewer.	.....	.....	.....	0.7734	.....	.....	.....	8
5104	Expired, not orthopedic, length of stay is 16 days or more.	.....	.....	.....	1.9277	.....	.....	.....	21

Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 2 shows how we estimate that the application of the revisions for FY 2016 would affect particular CMG relative weight values, which would affect the overall distribution of payments within CMGs and tiers. Note that, because we proposed to implement the CMG relative weight revisions in a budget-neutral manner (as previously described), total estimated aggregate payments to IRFs for FY 2016 would not be affected as a result of the CMG relative weight revisions. However, the revisions would affect the distribution of payments within CMGs and tiers.

TABLE 2—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMG RELATIVE WEIGHTS

[FY 2015 values compared with FY 2016 values]

Percentage change	Number of cases affected	Percentage of cases affected
Increased by 15% or more	170	0.0
Increased by between 5% and 15%	2,830	0.7
Changed by less than 5%	387,215	99.1
Decreased by between 5% and 15%	416	0.1
Decreased by 15% or more	0	0.0

As Table 2 shows, 99 percent of all IRF cases are in CMGs and tiers that would experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the proposed revisions for FY 2016. The largest estimated increase in the CMG relative weight values that affects the largest number of IRF discharges would be a 0.2 percent increase in the CMG relative weight value for CMG 0704—Fracture of lower extremity, with a motor score less than 28.15—in the ''no comorbidity'' tier. In the FY 2014 claims data, 19,356 IRF discharges (5.0 percent of all IRF discharges) were classified into this CMG and tier.

The largest decrease in a CMG relative weight value affecting the largest number of IRF cases would be a 0.9 percent decrease in the CMG relative weight for CMG 0604—Neurological, with a motor score less than 25.85—in the ''no comorbidity'' tier. In the FY 2014 IRF claims data, this change would have affected 9,295 cases (2.4 percent of all IRF cases).

The changes in the average length of stay values for FY 2016, compared with the FY 2015 average length of stay values, are small and do not show any particular trends in IRF length of stay patterns.

We received 1 comment on the proposed update to the CMG relative weights and average length of stay values for FY 2016, which is summarized below.

Comment: One commenter requested that we provide more detail about the use of the CCR data in the CMG relative weight calculations. Additionally, the commenter requested that we outline the methodology used to calculate the average length of stay values in the FY 2016 IRF PPS proposed rule.

Response: As we discussed in the FY 2015 IRF PPS final rule (79 FR 45872 at 45882), a key variable used to calculate the CMG relative weights is a facility's average cost per case, which is obtained by averaging the estimated cost per case for every patient discharged from the facility in a given fiscal year. To obtain the estimated cost per case for a given IRF patient, we start by pulling the appropriate charges from the Medicare claim for that patient. Then, we calculate the appropriate CCRs from the Medicare cost report submitted by the facility. The CCRs are then multiplied by the charges from the Medicare claim to obtain the estimated IRF cost for the case. This variable is used as the dependent variable in the regression analysis to estimate the CMG relative weights.

As we also discussed in the FY 2015 IRF PPS final rule (79 FR 45872 at 45882), the methodology for calculating the average length of stay values is available for download from the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Research.html*.

Final Decision: After careful consideration of the public comments, we are finalizing our proposal to update the CMG relative weight and average length of stay values for FY 2016, as shown in Table 1 of this final rule. These updates are effective October 1, 2015.

V. Continued Use of FY 2014 Facility-Level Adjustment Factors

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate ''by such . . . factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities.'' Under this authority, we currently adjust the federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

Based on the substantive changes to the facility-level adjustment factors that were adopted in the FY 2014 final rule (78 FR 47860, 47868 through 47872), in the FY 2015 final rule (79 FR 45872, 45882 through 45883) we froze the facility-level adjustment factors at the FY 2014 levels for FY 2015 and all subsequent years (unless and until we propose to update them again through future notice and comment rulemaking). For FY 2016, we will continue to hold the adjustment factors at the FY 2014 levels as we continue to monitor the most current IRF claims data available and continue to evaluate and monitor the effects of the FY 2014 changes.

VI. FY 2016 IRF PPS Payment Update

A. Background

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF federal prospective payment rates for each FY. Section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment, as described below. In addition, sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act require the application of a 0.2 percentage point reduction to the market basket increase factor for FY 2016. Thus, in the FY 2016 IRF PPS proposed rule (80 FR 23341), we proposed to update the IRF PPS payments for FY 2016 by a market basket increase factor based upon the most current data available, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.2 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act.

We have utilized various market baskets through the years in the IRF PPS program. When we implemented the IRF PPS in January 2002, it used the Excluded Hospital with Capital market basket (which was based on 1992 Medicare cost reports for Medicare participating IRFs, IPFs, LTCHs, cancer hospitals, and children's hospitals) as an ''input price index'' (66 FR 41427 through 41430). Although ''market basket'' technically describes the mix of goods and services used in providing health care at a given point in time, this term is also commonly used to denote the input price index (that is, cost category weights and price proxies) derived from that market basket. Accordingly, the term ''market basket,'' as used in this document, refers to an input price index.

Beginning with the FY 2006 IRF PPS final rule (70 FR 47908), we adopted a 2002-based RPL market basket for the IRF PPS. This market basket reflected the operating and capital cost structures for freestanding IRFs, freestanding IPFs, and LTCHs. Cancer and children's hospitals were excluded from the RPL market basket because their payments are based entirely on reasonable costs subject to rate-of-increase limits established under the authority of section 1886(b) of the Act and not through a PPS. Also, the 2002 cost structures for cancer and children's hospitals were noticeably different than the cost structures of freestanding IRFs, freestanding IPFs, and LTCHs. See the FY 2006 IRF PPS final rule (70 FR 47908) for a complete discussion of the 2002-based RPL market basket.

In the FY 2010 IRF proposed rule (74 FR 21062), we expressed an interest in exploring the feasibility of creating a stand-alone IRF, or IRF-specific, market basket that reflects the cost structures of only IRF providers. But, as we noted in that discussion, Medicare cost report data revealed differences between cost levels and cost structures for freestanding and hospital-based IRF facilities. As we were unable at that time to fully understand these differences even after reviewing explanatory variables such as geographic variation, case mix, urban/rural status, share of low income patients, teaching status, and outliers (short stay and high-cost), we noted that we would continue to research ways to reconcile the differences and solicited public comment for additional information that might help us to better understand the reasons for the observed variations (74 FR 21062). We summarized the public comments we received and our responses in the FY 2010 IRF PPS final rule (74 FR 39762, 39776 through 39778). Despite receiving comments from the public on this issue, however, we were still unable to sufficiently reconcile the observed variations, and, therefore, were unable to establish a stand-alone IRF market basket at that time.

Beginning with the FY 2012 IRF PPS, we used a rebased RPL market basket, which was named the 2008-based RPL market basket, reflecting the updated operating and capital cost structures for freestanding IRFs, freestanding IPFs, and LTCHs (76 FR 47849 through 47860). In doing so, we updated the base year from 2002 to 2008; adopted a more specific composite chemical price proxy; broke the professional fees cost category into two separate categories (Labor-related and Nonlabor-related); and added two additional cost categories (Administrative and Business Support Services and Financial Services), which were previously included in the residual All Other cost category. The FY 2012 IRF PPS proposed rule (76 FR 24229 through 24241) and FY 2012 IRF PPS final rule (76 FR 47849 through 47860) contain a complete discussion of the development of the 2008-based RPL market basket.

In the meantime, as stated in the FY 2016 IRF PPS proposed rule, we have continued to work to address our concerns regarding the development of a stand-alone IRF market. For the reasons described below, we believe using data from hospital-based and freestanding providers to derive IRF-specific market basket cost weights is appropriate, despite differences in facility versus unit cost levels and cost structures. Therefore, for FY 2016, we proposed to create and adopt a 2012-based IRF-specific market basket, using both freestanding and hospital-based IRF Medicare cost report data.

We received a total of 17 comments on our proposal to adopt an IRF-specific market basket. Several commenters supported the proposed stand-alone IRF market basket; while several other commenters raised concerns regarding the data and methodologies used to derive the proposed IRF-specific market basket. In particular, several commenters stated that CMS was using a flawed methodology for allocating overhead costs to hospital-based IRF units. In support of this comment, one of these commenters attached an analytic report they had commissioned.

This report outlined how the commenters came to believe that there were overhead costs allocation errors, and what could be done to fix those errors. Other commenters, on the overhead cost allocation issue, suggested that CMS continue using the RPL market basket, or make changes to the calculation of the proposed IRF-specific market basket cost weights. Several of these latter commenters requested that CMS allow for an additional round of comments on the revised IRF-specific market basket.

The commissioned report was authored by Dobson DaVanzo & Associates, LLC (Dobson DaVanzo).[1] Dobson DaVanzo's analysis replicated the CMS methodology described in the FY 2016 proposed rule to determine the major cost category weights for the proposed IRF-specific market basket using Medicare Cost Reports (form CMS–2552–10). As many of the commenters on the IRF-specific market basket referenced the Dobson DaVanzo report, the report and its conclusions regarding the allocation issue were clearly available to a significant segment of the industry.

The Dobson DaVanzo report raised two main concerns with the proposed cost weight methodology proposed in the FY 2016 IRF proposed rule (80 FR 23341). Their first concern was in regards to the proposed methodology for calculating wages and salaries for hospital-based IRFs—they asserted that CMS erroneously omitted overhead wages and salaries allocated to ancillary departments. Having identified this issue, Dobson DaVanzo then suggested a method to fix the methodology to account for these omitted costs. The second concern regarded the proposed use of certain IRF-specific data in the calculation of employee benefits and contract labor costs instead of the IPPS hospital data that had been used in both of the RPL market baskets. We provide a more detailed description of these concerns in section VI.C.1.a.i. through section VI.C.1.a.iii of this final rule.

Based on the public comments regarding flaws in the proposed methodology, and the suggested means of fixing those flaws as reflected in the Dobson DaVanzo report, we performed a detailed review of the entire proposed methodology for allocating overhead costs to hospital-based units, as well as Dobson DaVanzo's suggested fixes for deriving overhead wages and salaries attributable to the ancillary cost centers for hospital-based IRFs. In doing so, we confirmed that the proposed methodology only calculated overhead wages and salaries attributable to the routine inpatient hospital-based IRF unit; we agree with the commenters that the proposed method inadvertently omitted the overhead wages and salaries attributable to ancillary departments. In analyzing Dobson DaVanzo's suggestions to fix this error, we identified two related data errors that had not been specifically identified by Dobson DaVanzo. The first data-related error was in regard to the ratio of overhead wages and salaries to total overhead costs for the total facility, and the second related to the inclusion of capital costs in total overhead costs that are then allocated to overhead wages and salaries. To address these data errors, we effected slight technical modifications to their suggested corrections for the proposed methodology. The additional data errors that we identified, and the technical corrections to address those errors are described in detail in section VI.C.1.a.i. through section VI.C.1.a.ii of this final rule.

As amended, we believe that the final methodology fully addresses commenters concerns, as well as the technical errors that we discovered while considering commenters' proposed solutions to the inadvertent omission of the overhead wages and salaries attributable to ancillary departments. Having addressed these technical errors, we do not believe there is a need to seek further public comment, or a reason to further delay implementation of an IRF-specific market basket.

We summarize general comments about the proposed methodology below. Specific technical comments are summarized and responded to in the relevant sections of this final rule.

Comment: Several commenters supported the adoption of a stand-alone IRF market basket and considered the stand-alone market basket to be an improvement over the RPL market basket. While supportive, however, some of these commenters noted concerns with the proposed methodology for deriving some of the hospital-based costs. Many of these commenters cited the Dobson DaVanzo report, which replicated CMS's calculation of the proposed IRF-specific market basket and highlighted two concerns regarding the proposed methodologies' allocation of overhead costs to hospital-based IRFs. One concern was that there was an insufficient number of IRF Medicare cost reports to calculate reliable Employee Benefits and Contract Labor cost weights. The other concern, as noted above, was in regard to the omission of overhead wages and salaries attributable to ancillary cost centers for hospital-based IRFs. These commenters requested that CMS review the Dobson DaVanzo report findings and the suggested solution to the attribution of the overhead wage problem, and revise the proposed methodology for calculating the market basket accordingly. Our responses to these specific concerns raised by the commenters as presented in the Dobson DaVanzo report are discussed in greater detail in section VI.C.1.a.i through section VI.C.1.a.iii of this final rule.

Additionally, one commenter stated that a stand-alone IRF market basket is an integral step that must be taken as we move toward the goal of implementing the Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) (Pub. L. 113–185, enacted on October 6, 2014). The commenter stated that a stand-alone IRF market basket will help to more accurately capture the costs and resources for inpatient rehabilitation services. The commenter also believes that the creation of a stand-alone IRF market basket is an integral step in any plan to create site-neutral payments for IRFs and SNFs as discussed by the Medicare Payment Advisory Commission (MedPAC), as well as the House Ways and Means Subcommittee on Health, and the President's Budget. However, the commenter noted that they remain concerned about the disparities in costs and resources between freestanding and hospital-based IRFs and urged CMS to stay vigilant by monitoring and analyzing cost differences between these two types of IRFs after the IRF market basket is implemented. The commenter requested that any significant data derived from CMS analysis be shared with stakeholders in periodic reports and notices of proposed rulemaking for feedback on how the IRF market basket and payment system should be refined.

Response: We appreciate the commenters' support. As always, we will continue to evaluate our methodology and its effects over time. If we identify problems that need to be addressed, we will notify the public of our findings and our proposed solutions through the rulemaking process. And, as noted above, we address the commenter's specific concerns regarding our proposed methodology's allocation of overhead costs to hospital-based IRFs and concerns about the

[1] "Analysis of CMS Proposed Inpatient Rehabilitation Facility Specific Market Basket", submitted to HealthSouth Corporation by Dobson DaVanzo, May 22, 2015. The public reference for this comment letter is: CMS–2015–0053–0004, and can be retrieved from the following link: *http://www.regulations.gov/#!documentDetail;D=CMS-2015-0053-0004* (last accessed July 16, 2015).

number of IRF Medicare cost reports that are available for use in the calculation of the Employee Benefits and Contract Labor cost weights in section VI.C.1.a.i through section VI.C.1.a.iii of this final rule.

Comment: Some commenters recommended that CMS continue to use the RPL market basket methodology for deriving the Employee Benefits and Contract Labor cost weights until there are sufficient data for all IRFs, so as to more accurately represent the costs IRFs incur for these cost categories. One commenter also recommended that CMS continue to encourage all providers to report these data on the Medicare cost report. In addition, the commenters recommended that CMS develop educational materials related to the Medicare cost reports to help providers understand the importance of completing the reports, what the data are utilized for, and how to complete the reports.

Response: We address the commenters' specific concerns regarding the calculation of the cost weights in section VI.C.1 of this final rule. We have encouraged and will continue to encourage all providers to report data completely and accurately on the Medicare cost report. Furthermore, the commenter may be interested in Change Request 6132, which was published on August 1, 2008 (*https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/MM6132.pdf*). This Change Request directed Medicare contractors to educate Medicare providers regarding the specific ways that CMS uses Medicare cost report data. In this Change Request, we noted that the Medicare cost reports play a central role in the development of the market baskets used to update PPS payments, as well as in the evaluation of Medicare payment adequacy. We also indicated that Medicare contractors were to supply information to providers regarding how we use the Medicare cost report data to update future PPS payments. We also stated that it is crucial that Medicare providers fill out these reports with complete and valid data. Finally, we would also note that complete instructions for the Hospital Medicare cost report (CMS Form 2552–10) are available in Chapter 40 of the Provider Reimbursement Manual on the CMS Web site (*https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021935.html*).

Comment: One commenter supported CMS' use of an IRF-specific market basket, but stated that because of the cost disparity between hospital-based and freestanding facilities, CMS should develop separate market basket update percentages for each of those two groups. The commenter stated that patients treated in hospital-based units have more complex medical conditions and require more resources to treat than those in freestanding units. The commenter stated that combining these two facilities for the purpose of establishing one market basket update could result in underpayments for Medicare patients treated in hospital-based facilities.

Response: We respectfully disagree with the suggestion that we should provide separate market basket updates for freestanding and hospital-based IRFs. In particular, the base payment rate reflects costs for both freestanding and hospital-based facilities. Thus, we believe it is appropriate for the IRF market basket to also reflect the data for both facility types.

Comment: Several commenters suggested that CMS should postpone implementation of a new IRF-specific market basket until CMS can ensure that the IRF-specific market basket accurately reflects costs for freestanding and hospital-based IRFs. Most of these commenters cited the two main concerns noted in the Dobson DaVanzo report regarding our proposed methodology's allocation of overhead costs to hospital-based IRFs and concerns about the number of IRF Medicare cost reports that are available for use in the calculation of the Employee Benefits and Contract Labor cost weights. The commenters stated that until these two concerns are addressed, and calculations are corrected by CMS, the implementation of the IRF-specific market basket should be postponed. The commenters also asked that IRFs be provided with an opportunity to analyze and comment on the recalculated cost weights prior to CMS' implementation of the IRF-specific market basket.

Response: We respectfully disagree with the commenters' request to postpone implementation of the IRF market basket. The primary data sources for the IRF market basket cost weights are the Medicare cost reports for both freestanding and hospital-based IRFs. We proposed specific methodologies for deriving the cost weights using these Medicare cost reports in the proposed rule. Commenters provided valuable feedback on those specific methodologies and, as discussed above, and in greater detail below, we are making modifications to the methodology based on these comments in this final rule (detailed discussion can be found in section VI.C.1 of this final rule). In sum, we believe that using IRF facilities' (freestanding and hospital-based) cost report data to establish an IRF-specific market basket is a technical improvement from the current 2008-based RPL market basket, which is based on 2008 data for freestanding IRFs, freestanding IPFs, and LTCHs.

In addition, as discussed in sections VI.C.1.a.i. through section VI.C.1.a.ii of this final rule, we evaluated the comments provided on the proposed rule, and based on these comments, we are making technical corrections to errors in our proposed methodology for deriving the Wages and Salaries and Employee Benefits cost weights. As described in those sections, these modifications are made either at the suggestion of comments, or in response to errors identified in the course of our considering commenters' suggested solutions to the issues that were raised in their public comments (specifically the Dobson DaVanzo report). Both sets of corrections will resolve the identified inaccuracies in the proposed calculation of the cost weights. And, as these methodological and technical changes are straightforward and in direct response to public comments and suggestions within the public comments, we do not believe a second round of rulemaking is required.

Comment: One commenter stated that the CMS methodology for hospital-based IRFs assumes that the provision of, and intensity of, services are uniform between all payers and within each ancillary and overhead cost center. The commenter stated that this assumption may not be accurate and could therefore lead to the use of inaccurate data to develop the underlying cost weights. Several commenters stated that 78 percent of IRF providers are hospital-based units and cited the Dobson DaVanzo report, which estimated that ''67 percent of the expenditure weights will be based on data for hospital-based units'' and concluded that ''using potentially unreliable allocated data that will account for more than two-thirds of the market basket information could be problematic and perhaps introduce error into the IRF-specific market basket.''

Response: We respectfully disagree with the commenter's suggestion that the derivation of the IRF market basket is based on unreliable allocated data. Using the IRF Medicare cost report data, we proposed specific methodologies for deriving the cost weights in the proposed rule. As discussed in section VI.C.1.a.i of this final rule, based on comments on that specific methodology, suggested solutions to issues identified

in that methodology, and our further evaluation of those proposed solutions, we are making modifications to our proposed methodology to address the issues identified by commenters. We believe that our revised methodology is based on a set of reasonable assumptions and results in a set of cost weights that is more representative of the universe of IRF providers compared to the 2008-based RPL market basket cost weights.

Comment: One commenter noted that the LTCH PPS, IPF PPS, and IRF PPS all arrived at the same 2.7 percent market basket update. The commenter questioned whether the extensive work performed by CMS to develop three specific market basket updates that generally produce the same result justifies the departure from the RPL methodology.

Response: We respectfully disagree with the commenter's suggestion that we should not develop different market baskets due to the market basket updates being similar. The IRF-specific market basket cost weights and price proxies are intended to reflect the cost structures of, and price pressures faced by, IRF providers. These cost weights and price proxies are used to develop the market basket update and labor-related share. While the proposed updates rounded to the same value for FY 2016, there may be years when they do not. Also, the proposed labor-related share differed between IRF (80 FR 23356), IPF (80 FR 25032), and LTCH providers (80 FR 24474), and we believe that using a labor-related share based on cost data for the specific type of facility is a technical improvement over using a labor-related share based on the RPL market basket, which combines the 3 types of freestanding facilities together.

Final Decision: We reviewed all of the public comments regarding the proposed creation of an IRF-specific market basket. Where noted above, we have summarized and responded to each of the specific technical comments in the relevant methodology discussion in section VI.C.1 of this final rule, and as indicated in those discussions, we are making several changes to the proposed methodologies based on these comments.

After consideration of the public comments, we are finalizing the creation and adoption of a 2012-based IRF market basket because we believe that the use of this 2012-based IRF market basket to update IRF PPS payments is a technical improvement over the current 2008-based RPL market basket, as the major cost weights are based on Medicare cost report data from both freestanding and hospital-based IRFs and do not include costs from either IPF or LTCH providers, which could have different cost structures than IRFs.

In the following discussion, we provide an overview of the proposed IRF market basket and describe the methodologies we proposed to use to determine the operating and capital portions of the proposed 2012-based IRF market basket. For each proposed methodology, we indicate whether we received any public comments, and we include responses to comments, if applicable. We then provide the methodology we are finalizing for the 2012-based IRF market basket.

B. Overview of the 2012-Based IRF Market Basket

The 2012-based IRF market basket is a fixed-weight, Laspeyres-type price index. A Laspeyres price index measures the change in price, over time, of the same mix of goods and services purchased in the base period. Any changes in the quantity or mix of goods and services (that is, intensity) purchased over time relative to a base period are not measured.

The index itself is constructed in 3 steps. First, a base period is selected (in this final rule, the base period is FY 2012), total base period costs are estimated for a set of mutually exclusive and exhaustive cost categories, and the proportion of total costs that each cost category represents is calculated. These proportions are called cost weights. Second, each cost category is matched to an appropriate price or wage variable, referred to as a price proxy. In nearly every instance where we have selected price proxies for the various market baskets, these price proxies are derived from publicly available statistical series that are published on a consistent schedule (preferably at least on a quarterly basis). In cases where a publicly available price series is not available (for example, a price index for malpractice insurance), we have collected price data from other sources and subsequently developed our own index to capture changes in prices for these types of costs. Finally, the cost weight for each cost category is multiplied by the established price proxy. The sum of these products (that is, the cost weights multiplied by their price levels) for all cost categories yields the composite index level of the market basket for the given time period. Repeating this step for other periods produces a series of market basket levels over time. Dividing the composite index level of one period by the composite index level for an earlier period produces a rate of growth in the input price index over that timeframe.

As previously noted, the market basket is described as a fixed-weight index because it represents the change in price over time of a constant mix (quantity and intensity) of goods and services needed to furnish IRF services. The effects on total costs resulting from changes in the mix of goods and services purchased subsequent to the base period are not measured. For example, an IRF hiring more nurses to accommodate the needs of patients would increase the volume of goods and services purchased by the IRF, but would not be factored into the price change measured by a fixed-weight IRF market basket. Only when the index is rebased would changes in the quantity and intensity be captured, with those changes being reflected in the cost weights. Therefore, we rebase the market basket periodically so that the cost weights reflect recent changes in the mix of goods and services that IRFs purchase (hospital inputs) to furnish inpatient care between base periods.

C. Creating an IRF-Specific Market Basket

As explained in the FY 2016 IRF PPS proposed rule (80 FR 23341 through 23342), we have been investigating the creation of a stand-alone, IRF-specific, market basket that reflects the cost structures of only IRF providers to replace the RPL market basket. The major cost weights for the 2008-based RPL market basket were calculated using Medicare cost report data for those providers that complete a stand-alone Medicare cost report. We define a ''major cost weight'' as one for which we are able to obtain data from the Medicare cost report for that particular cost category (for example, Wages and Salaries). However, the Medicare cost report data does not collect detailed input cost data for the more detailed cost categories for which we would like to capture input price pressures (for example, Chemicals). Therefore, a public data source is used to identify the costs associated with these more detailed cost categories. For the 2008-based RPL market basket, we used only data from stand-alone Medicare cost reports due to concerns regarding our ability to incorporate Medicare cost report data for hospital-based providers. In the FY 2015 IRF PPS final rule (79 FR 45884 through 45886), we presented several of these concerns (as restated below) but explained that we would continue to research the possibility of creating an IRF-specific market basket to update IRF PPS payments.

Since the FY 2015 IRF PPS final rule, we performed additional research on the Medicare cost report data available for

hospital-based IRFs and evaluated these concerns. We subsequently concluded from this research that Medicare cost report data for both hospital-based IRFs and freestanding IRFs could be used to calculate the major market basket cost weights for a stand-alone IRF market basket. We developed a detailed methodology to derive market basket cost weights that are representative of the universe of IRF providers. We believe the use of an IRF market basket is a technical improvement over the RPL market basket that is currently used to update IRF PPS payments. As a result, in the FY 2016 IRF PPS proposed rule, we proposed to adopt a 2012-based IRF market basket that reflects data for both freestanding and hospital-based IRFs. Below we discuss our prior concerns and provide reasons for why we believe it is technically feasible to create a stand-alone IRF market basket using Medicare cost report data for both hospital-based and freestanding IRFs.

One concern discussed in the FY 2015 IRF PPS final rule (79 FR 45884) was that the cost level differences for hospital-based IRFs relative to freestanding IRFs were not readily explained by the specific characteristics of the individual providers and/or the patients that they served (for example, characteristics related to case mix, urban/rural status, or teaching status). To address this concern, we used regression analysis to evaluate the effect of including hospital-based IRF Medicare cost report data in the calculation of cost distributions (which refers to how costs for certain categories relate to total costs for a particular provider). A more detailed description of these regression models can be found in the FY 2015 IRF final rule (79 FR 45884 through 45885). Based on this analysis, we concluded that the inclusion of those IRF providers with unexplained variability in costs would not significantly impact the cost weights and, therefore, should not be a major cause of concern.

Another concern regarding the incorporation of hospital-based IRF data into the calculation of the market basket cost weights was the complexity of the Medicare cost report data for these providers. The freestanding IRFs independently submit a Medicare cost report for their facilities, making it relatively straightforward to obtain the cost categories necessary to determine the major market basket cost weights for such facilities. However, Medicare cost report data submitted for a hospital-based IRF are embedded in the Medicare cost report submitted for the entire hospital facility in which the IRF is located. To use Medicare cost report data from these providers, we needed to determine the appropriate adjustments to apply to the data to ensure that the cost weights we use would represent only the hospital-based IRF (not the hospital as a whole). Over the past year, we worked to develop detailed methodologies to calculate the major cost weights for both freestanding and hospital-based IRFs. We described our proposed methodologies and the resulting cost weights in section V.C.1 of the proposed rule (80 FR 23332, 23343 through 23349), and we welcomed public comments on these proposals.

We also evaluated the differences in cost weights for hospital-based and freestanding IRFs and found the most significant differences occurred for wages and salaries and pharmaceutical costs. Specifically, the hospital-based IRF wages and salaries cost shares tend to be lower than those of freestanding IRFs while hospital-based IRF pharmaceutical cost shares tend to be higher than those of freestanding IRFs. The proposed methodology for deriving costs for each of these categories can be found in section V.C.1 of the proposed rule.

Our research led to the conclusion that it is appropriate to include hospital-based IRF data in the calculation of the major cost weights for an IRF market basket. We proposed methodologies to estimate proposed cost weights for a combined sample of freestanding and hospital-based IRF providers, thus reflecting the cost structure of the universe of IRF providers. We believe this proposed methodology is a technical improvement over the RPL market basket that relied solely on freestanding IRF, freestanding IPF, and LTCH cost structures. In the sections below, we summarize and respond to the comments we received on these specific proposals.

1. Development of Cost Categories and Weights for the 2012-Based IRF Market Basket

a. Use of Medicare Cost Report Data

We proposed a 2012-based IRF market basket that consisted of seven major cost categories derived from the FY 2012 Medicare cost reports (CMS Form 2552–10) for freestanding and hospital-based IRFs. These categories were Wages and Salaries, Employee Benefits, Contract Labor, Pharmaceuticals, Professional Liability Insurance (PLI), Capital, and a residual category. The residual category reflects all remaining costs that are not captured in the other six cost categories. The FY 2012 cost reports include providers whose cost reporting period began on or after October 1, 2011, and prior to September 30, 2012. We selected FY 2012 as the base year because the Medicare cost reports for that year were the most recent, complete set of Medicare cost report data available for IRFs at the time of development of the proposed IRF market basket.

Since our goal was to establish cost weights that were reflective of case mix and practice patterns associated with the services IRFs provide to Medicare beneficiaries, we proposed to limit the cost reports used to establish the 2012-based IRF market basket to those from facilities that had a Medicare average length of stay (LOS) that was relatively similar to their facility average LOS. We believe that this trim eliminates statistical outliers and ensures a more accurate market basket that reflects the costs generally incurred during a Medicare-covered stay. We proposed to define the Medicare average LOS for freestanding IRFs based on what the IRFs reported on line 14 of Worksheet S–3, Part I. We proposed to define the Medicare average LOS for hospital-based IRFs based on what was reported on line 17 of Worksheet S–3, Part I. We then used the cost reports from IRFs with a Medicare average LOS within 15 percent (that is, 15 percent higher or lower) than the facility average LOS for IRFs to establish the sample of providers used to estimate the 2012-based IRF market basket cost weights. We applied this LOS edit to the data for IRFs to exclude providers that serve a population whose LOS would indicate that the patients served are not consistent with a LOS of a typical Medicare patient. This process resulted in the exclusion of about eight percent of the freestanding and hospital-based IRF Medicare cost reports. Of those excluded, about 18 percent were freestanding IRFs and 82 percent were hospital-based IRFs. This ratio is relatively consistent with the ratio of the universe of freestanding to hospital-based IRF providers. In the FY 2012 IRF PPS final rule (76 FR 47850), the same process was used to derive the 2008-based RPL market basket.

We did not receive any specific comments on our proposed LOS edit methodology.

Final Decision: We are finalizing the LOS edit methodology as proposed.

We also proposed to use the cost reports for IRFs that were not excluded through this process to calculate the costs for six of the seven major cost categories (Wages and Salaries, Employee Benefits, Contract Labor, Professional Liability Insurance,

Pharmaceuticals, and Capital) for the market basket.

Similar to the 2008-based RPL market basket major cost weights, the resulting 2012-based IRF market basket cost weights reflect Medicare allowable costs (routine, ancillary and capital)—costs that are eligible for reimbursement through the IRF PPS. We proposed to define Medicare allowable costs for freestanding facilities as cost centers (CMS Form 2552–10): 30 through 35, 50 through 76 (excluding 52 and 75), 90 through 91 and 93. We proposed to define Medicare allowable costs for hospital-based facilities as cost centers (CMS Form 2552–10): 40, 50 through 76 (excluding 52 and 75), 90 through 91 and 93.

For freestanding IRFs, total Medicare allowable costs would be equal to the total costs as reported on Worksheet B, part I, column 26. For hospital-based IRFs, total Medicare allowable costs would be equal to total costs for the IRF inpatient unit after the allocation of overhead costs (Worksheet B, part I, column 26, line 41) and a proportion of total ancillary costs. We calculated the portion of ancillary costs attributable to the hospital-based IRF for a given ancillary cost center by multiplying total facility ancillary costs for the specific cost center (as reported on Worksheet B, Part I, column 26) by the ratio of IRF Medicare ancillary costs for the cost center (as reported on Worksheet D–3, column 3 for hospital-based IRFs) to total Medicare ancillary costs for the cost center (equal to the sum of Worksheet D–3, column 3 for all relevant PPS (that is, IPPS, IRF, IPF and SNF)). We proposed to use these methods to derive levels of total costs for IRF providers.

We did not receive any specific public comments on our proposed methodology for deriving total costs for freestanding and hospital-based IRFs.

Final Decision: We are finalizing our methodology for calculating total costs as proposed.

With this work complete, we then set about deriving cost levels for six of the seven major cost categories.

(i) Wages and Salaries Costs

For freestanding IRFs, we proposed to derive wages and salaries costs as the sum of inpatient salaries, ancillary salaries, and a proportion of overhead (or general service cost center) salaries as reported on Worksheet A, column 1. Since overhead salary costs are attributable to the entire IRF, we proposed to only include the proportion attributable to the Medicare allowable cost centers. We proposed to estimate the proportion of overhead salaries that are attributed to Medicare allowable costs centers by multiplying the ratio of Medicare allowable area salaries to total salaries (Worksheet A, column 1, line 200) times total overhead salaries. In the FY 2012 IRF PPS final rule (76 FR 47850), a similar methodology was used to derive wages and salaries costs in the 2008-based RPL market basket.

As stated in the proposed rule, for hospital-based IRFs, we proposed to derive wages and salaries costs as the sum of inpatient unit wages and salaries (Worksheet A, column 1, line 41) and a portion of salary costs attributable to total facility ancillary and overhead cost centers as these cost centers are shared with the entire facility. We proposed to calculate the portion of ancillary salaries attributable to the hospital-based IRF for a given ancillary cost center by multiplying total facility ancillary salary costs for the specific cost center (as reported on Worksheet A, column 1) by the ratio of IRF Medicare ancillary costs for the cost center (as reported on Worksheet D–3, column 3 for hospital-based IRFs) to total Medicare ancillary costs for the cost center (equal to the sum of Worksheet D–3, column 3 for all relevant PPS units [that is, IPPS, IRF, IPF and SNF]). For example, if hospital-based IRF Medicare physical therapy costs represent 30 percent of the total Medicare physical therapy costs for the entire facility, then 30 percent of total facility physical therapy salaries (as reported in Worksheet A, column 1, line 66) would be attributable to the hospital-based IRF. We believe it is appropriate to use only a portion of the ancillary costs in the market basket cost weight calculations since the hospital-based IRF only utilizes a portion of the facility's ancillary services. We believe the ratio of reported IRF Medicare costs to reported total Medicare costs provides a reasonable estimate of the ancillary services utilized, and costs incurred, by the hospital-based IRF.

We also proposed to calculate the portion of overhead salary costs attributable to hospital-based IRFs by multiplying the total overhead costs attributable to the hospital-based IRF (sum of columns 4–18 on Worksheet B, part I, line 41) by the ratio of total facility overhead salaries (as reported on Worksheet A, column 1, lines 4–18) to total facility overhead costs (as reported on Worksheet A, column 7, lines 4–18). This methodology assumes the proportion of total costs related to salaries for the overhead cost center is similar for all inpatient units (that is, acute inpatient or inpatient rehabilitation).

We received nine comments on our proposed methodology for deriving wages and salaries costs.

Comment: Several commenters expressed concern about the accuracy of our wages and salaries calculations for hospital-based IRFs. Some of these commenters cited the Dobson DaVanzo report, which replicated and analyzed our proposed methodology for calculating wages and salaries costs for hospital-based and freestanding IRFs. Commenters especially noted one of the report's two main concerns, namely our proposed methodology's allocation of overhead costs to hospital-based IRFs (regarding our having allocated overhead wages and salaries associated with the routine portion of the IRF unit, that is, Worksheet B, line 41, which contains costs for only the hospital-based IRF routine department) and disregards the overhead wages and salaries associated with the ancillary departments and the number of IRF Medicare cost reports that are available for use in the calculation of the Employee Benefits and Contract Labor cost weights. Citing the report, several commenters expressed general concern that CMS is using a flawed methodology for allocating overhead costs to hospital-based IRFs. The commenters requested that we correct our methodology to include an allocation for overhead wages and salaries attributable to ancillary departments. The Dobson DaVanzo report provided a specific description of the methodology they suggested to correct for this omission. Specifically, for each ancillary department, they computed the sum of columns 4–18 on Worksheet B, part I, which was then multiplied by the ratio of IRF Medicare ancillary costs to total Medicare (IPPS, IRF, IPF, and SNF) ancillary costs for each cost center. The sum of IRF routine and ancillary department costs was then multiplied by the ratio of facility wage and salary overhead costs (as reported on Worksheet A, column 1, lines 4–18) to facility total overhead costs (as reported on Worksheet A, column 7, lines 4–18).

Response: We appreciate commenters' detailed review of our methodology, and their having had concerns about our wages and salaries calculations. For those citing the concerns raised by the Dobson DaVanzo report, we concur that our proposed methodology did inadvertently omit the overhead wages and salaries attributable to the ancillary departments of hospital-based IRFs. Therefore, based on those commenters' request that we correct the omission as identified by the Dobson DaVanzo report, we are including in the calculation of wages and salaries costs

for hospital-based IRFs an estimate of overhead wages and salaries attributable to the ancillary departments.

As finalized in this final rule, we will calculate the overhead wages and salaries attributable to each ancillary department by first calculating total noncapital overhead costs attributable to the specific ancillary department (Worksheet B, part I, columns 4–18, less Worksheet B, part II, columns 4–18). We will then identify the portion of these noncapital overhead costs for each ancillary cost center that is attributable to the hospital-based IRF. For each cost center, we then multiply total facility noncapital overhead costs by the ratio of IRF Medicare ancillary costs (as reported on Worksheet D–3, column 3, for hospital-based IRFs) to total Medicare ancillary costs (equal to the sum of Worksheet D–3, column 3, for all relevant PPS units [that is, IPPS, IRF, IPF and SNF]). Next, we identify the portion of these noncapital overhead costs for the hospital-based IRF attributable to wages and salaries by multiplying the noncapital overhead costs by an ''overhead ratio,'' which is defined as the ratio of total facility overhead salaries (as reported on Worksheet A, column 1, lines 4–18) to total noncapital overhead costs (as reported on Worksheet A, columns 1 & 2, lines 4–18) for all ancillary departments. This methodology is nearly identical to the methodology suggested in the Dobson DaVanzo report with two modifications to correct data errors not noted by Dobson DaVanzo.

The Dobson DaVanzo report suggested that the ratio of total facility overhead salaries to total facility overhead costs (''overhead ratio'') be made equal to facility wage and salary overhead costs (as reported on Worksheet A, column 1, lines 4–18) divided by facility total noncapital overhead costs (as reported on Worksheet A, column 7, lines 4–18). In considering this suggestion, we reviewed the overhead ratios (Worksheet A, column 1 divided by Worksheet A, column 7) by cost center, which showed that many providers reported data for these columns that resulted in an overhead ratio that exceeded 100 percent. This is a problem, as an overhead ratio exceeding 100 percent would erroneously suggest that wages and salaries costs are greater than total costs. Given this error, the suggested overhead ratio methodology would result in erroneous data being included in the calculation of estimated overhead wages and salaries. In order to address this issue, we reevaluated the numerator (wage and salaries for overhead cost centers) of the overhead ratio, and found no data errors or other concerns with Worksheet A, column 1, lines 4–18 that would explain the observed overhead ratio issue. We then reevaluated the denominator (total noncapital costs for overhead cost centers). A facility's total noncapital overhead costs are reflected in multiple columns in the Medicare cost report for the overhead cost center rows (Worksheet A, sum of columns 1 and 2; Worksheet A, column 7). Looking at those options, we noted that data from Worksheet A, columns 1 and 2, lines 4–18, was a more reliable reflection of total noncapital overhead costs data for purposes of calculating an overhead ratio because, unlike our proposed use of Worksheet A, column 7, lines 4–18, that data results in the lowest incidence of an erroneous overhead ratio that is greater than 100 percent as compared to our other data source options. Because this is a more reliable cost report data source for total noncapital overhead costs for purposes of calculating an overhead ratio, we are changing the proposed denominator in the calculation of the overhead ratio to the sum of total overhead wages and salaries and total noncapital nonsalary overhead costs (as reported on Worksheet A, column 1 and 2, lines 4–18). As amended with this technical correction, no providers were found to have an aggregate overhead ratio in excess of 100 percent; therefore, this revision minimizes the impacts of potential misreporting in the Medicare cost report data.

Second, the Dobson DaVanzo report's suggested methodology for accounting for overhead wages and salaries attributable to ancillary departments starts by computing total overhead costs using columns 4–18 on Worksheet B, part I, for each ancillary cost center. However, we found that these total overhead costs include capital costs. The inclusion of capital costs in overhead wages and salaries is erroneous in that total capital costs are accounted for in the capital cost weight of the market basket, and the inclusion of any capital costs in overhead wages and salaries would therefore double count capital costs. Furthermore, the designation of a portion of capital costs as wages and salaries would be inconsistent with the Medicare cost report instructions.

The Medicare cost report instructions define capital-related costs as ''depreciation, leases and rentals for the use of facilities and/or equipment, and interest incurred in acquiring land or depreciable assets used for patient care, insurance on depreciable assets used for patient care and taxes on land or depreciable assets used for patient care.'' [2] The instructions also state that providers should exclude the following from capital-related costs: ''costs incurred for the repair or maintenance of equipment or facilities, amounts included in rentals or lease payments for repair and/or maintenance agreements. . . .'' Based on this definition of capital costs as reported on the Medicare cost report, we concluded that capital costs do not include direct wages and salaries costs (of which overhead salaries is a component) and that it would be erroneous to allocate a portion of capital costs to overhead wages and salaries.

Therefore, the Dobson DaVanzo report's suggested methodology would result in allocating a portion of total overhead costs (which includes capital costs) to overhead wages and salaries and, ultimately, the Wages and Salaries cost weight. In order to address this issue, we reevaluated the suggested calculation of total overhead costs in light of the available data and determined that capital costs were identified in Worksheet B, part II, columns 4–18. We further determined that excluding the capital costs reflected in Worksheet B, part II, columns 4–18, from the overhead costs reflected in Worksheet B, part I, columns 4–18, results in a calculation of total overhead costs to then allocate to wages and salaries that is accurate and consistent with the Medicare cost reporting instructions and our proposed methodologies for calculating overhead wages and salaries and the Wages and Salaries cost weight. Thus, in our final calculation as presented above we are modifying the suggested methodology to eliminate any erroneous allocation of capital costs to overhead wages and salaries. Therefore, the starting point of our corrected calculation is total noncapital overhead costs (Worksheet B, part I, columns 4–18, less Worksheet B, part II, columns 4–18 for the ancillary cost centers).

Having corrected our methodology for calculating overhead wages and salaries attributable to the ancillary departments for hospital-based IRFs, and in light of general comments that we had proposed a flawed methodology for allocating overhead costs to the hospital-based IRF, we reviewed the corresponding calculations in the proposed methodology for the routine inpatient hospital-based IRFs. Based on that review, we identified the same inaccuracies, which led to the

[2] See the Medicare cost report instructions at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021935.html*, Chapter, 40, Page 40–259 to 40–260.

incorporation of the same two modifications that we made to the Dobson DaVanzo suggested methodology discussed above for our routine inpatient hospital-based IRF calculations. These technical corrections resolve the observed data inaccuracies that we found in the calculation of overhead wages and salaries attributable to routine inpatient hospital-based IRFs.

Specifically, our proposed methodology was to calculate the portion of overhead wages and salaries costs attributable to the routine inpatient hospital-based IRF by multiplying the total overhead costs attributable to the hospital-based IRF (sum of columns 4–18 on Worksheet B, part I, line 41) by an ''overhead ratio'' of total facility overhead salaries (as reported on Worksheet A, column 1, lines 4–18) to total facility noncapital overhead costs (as reported on Worksheet A, column 7, lines 4–18). As stated above, our proposed methodology erroneously produced overhead ratios that exceeded 100 percent. In order to address this erroneous result, we are, for the same reasons described above, changing the denominator in the calculation of the overhead ratio to the sum of total facility overhead salaries and total facility noncapital nonsalary costs (as reported on Worksheet A, column 1 and 2, lines 4–18).

Also, as stated above, calculating total overhead costs as the sum of columns 4–18 on Worksheet B, part I, as we proposed, would erroneously include capital costs. Capital costs, as defined by the Medicare cost report instructions, should not be included in the calculation of overhead wages and salaries for hospital-based IRFs. As proposed, our methodology for calculating overhead wages and salaries attributable to the routine inpatient hospital-based IRF erroneously included a portion of capital costs in the Wages and Salaries cost weight. To address this inaccuracy, we are, for the same reasons described above, revising our calculation of total overhead costs to be equal to total noncapital overhead costs attributable to the hospital-based IRF (sum of columns 4–18 on Worksheet B, part I, line 41 less total capital costs as reported on Worksheet B, part II, columns 4–18, line 41).

These modifications to the calculation of overhead wages and salaries attributable to the routine inpatient hospital-based IRFs are consistent with the methodology we are finalizing for the calculation of overhead wages and salaries attributable to the ancillary departments for hospital-based IRF as described above. We note that these modifications result in changes to the calculation of employee benefits, which we discuss below.

Comment: Several commenters requested that CMS explain with greater specificity the methodology that we used to calculate the wages and salaries costs for the proposed 2012-based IRF market basket.

Response: In the proposed rule, we provided a detailed description of how we derived the wages and salaries costs for the proposed IRF market basket. This discussion in the proposed rule contained sufficient detail such that, as noted above, Dobson DaVanzo was able to replicate our calculations and determine which costs we inadvertently omitted in our calculation. Therefore, we believe that we provided sufficient detail regarding our proposed methodology. Furthermore, we provide above a detailed description of the changes to our methodology that we are making in response to comments, including those citing the Dobson DaVanzo report.

Final Decision: Based on public comments, we are changing the proposed methodology for estimating wages and salaries costs as described above and finalizing the methodology as changed. We discuss the effect of the changes to the proposed methodology on the Wages and Salaries cost weight in section VI.C.1.b of this final rule.

(ii) Employee Benefits Costs

Effective with our implementation of CMS Form 2552–10, we began collecting employee benefits and contract labor data on Worksheet S–3, Part V. Previously, with CMS Form 2540–96, employee benefits and contract labor data were reported on Worksheet S–3, part II, which was applicable to only IPPS providers, and, therefore, these data were not available for the derivation of the RPL market basket. Due to the lack of such data, the Employee Benefits cost weight for the 2008-based RPL market basket was derived by multiplying the 2008-based RPL market basket Wages and Salaries cost weight by the ratio of the IPPS hospital market basket Employee Benefits cost weight to the IPPS hospital market basket Wages and Salaries cost weight. Similarly, the Contract Labor cost weight for the 2008-based RPL market basket was derived by multiplying the 2008-based RPL market basket Wages and Salaries cost weight by the ratio of the IPPS hospital market basket Contract Labor cost weight to the IPPS hospital market basket Wages and Salaries cost weight (*see* FY 2012 IRF PPS final rule (76 FR 47850 through 47851)).

For FY 2012 Medicare cost report data, while there were providers that did report data on Worksheet S–3, part V, many providers did not complete this worksheet. However, in the proposed rule (80 FR 23344), we stated that we believed we had a large enough sample to enable us to produce a reasonable Employee Benefits cost weight.

For freestanding IRFs, we proposed that employee benefits costs would be equal to the data reported on Worksheet S–3, Part V, line 2, column 2.

As stated in the proposed rule, for hospital-based IRFs, we proposed to calculate total benefits as the sum of benefit costs reported on Worksheet S–3 Part V, line 4, column 2, and a portion of ancillary benefits and overhead benefits for the total facility. We proposed that ancillary benefits attributable to the hospital-based IRF would be calculated by multiplying ancillary salaries for the hospital-based IRF as determined in the derivation of wages and salaries for the hospital-based IRF by the ratio of total facility benefits to total facility salaries. Similarly, we proposed that overhead benefits attributable to the hospital-based IRF would be calculated by multiplying overhead wages and salaries for the hospital-based IRF as determined in the derivation of wages and salaries for the hospital-based IRF by the ratio of total facility benefits costs to total facility wages and salaries costs.

Based on public comments, as stated above, we are now including a portion of overhead wages and salaries attributable to the ancillary departments in our calculation of wages and salaries for hospital-based IRFs. That change compelled us to make corresponding corrections to the calculation of employee benefits costs. Specifically, we need to include a portion of overhead employee benefits attributable to ancillary departments for hospital-based IRFs. We are estimating overhead employee benefits attributable to the ancillary departments using the same general methodology used to calculate routine inpatient overhead and ancillary employee benefits attributable to the hospital-based unit. Overhead employee benefits attributable to the ancillary departments are calculated by multiplying overhead wages and salaries attributable to the ancillary departments by the ratio of total facility benefits to total facility salaries. Therefore, based on public comments and corrections to errors identified in our analysis of suggested solutions to concerns raised by commenters, total employee benefits for hospital-based IRFs are equal to the sum of benefit costs reported on Worksheet S–3 Part V,

line 4, column 2 and a portion of ancillary benefit costs and a portion of overhead benefit costs attributable to the routine inpatient unit and ancillary departments.

The proposed methodology calculated routine overhead benefit costs attributable to the hospital-based IRF by multiplying overhead wages and salaries attributable to the routine inpatient portion of the hospital-based IRF by the ratio of total facility benefits to total facility salaries. As stated above, however, we are making two corrections to the calculation of the overhead wages and salaries attributable to the routine inpatient hospital-based IRF to correct data errors. These changes to the calculation of routine overhead wages and salaries as provided above result in changes to the routine overhead employee benefits attributable to the hospital-based IRF. The effect of methodological changes on the Employee Benefits cost weight is discussed in more detail in sections VI.C.1.b of this final rule.

We received nine comments specific to our proposed methodology for calculating employee benefits costs.

Comment: Several commenters noted our proposal to change the methodology for determining employee benefits costs from the methodology used to determine the employee benefits costs for the 2008-based RPL market basket. As discussed in the proposed rule, under the RPL methodology, we used data from IPPS hospitals as a proxy for determining these costs for RPL facilities. Several commenters noted concern about the employee benefit cost data we relied upon, citing to the Dobson DaVanzo report, which found that only 96 of 217 freestanding IRFs (44 percent) and 268 of 819 hospitals with IRF units (33 percent) provided data on employee benefit costs. Commenters further noted that the Dobson DaVanzo report concluded that data were available for only a very few providers and the use of that data reduced the cost weight for Employee Benefits by 13 percent compared to if the cost weight were derived using the RPL market basket methodology. The report notes that this is contrary to the CMS conclusion that there was a sufficient volume of providers and that the use of IRF specific data instead of IPPS data did not make a material difference in the cost weights for these categories. The commenters stated that CMS should, for any future IRF market basket that replaces the RPL market basket, consider using IPPS data as a proxy for these specific data elements, as was done for the RPL market basket.

Response: We believe our statement regarding the data available for our proposed methodology was misunderstood. In the proposed rule, we noted that many providers did not report Worksheet S–3, part V, data, but that we believed we had a sufficiently large sample to produce a reasonable Employee Benefits cost weight. Specifically, we found that when we recalculated the 2012 cost weight using the proposed IRF market basket methodology by reweighting the results to reflect the characteristics of the universe of IRF providers (freestanding and hospital-based), it did not have a material effect on the resulting cost weight.

We understand the commenters' concern regarding our proposed methodology as compared to what was done for the 2008-based RPL market basket. However, we believe that the use of employee benefit costs reported by IRFs is a technical improvement from the methodology used for the 2008-based RPL market basket. Specifically, this methodology calculated the Employee Benefit cost weight by multiplying the RPL market basket Wages and Salaries cost weight by the IPPS employee benefit ratio. The IPPS employee benefit ratio was equal to the 2006-based IPPS market basket Employee Benefit cost weight divided by the 2006-based IPPS market basket Wages and Salaries cost weight. Using the rebased and revised 2010-based IPPS market basket; we calculate an employee benefit ratio of 28 percent compared to the 2012-based IRF market basket with 24 percent. Much of this 4-percentage-point difference is attributable to the characteristics of the IRF facilities as compared to the IPPS. Approximately 30 percent of total costs for IRFs are attributable to for-profit facilities (70 percent are attributable to nonprofit and government facilities) while approximately 10 percent of total costs for IPPS hospitals are attributable to for-profit facilities (90 percent are attributable to nonprofit and government facilities). Both the IRF and IPPS data show that the employee benefit ratio for for-profit facilities is lower than the employee benefit ratio for nonprofit/government facilities (in the range of 6 through 8 percentage points lower), thus IRF's higher proportion of for-profit facilities compared to IPPS hospitals leads to a lower employee benefit ratio.

Final Decision: In conclusion, we believe the use of Worksheet S–3, part V data for IRFs is a technical improvement from the methodology used for the 2008-based RPL market basket, as we believe it better reflects the cost structures of IRFs. We encourage IRF providers to continue to report Worksheet S–3, part V, data and we will continue to monitor the data as the reporting improves. Therefore, having considered these public comments, we are finalizing our proposed methodology for calculating the primary Employee Benefit costs for the 2012-based IRF market basket using the Worksheet S–3, part V data we proposed. As noted above, we are also finalizing the calculation of total employee benefits for hospital-based IRFs as equal to the sum of benefit costs reported on Worksheet S–3 Part V, line 4, column 2, and a portion of ancillary benefits and a portion of overhead benefits attributable to the routine inpatient unit and ancillary departments. This is slightly different than the proposed rule as we are now incorporating a portion of overhead benefits attributable to the ancillary departments in response to public comments. In addition, as mentioned above, the changes to the calculated routine overhead salaries for the hospital-based IRF, based on public comment, would also result in changes to the routine overhead employee benefits attributable to the hospital-based IRF.

(iii) Contract Labor Costs

Similar to the RPL and IPPS market baskets, contract labor costs are primarily associated with direct patient care services. Contract labor costs for services such as accounting, billing, and legal are estimated using other government data sources. We proposed to derive the Contract Labor cost weight for the 2012-based IRF market basket using data from Worksheet S–3, part V. As previously noted, for FY 2012 Medicare cost report data, while there were providers that did report data on Worksheet S–3, part V, many providers did not complete this worksheet. However, as we said in the proposed rule (80 FR 23344), we believe that we have a large enough sample to enable us to produce a reasonable Contract Labor cost weight.

For freestanding IRFs, we proposed that contract labor costs would be based on data reported on Worksheet S–3, part V, column 1, line 2, and for hospital-based IRFs, contract labor costs would be based on line 4 of this same worksheet.

We received 9 comments on our methodology for calculating contract labor costs that were similar to the comments we received regarding employee benefits costs.

Comment: Several commenters noted our proposal to change the methodology

for determining the Contract Labor cost weight from the methodology used to derive that weight for the 2008-based RPL market basket. Under the RPL methodology, CMS used data from IPPS hospitals as a proxy for determining these costs for RPL facilities. Commenters expressed concern about the number of IRFs upon which those proposals were based, with some commenters citing to the Dobson DaVanzo report, which found that only 79 of 217 freestanding IRFs (36 percent) and 131 of 819 hospitals with IRF units (16 percent) provided data on contract labor costs. Commenters further cited the Dobson DaVanzo report as evidence that there was insufficient data to produce a reasonable Contract Labor cost weight. The commenters also noted that the report found that, using the proposed IRF data as opposed to the IPPS cost weights (as was done for the RPL market basket) reduced the cost weight for contract labor by 70 percent.

Response: We believe our statement regarding the data available for our proposed methodology was misunderstood. As the commenter noted, about 20 percent of freestanding and hospital-based IRF providers reported Worksheet S–3, part V, data on contract labor costs. As noted in the proposed rule, when we recalculated an IRF-specific Contract Labor cost weight using Worksheet S–3, part V, data, which we weighted to reflect the characteristics of the universe of IRF providers (freestanding and hospital-based), and compared that figure to the proposed IRF-specific cost weight, the reweighted cost weight produced a Contract Labor cost weight that was similar to the proposed cost weight under the IRF-specific market basket. Therefore, we concluded that the small sample size did not likely have a material effect on the Contract Labor cost weight.

We understand the commenters' concern for the methodology change. Specifically, the methodology used for the RPL market basket calculated the Contract Labor cost weight by multiplying the RPL market basket Wages and Salaries cost weight by the IPPS contract labor ratio. The IPPS contract labor ratio was equal to the 2006-based IPPS market basket Contract Labor cost weight divided by the 2006-based IPPS market basket Wages and Salaries cost weight. Using the rebased and revised 2010- based IPPS market basket, we calculated a contract labor ratio using the current RPL-based methodology of 4 percent compared to the contract labor ratio we calculated using the 2012-based IRF market basket of 2 percent. This difference appears consistent across different types of providers (for example, nonprofit vs. for-profit). As a result, we believe that the use of contract labor data directly reported by IRFs represents a technical improvement over the contract labor ratio resulting from the IPPS cost weights, as it reflects IRF's Medicare services and the characteristics of these providers instead of the contract labor employed relative to direct wages and salaries as experienced by IPPS hospitals.

Final Decision: After consideration of the public comments, we are finalizing our methodology for deriving contract labor costs as proposed.

(iv) Pharmaceuticals Costs

In the FY 2016 IRF PPS proposed rule (80 FR 23344), for freestanding IRFs, we proposed to calculate pharmaceuticals costs using non-salary costs reported on Worksheet A, column 7, less Worksheet A, column 1, for the pharmacy cost center (line 15) and drugs charged to patients cost center (line 73).

For hospital-based IRFs, we proposed to calculate pharmaceuticals costs using a portion of the non-salary pharmacy costs and a portion of the non-salary drugs charged to patient costs reported for the total facility. Non-salary pharmacy costs attributable to the hospital-based IRF are calculated by multiplying total pharmacy costs attributable to the hospital-based IRF (as reported on Worksheet B, column 15, line 41) by the ratio of total non-salary pharmacy costs (Worksheet A, column 2, line 15) to total pharmacy costs (sum of Worksheet A, columns 1 and 2 for line 15) for the total facility. Non-salary drugs charged to patient costs attributable to the hospital-based IRF are calculated by multiplying total non-salary drugs charged to patient costs (Worksheet B, part I, column 0, line 73, plus Worksheet B, part I, column 15, line 73, less Worksheet A, column 1, line 73) for the total facility by the ratio of Medicare drugs charged to patient ancillary costs for the IRF unit (as reported on Worksheet D–3 for hospital-based IRFs, line 73, column 3) to total Medicare drugs charged to patient ancillary costs for the total facility (equal to the sum of Worksheet D–3, line 73, column 3, for all relevant PPS (that is, IPPS, IRF, IPF and SNF)).

We did not receive any specific comments on our proposed methodology for calculating pharmaceuticals costs for freestanding and hospital-based IRFs.

Final Decision: We are finalizing our methodology for calculating pharmaceuticals costs as proposed.

(v) Professional Liability Insurance Costs

In the FY 2016 IRF PPS proposed rule (80 FR 23345), for freestanding IRFs, we proposed that Professional Liability Insurance (PLI) costs (often referred to as malpractice costs) would be equal to premiums, paid losses and self-insurance costs reported on Worksheet S–2, line 118, columns 1 through 3. For hospital-based IRFs, we proposed to assume that the PLI weight for the total facility is similar to the hospital-based IRF unit since the only data reported on this worksheet is for the entire facility, as we currently have no means to identify the proportion of total PLI costs that are only attributable to the hospital-based IRF. Therefore, hospital-based IRF PLI costs would be equal to total facility PLI (as reported on Worksheet S–2, line 118, columns 1 through 3) divided by total facility costs (as reported on Worksheet A, line 200) times hospital-based IRF Medicare allowable total costs.

We did not receive any specific comments on this proposed methodology for deriving PLI costs for freestanding and hospital-based IRFs.

Final Decision: We are finalizing our methodology for calculating PLI costs as proposed.

(vi) Capital Costs

In the FY 2016 IRF PPS proposed rule (80 FR 23345), for freestanding IRFs, we proposed that capital costs would be equal to Medicare allowable capital costs as reported on Worksheet B, Part II, column 26.

For hospital-based IRFs, we proposed that capital costs would be equal to IRF inpatient capital costs (as reported on Worksheet B, part II, column 26, line 41) and a portion of IRF ancillary capital costs. We proposed to calculate the portion of ancillary capital costs attributable to the hospital-based IRF for a given cost center by multiplying total facility ancillary capital costs for the specific ancillary cost center (as reported on Worksheet B, Part II, column 26) by the ratio of IRF Medicare ancillary costs for the cost center (as reported on Worksheet D–3, column 3 for hospital-based IRFs) to total Medicare ancillary costs for the cost center (equal to the sum of Worksheet D–3, column 3 for all relevant PPS (that is, IPPS, IRF, IPF and SNF)). For example, if hospital-based IRF Medicare physical therapy costs represent 30 percent of the total Medicare physical therapy costs for the entire facility, then 30 percent of total facility physical therapy capital costs (as reported in Worksheet B, part II, column 26, line 66)

would be attributable to the hospital-based IRF.

We did not receive any specific comments on our proposed methodology for deriving capital costs for freestanding and hospital-based IRFs.

Final Decision: We are finalizing our methodology for calculating capital costs as proposed.

b. Final Major Cost Category Computation

After we derived costs for the 6 major cost categories for each provider using the Medicare cost report data as previously described, we proposed to address data outliers using the following steps (80 FR 23345). First, we divide the costs for each of the six categories by total Medicare allowable costs calculated for the provider to obtain cost weights for the universe of IRF providers. We then remove those providers whose derived cost weights fall in the top and bottom five percent of provider specific derived cost weights to ensure the removal of outliers. After the outliers have been removed, we sum the costs for each category across all remaining providers. We then divide this by the sum of total Medicare allowable costs across all remaining providers to obtain a cost weight for the proposed 2012-based IRF market basket for the given category. Finally, we calculate the residual ''All Other'' cost weight that reflects all remaining costs that are not captured in the six cost categories listed. See Table 3 for the resulting cost weights for these major cost categories that we obtain from the Medicare cost reports. In this table, we provide the proposed cost weights, as well as the final major cost weights, after implementing the methodological changes to the calculation of the wages and salaries and employee benefits costs as described in section VI.C.1.a.i through section VI.C.1.a.ii of this final rule.

TABLE 3—MAJOR COST CATEGORIES AS DERIVED FROM MEDICARE COST REPORTS

Major cost categories	2012-based IRF proposed (percent)	2012-based IRF final (percent)	2008-based RPL (percent)
Wages and Salaries	45.5	47.3	47.4
Employee Benefits [1]	10.7	11.2	12.3
Contract Labor [1]	0.8	0.8	2.6
Professional Liability Insurance (Malpractice)	0.9	0.9	0.8
Pharmaceuticals	5.1	5.1	6.5
Capital	8.6	8.6	8.4
All Other	28.4	26.1	22.0

Total may not sum to 100 due to rounding.

[1] Due to the lack of Medicare cost report data, the Employee Benefits and Contract Labor cost weights in the 2008-based RPL market basket were based on the IPPS market basket.

As discussed in section VI.C.1.a.i of this final rule, we made revisions to our proposed methodology for calculating wages and salaries costs for the IRF market basket based on public comments. The total effect of this methodology change on the 2012-based IRF market basket Wages and Salaries cost weight (which reflects freestanding and hospital-based IRFs) is an increase of about 1.9 percentage points from the proposed 2012-based IRF market basket Wages and Salaries cost weight of 45.5 percent. This overall effect can be broken down into multiple parts. The first part is our change to include overhead wages and salaries attributable to the ancillary departments for hospital-based IRFs, which resulted in an increase of 3.2 percentage points to the aggregate Wages and Salaries cost weight. This effect is partially offset by the second part, which is our change in methodology for deriving the overhead wages and salaries attributable to the routine department of hospital-based IRFs (resulting in a decrease of 1.3 percentage points to the Wages and Salaries cost weight). The resulting final Wages and Salaries cost weight obtained directly from the Medicare cost reports for the 2012-based IRF market basket is now similar to the Wages and Salaries cost weight for the 2008-based RPL market basket.

Also as discussed in section VI.C.1.a.ii of this final rule, we made revisions to our calculation of employee benefits costs based on public comments. The total effect of this methodology change on the 2012-based IRF market basket Employee Benefits cost weight (which reflects freestanding and hospital-based IRFs) is an increase of about 0.4 percentage point from the proposed 2012-based IRF market basket Employee Benefits cost weight of 10.7 percent. This net overall effect can be broken down into two components: (1) The inclusion of overhead employee benefits attributable to the ancillary departments (resulting in an increase of 0.7 percentage point to the aggregate Employee Benefits cost weight), and (2) changes to the routine overhead employee benefits attributable to the hospital-based IRF as a result of changes to the routine overhead salaries for the hospital-based IRF (resulting in a decrease of 0.2 percentage point to the Employee Benefits cost weight).

As we did for the 2008-based RPL market basket, we proposed to allocate the Contract Labor cost weight to the Wages and Salaries and Employee Benefits cost weights based on their relative proportions under the assumption that contract labor costs are comprised of both wages and salaries and employee benefits. The contract labor allocation proportion for wages and salaries is equal to the Wages and Salaries cost weight as a percent of the sum of the Wages and Salaries cost weight and the Employee Benefits cost weight. For the proposed rule, this rounded percentage was 81 percent; therefore, we proposed to allocate 81 percent of the Contract Labor cost weight to the Wages and Salaries cost weight and 19 percent to the Employee Benefits cost weight.

We did not receive any specific comments on our methodology for allocating contract labor costs to the Wages and Salaries and Employee Benefits cost weights.

Final Decision: We are finalizing our methodology for allocating contract labor as proposed. For the final rule, after making changes to the Wages and Salaries and Employee Benefits cost weights, the rounded percentage remains 81 percent. Therefore, we are finalizing our methodology as proposed and allocating 81 percent of the Contract Labor cost weight to the Wages and Salaries cost weight and 19 percent to the Employee Benefits cost weight.

Table 4 shows the Wages and Salaries and Employee Benefit cost weights after

Contract Labor cost weight allocation for the proposed 2012-based IRF market basket, the final 2012-based IRF market basket, and the 2008-based RPL market basket.

TABLE 4—WAGES AND SALARIES AND EMPLOYEE BENEFITS COST WEIGHTS AFTER CONTRACT LABOR ALLOCATION

Major cost categories	2012-based IRF proposed (percent)	2012-based IRF final (percent)	2008-based RPL (percent)
Wages and Salaries	46.1	47.9	49.4
Employee Benefits	10.9	11.3	12.8

c. Derivation of the Detailed Operating Cost Weights

To further divide the ''All Other'' residual cost weight estimated from the FY 2012 Medicare cost report data into more detailed cost categories, we proposed to use the 2007 Benchmark Input-Output (I–O) ''Use Tables/Before Redefinitions/Purchaser Value'' for NAICS 622000, Hospitals, published by the Bureau of Economic Analysis (BEA) (80 FR 23346). This data is publicly available at *http://www.bea.gov/industry/io_annual.htm.*

The BEA Benchmark I–O data are scheduled for publication every five years with the most recent data available for 2007. The 2007 Benchmark I–O data are derived from the 2007 Economic Census and are the building blocks for BEA's economic accounts. Thus, they represent the most comprehensive and complete set of data on the economic processes or mechanisms by which output is produced and distributed.[3] BEA also produces Annual I–O estimates; however, while based on a similar methodology, these estimates reflect less comprehensive and less detailed data sources and are subject to revision when benchmark data becomes available. Instead of using the less detailed Annual I–O data, we proposed to inflate the 2007 Benchmark I–O data forward to 2012 by applying the annual price changes from the respective price proxies to the appropriate market basket cost categories that are obtained from the 2007 Benchmark I–O data. We repeat this practice for each year. We then calculate the cost shares that each cost category represents of the inflated 2012 data. These resulting 2012 cost shares are applied to the All Other residual cost weight to obtain the detailed cost weights for the proposed 2012-based IRF market basket. For example, the cost for Food: Direct Purchases represents 6.5 percent of the sum of the ''All Other'' 2007 Benchmark I–O Hospital Expenditures inflated to 2012; therefore, the Food: Direct Purchases cost weight represents 6.5 percent of the proposed 2012-based IRF market basket's ''All Other'' cost category (28.4 percent), yielding a ''final'' Food: Direct Purchases proposed cost weight of 1.8 percent in the proposed 2012-based IRF market basket (0.065 * 28.4 percent = 1.8 percent).

Using this methodology, we proposed to derive eighteen detailed IRF market basket cost category weights from the proposed 2012-based IRF market basket residual cost weight (28.4 percent). These categories are: (1) Electricity, (2) Fuel, Oil, and Gasoline (3) Water & Sewerage (4) Food: Direct Purchases, (5) Food: Contract Services, (6) Chemicals, (7) Medical Instruments, (8) Rubber & Plastics, (9) Paper and Printing Products, (10) Miscellaneous Products, (11) Professional Fees: Labor-related, (12) Administrative and Facilities Support Services, (13) Installation, Maintenance, and Repair, (14) All Other Labor-related Services, (15) Professional Fees: Nonlabor-related, (16) Financial Services, (17) Telephone Services, and (18) All Other Nonlabor-related Services.

We did not receive any specific comments on our proposed methodology of deriving detailed market basket cost category weights from the BEA Benchmark I–O data.

Final Decision: We are finalizing our methodology for deriving the detailed market basket cost weights as proposed; however, since the methodological change to the derivation of wages and salaries costs and of employee benefits costs results in a Compensation cost weight that is slightly higher than proposed, the residual cost share weight is lower than proposed. Therefore, we are finalizing the residual cost share weight of 26.1 percent rather than the proposed residual of 28.4 percent.

d. Derivation of the Detailed Capital Cost Weights

As described in section V.C.1.a.vi of the proposed rule (80 FR 23345), we proposed a Capital-Related cost weight of 8.6 percent as obtained from the FY 2012 Medicare cost reports for freestanding and hospital-based IRF providers. We proposed to then separate this total Capital-Related cost weight into more detailed cost categories (80 FR 23346).

Using FY 2012 Medicare cost reports, we are able to group capital-Related costs into the following categories: Depreciation, Interest, Lease, and Other capital-Related costs. For each of these categories, we proposed to determine separately for hospital-based IRFs and freestanding IRFs what proportion of total capital-related costs the category represents.

For freestanding IRFs, we proposed to derive the proportions for depreciation, interest, lease, and other capital-related costs using the data reported by the IRF on Worksheet A–7, which is similar to the methodology used for the 2008-based RPL market basket.

For hospital-based IRFs, data for these four categories are not reported separately for the hospital-based IRF; therefore, we proposed to derive these proportions using data reported on Worksheet A–7 for the total facility. We assume the cost shares for the overall hospital are representative for the hospital-based IRF unit. For example, if depreciation costs make up 60 percent of total capital costs for the entire facility, we believe it is reasonable to assume that the hospital-based IRF would also have a 60 percent proportion because it is a unit contained within the total facility.

To combine each detailed Capital cost weight for freestanding and hospital-based IRFs into a single Capital cost weight for the proposed 2012-based IRF market basket, we proposed to weight together the shares for each of the categories (depreciation, interest, lease, and other capital-related costs) based on the share of total capital costs each provider type represents of the total capital costs for all IRFs for 2012. Applying this methodology, results in proportions of total capital-related costs for depreciation, interest, lease and other capital-related costs that are

[3] *http://www.bea.gov/papers/pdf/IOmanual_092906.pdf.*

representative of the universe of IRF providers.

We also proposed to allocate lease costs across each of the remaining detailed capital-related cost categories as was done in the 2008-based RPL market basket. This would result in three primary capital-related cost categories in the proposed 2012-based IRF market basket: Depreciation, Interest, and Other capital-Related costs. Lease costs are unique in that they are not broken out as a separate cost category in the proposed 2012-based IRF market basket. Rather, we proposed to proportionally distribute these costs among the cost categories of Depreciation, Interest, and Other Capital-Related, reflecting the assumption that the underlying cost structure of leases is similar to that of capital-related costs in general. As was done under the 2008-based RPL market basket, we proposed to assume that 10 percent of the lease costs as a proportion of total capital-related costs represents overhead and assign those costs to the Other Capital-Related cost category accordingly. We proposed to distribute the remaining lease costs proportionally across the three cost categories (Depreciation, Interest, and Other Capital-Related) based on the proportion that these categories comprise of the sum of the Depreciation, Interest, and Other Capital-related cost categories (excluding lease expenses). This is the same methodology used for the 2008-based RPL market basket. The allocation of these lease expenses are shown in Table 5.

Finally, we proposed to further divide the Depreciation and Interest cost categories. We proposed to separate Depreciation into the following two categories: (1) Building and Fixed Equipment and (2) Movable Equipment; and proposed to separate Interest into the following two categories: (1) Government/Nonprofit and (2) For-profit.

To disaggregate the Depreciation cost weight, we needed to determine the percent of total Depreciation costs for IRFs attributable to Building and Fixed Equipment, which we hereafter refer to as the ''fixed percentage.'' For the proposed 2012-based IRF market basket, we proposed to use slightly different methods to obtain the fixed percentages for hospital-based IRFs compared to freestanding IRFs.

For freestanding IRFs, we proposed to use depreciation data from Worksheet A–7 of the FY 2012 Medicare cost reports, similar to the methodology used for the 2008-based RPL market basket. However, for hospital-based IRFs, we determined that the fixed percentage for the entire facility may not be representative of the hospital-based IRF unit due to the entire facility likely employing more sophisticated movable assets that are not utilized by the hospital-based IRF. Therefore, for hospital-based IRFs, we proposed to calculate a fixed percentage using: (1) Building and fixture capital costs allocated to the hospital-based IRF unit as reported on Worksheet B, part I, line 41, and (2) building and fixture capital costs for the top five ancillary cost centers utilized by hospital-based IRFs. We proposed to weight these two fixed percentages (inpatient and ancillary) using the proportion that each capital cost type represents of total capital costs in the proposed 2012-based IRF market basket. We proposed to then weight the fixed percentages for hospital-based and freestanding IRFs together using the proportion of total capital costs each provider type represents.

To disaggregate the Interest cost weight, we needed to determine the percent of total interest costs for IRFs that are attributable to government and nonprofit facilities, which we hereafter refer to as the ''nonprofit percentage,'' as price pressures associated with these types of interest costs tend to differ from those for for-profit facilities. For the IRF market basket, we proposed to use interest costs data from Worksheet A–7 of the FY 2012 Medicare cost reports for both freestanding and hospital-based IRFs, similar to the methodology used for the 2008-based RPL market basket. We proposed to determine the percent of total interest costs that are attributed to government and nonprofit IRFs separately for hospital-based and freestanding IRFs. We then proposed to weight the nonprofit percentages for hospital-based and freestanding IRFs together using the proportion of total capital costs that each provider type represents.

Table 5 provides the detailed capital cost shares obtained from the Medicare cost reports. Ultimately, these detailed capital cost shares were applied to the total Capital-Related cost weight determined in section V.C.1.a.vi of the proposed rule to split out the total weight of 8.6 percent into more detailed cost categories and weights.

We did not receive any specific comments on our proposed methodology for calculating the detailed capital cost weights for the 2012-based IRF market basket.

Final Decision: We are finalizing our methodology for deriving the detailed capital cost weights as proposed. Therefore, the detailed capital cost weights for the final 2012-based IRF market basket contained in Table 5 are unchanged from the proposed rule.

TABLE 5—DETAILED CAPITAL COST WEIGHTS FOR THE 2012-BASED IRF MARKET BASKET

	Cost shares obtained from Medicare cost reports (%)	Detailed capital cost shares after allocation of lease expenses (%)
Depreciation	61	74
Building and Fixed Equipment	39	48
Movable Equipment	22	26
Interest	13	16
Government/Nonprofit	8	10
For Profit	5	6
Lease	20	n/a
Other	6	10

e. 2012-Based IRF Market Basket Cost Categories and Weights

Table 6 shows the cost categories and weights for the proposed 2012-based IRF market basket, the final 2012-based IRF market basket, and the 2008-based RPL market basket.

TABLE 6—PROPOSED AND FINAL 2012-BASED IRF COST WEIGHTS COMPARED TO 2008-BASED RPL COST WEIGHTS

Cost category	Proposed 2012-based IRF cost weight	Final 2012-based IRF cost weight	2008-based RPL cost weight
Total	100.0	100.0	100.0
Compensation	57.0	59.2	62.3
Wages and Salaries	46.1	47.9	49.4
Employee Benefits	10.9	11.3	12.8
Utilities	2.3	2.1	1.6
Electricity	1.0	1.0	1.1
Fuel, Oil, and Gasoline	1.1	1.1	0.4
Water & Sewerage	0.1	0.1	0.1
Professional Liability Insurance	0.9	0.9	0.8
All Other Products and Services	31.2	29.1	27.0
All Other Products	14.0	13.3	15.6
Pharmaceuticals	5.1	5.1	6.5
Food: Direct Purchases	1.8	1.7	3.0
Food: Contract Services	1.1	1.0	0.4
Chemicals	0.7	0.7	1.1
Medical Instruments	2.5	2.3	1.8
Rubber & Plastics	0.6	0.6	1.1
Paper and Printing Products	1.2	1.1	1.0
Apparel	.....	.....	0.2
Machinery and Equipment	.....	.....	0.1
Miscellaneous Products	0.9	0.8	0.3
All Other Services	17.2	15.8	11.4
Labor-Related Services	8.8	8.0	4.7
Professional Fees: Labor-related	3.8	3.5	2.1
Administrative and Facilities Support Services	0.9	0.8	0.4
Installation, Maintenance, and Repair	2.1	1.9	.....
All Other: Labor-related Services	2.0	1.8	2.1
Nonlabor-Related Services	8.5	7.8	6.7
Professional Fees: Nonlabor-related	3.4	3.1	4.2
Financial services	3.0	2.7	0.9
Telephone Services	0.7	0.7	0.4
Postage	.....	.....	0.6
All Other: Nonlabor-related Services	1.4	1.3	0.6
Capital-Related Costs	8.6	8.6	8.4
Depreciation	6.4	6.4	5.5
Fixed Assets	4.1	4.1	3.3
Movable Equipment	2.3	2.3	2.2
Interest Costs	1.4	1.4	2.0
Government/Nonprofit	0.9	0.9	0.7
For Profit	0.5	0.5	1.3
Other Capital-Related Costs	0.8	0.8	0.9

Note: Detail may not add to total due to rounding.

We stated that the 2012-based IRF market basket would not include separate cost categories for Apparel, Machinery & Equipment, and Postage. Due to the small weights associated with these detailed categories and relatively stable price growth in the applicable price proxy, we proposed to include Apparel and Machinery & Equipment in the Miscellaneous Products cost category and Postage in the All-Other Nonlabor-related Services. We note that these Machinery & Equipment expenses are for equipment that is paid for in a given year and not depreciated over the asset's useful life. Depreciation expenses for movable equipment are reflected in the Capital-related costs of the 2012-based IRF market basket. We also proposed to include a separate cost category for Installation, Maintenance, and Repair.

We did not receive any specific comments on our proposed list of detailed cost categories for the 2012-based IRF market basket.

Final Decision: We are finalizing our list of detailed cost categories as proposed.

2. Selection of Price Proxies

After developing the cost weights for the 2012-based IRF market basket, we proposed to select the most appropriate wage and price proxies currently available to represent the rate of price change for each expenditure category (80 FR 23349). For the majority of the cost weights, we proposed to base the price proxies on U.S. Bureau of Labor Statistics (BLS) data and grouped them into one of the following BLS categories:

- *Employment Cost Indexes.* Employment Cost Indexes (ECIs) measure the rate of change in employment wage rates and employer costs for employee benefits per hour worked. These indexes are fixed-weight indexes and strictly measure the change

in wage rates and employee benefits per hour. ECIs are superior to Average Hourly Earnings (AHE) as price proxies for input price indexes because they are not affected by shifts in occupation or industry mix, and because they measure pure price change and are available by both occupational group and by industry. The industry ECIs are based on the North American Industry Classification System (NAICS), and the occupational ECIs are based on the Standard Occupational Classification System (SOC).

• *Producer Price Indexes.* Producer Price Indexes (PPIs) measure price changes for goods sold in other than retail markets. PPIs are used when the purchases of goods or services are made at the wholesale level.

• *Consumer Price Indexes.* Consumer Price Indexes (CPIs) measure change in the prices of final goods and services bought by consumers. CPIs are only used when the purchases are similar to those of retail consumers rather than purchases at the wholesale level, or if no appropriate PPIs are available.

We evaluated the price proxies using the criteria of reliability, timeliness, availability, and relevance:

• *Reliability.* Reliability indicates that the index is based on valid statistical methods and has low sampling variability. Widely accepted statistical methods ensure that the data were collected and aggregated in a way that can be replicated. Low sampling variability is desirable because it indicates that the sample reflects the typical members of the population. (Sampling variability is variation that occurs by chance because only a sample was surveyed rather than the entire population.)

• *Timeliness.* Timeliness implies that the proxy is published regularly, preferably at least once a quarter. The market baskets are updated quarterly, and therefore, it is important for the underlying price proxies to be up-to-date, reflecting the most recent data available. We believe that using proxies that are published regularly (at least quarterly, whenever possible) helps to ensure that we are using the most recent data available to update the market basket. We strive to use publications that are disseminated frequently, because we believe that this is an optimal way to stay abreast of the most current data available.

• *Availability.* Availability means that the proxy is publicly available. We prefer that our proxies are publicly available because this will help ensure that our market basket updates are as transparent to the public as possible. In addition, this enables the public to be able to obtain the price proxy data on a regular basis.

• *Relevance.* Relevance means that the proxy is applicable and representative of the cost category weight to which it is applied. The CPIs, PPIs, and Employment Cost Index (ECIs) that we selected meet these criteria. Therefore, we believe that they continue to be the best measure of price changes for the cost categories to which they would be applied.

Table 6 lists all price proxies that we proposed to use for the 2012-based IRF market basket. Below is a detailed explanation of the price proxies that we proposed for each cost category weight, (80 FR 23350 through 23351). We note that many of the proxies that we proposed for the 2012-based IRF market basket are the same as those used for the 2008-based RPL market basket. For further discussion on the 2008-based RPL market basket, see the FY 2012 IRF final rule (76 FR 47852 through 47860).

a. Price Proxies for the Operating Portion of the Proposed 2012-Based IRF Market Basket

1. Wages and Salaries

We proposed to continue to use the ECI for Wages and Salaries for All Civilian workers in Hospitals (BLS series code #CIU1026220000000I) to measure the wage rate growth of this cost category. This is the same price proxy used in the 2008-based RPL market basket.

2. Benefits

We proposed to continue to use the ECI for Total Benefits for All Civilian workers in Hospitals to measure price growth of this category. This ECI is calculated using the ECI for Total Compensation for All Civilian workers in Hospitals (BLS series code # CIU1016220000000I) and the relative importance of wages and salaries within total compensation. This is the same price proxy used in the 2008-based RPL market basket.

3. Electricity

We proposed to continue to use the PPI for Commercial Electric Power (BLS series code #WPU0542) to measure the price growth of this cost category. This is the same price proxy used in the 2008-based RPL market basket.

4. Fuel, Oil, and Gasoline

We proposed to change the proxy used for the Fuel, Oil, and Gasoline cost category. The 2008-based RPL market basket uses the PPI for Petroleum Refineries (BLS series code #PCU32411–32411) to proxy these expenses.

For the 2012-based IRF market basket, we proposed to use a blend of the PPI for Petroleum Refineries and the PPI Commodity for Natural Gas (BLS series code #WPU0531). Our analysis of the Bureau of Economic Analysis' 2007 Benchmark Input-Output data (use table before redefinitions, purchaser's value for NAICS 622000 [Hospitals]) showed that Petroleum Refineries expenses accounts for approximately 70 percent and Natural Gas accounts for approximately 30 percent of the Fuel, Oil, and Gasoline expenses. Therefore, we proposed a blend using of 70 percent of the PPI for Petroleum Refineries (BLS series code #PCU32411–32411) and 30 percent of the PPI Commodity for Natural Gas (BLS series code #WPU0531). We believe that these 2 price proxies are the most technically appropriate indices available to measure the price growth of the Fuel, Oil, and Gasoline cost category in the 2012-based IRF market basket.

5. Water and Sewerage

We proposed to continue to use the CPI for Water and Sewerage Maintenance (BLS series code #CUUR0000SEHG01) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

6. Professional Liability Insurance

We proposed to continue to use the CMS Hospital Professional Liability Index to measure changes in PLI premiums. To generate this index, we collect commercial insurance premiums for a fixed level of coverage while holding non-price factors constant (such as a change in the level of coverage). This is the same proxy used in the 2008-based RPL market basket.

7. Pharmaceuticals

We proposed to continue to use the PPI for Pharmaceuticals for Human Use, Prescription (BLS series code #WPUSI07003) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

8. Food: Direct Purchases

We proposed to continue to use the PPI for Processed Foods and Feeds (BLS series code #WPU02) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

9. Food: Contract Purchases

We proposed to continue to use the CPI for Food Away From Home (BLS series code #CUUR0000SEFV) to measure the price growth of this cost

category. This is the same proxy used in the 2008-based RPL market basket.

10. Chemicals

We proposed to continue to use a 4-part blended PPI composed of the PPI for Industrial Gas Manufacturing (BLS series code PCU325120325120P), the PPI for Other Basic Inorganic Chemical Manufacturing (BLS series code #PCU32518–32518), the PPI for Other Basic Organic Chemical Manufacturing (BLS series code #PCU32519–32519), and the PPI for Soap and Cleaning Compound Manufacturing (BLS series code #PCU32561–32561). We proposed updating the blend weights using 2007 Benchmark I–O data, which compared to 2002 Benchmark I–O data is weighted more toward organic chemical products and weighted less toward inorganic chemical products.

Table 7 shows the weights for each of the four PPIs used to create the blended PPI. These are the same four proxies used in the 2008-based RPL market basket; however, the blended PPI weights in the 2008-based RPL market baskets were based on 2002 Benchmark I–O data.

TABLE 7—BLENDED CHEMICAL PPI WEIGHTS

Name	2012-based IRF weights (%)	2008-based RPL weights	NAICS
PPI for Industrial Gas Manufacturing	32	35	325120
PPI for Other Basic Inorganic Chemical Manufacturing	17	25	325180
PPI for Other Basic Organic Chemical Manufacturing	45	30	325190
PPI for Soap and Cleaning Compound Manufacturing	6	10	325610

11. Medical Instruments

We proposed to use a blend for the Medical Instruments cost category. The 2007 Benchmark Input-Output data shows an approximate 50/50 split between Surgical and Medical Instruments and Medical and Surgical Appliances and Supplies for this cost category. Therefore, we proposed a blend composed of 50 percent of the commodity-based PPI for Surgical and Medical Instruments (BLS code #WPU1562) and 50 percent of the commodity-based PPI for Medical and Surgical Appliances and Supplies (BLS code #WPU1563). The 2008-based RPL market basket uses the single, higher level PPI for Medical, Surgical, and Personal Aid Devices (BLS series code #WPU156).

12. Rubber and Plastics

We proposed to continue to use the PPI for Rubber and Plastic Products (BLS series code #WPU07) to measure price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

13. Paper and Printing Products

We proposed to continue to use the PPI for Converted Paper and Paperboard Products (BLS series code #WPU0915) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

14. Miscellaneous Products

We proposed to continue to use the PPI for Finished Goods Less Food and Energy (BLS series code #WPUSOP3500) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

15. Professional Fees: Labor-Related

We proposed to continue to use the ECI for Total Compensation for Private Industry workers in Professional and Related (BLS series code #CIU2010000120000I) to measure the price growth of this category. This is the same proxy used in the 2008-based RPL market basket.

16. Administrative and Facilities Support Services

We proposed to continue to use the ECI for Total Compensation for Private Industry workers in Office and Administrative Support (BLS series code #CIU2010000220000I) to measure the price growth of this category. This is the same proxy used in the 2008-based RPL market basket.

17. Installation, Maintenance, and Repair

We proposed to use the ECI for Total Compensation for Civilian workers in Installation, Maintenance, and Repair (BLS series code #CIU1010000430000I) to measure the price growth of this new cost category. Previously these costs were included in the All Other: Labor-related Services category and were proxied by the ECI for Total Compensation for Private Industry workers in Service Occupations (BLS series code #CIU2010000300000I). We believe that this index better reflects the price changes of labor associated with maintenance-related services and its incorporation represents a technical improvement to the market basket.

18. All Other: Labor-Related Services

We proposed to continue to use the ECI for Total Compensation for Private Industry workers in Service Occupations (BLS series code #CIU2010000300000I) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

19. Professional Fees: Nonlabor-Related

We proposed to continue to use the ECI for Total Compensation for Private Industry workers in Professional and Related (BLS series code #CIU2010000120000I) to measure the price growth of this category. This is the same proxy used in the 2008-based RPL market basket.

20. Financial Services

We proposed to continue to use the ECI for Total Compensation for Private Industry workers in Financial Activities (BLS series code #CIU201520A000000I) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

21. Telephone Services

We proposed to continue to use the CPI for Telephone Services (BLS series code #CUUR0000SEED) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

22. All Other: Nonlabor-Related Services

We proposed to continue to use the CPI for All Items Less Food and Energy (BLS series code #CUUR0000SA0L1E) to measure the price growth of this cost category. This is the same proxy used in the 2008-based RPL market basket.

We did not receive any specific comments on our proposed selection of price proxies. *Final Decision:* We are finalizing our selection of price proxies as proposed.

b. Price Proxies for the Capital Portion of the 2012-Based IRF Market Basket

1. Capital Price Proxies Prior to Vintage Weighting

We proposed to apply the same price proxies to the detailed capital-related cost categories as were applied in the 2008-based RPL market basket, which are described and provided in Table 7. We also proposed to continue to vintage weight the capital price proxies for Depreciation and Interest to capture the long-term consumption of capital. This vintage weighting method is similar to the method used for the 2008-based RPL market basket and is described in section V.C.2.b.2 of the proposed rule.

We proposed to proxy the Depreciation: Building and Fixed Equipment cost category by BEA's Chained Price Index for Nonresidential Construction for Hospitals and Special Care Facilities (BEA Table 5.4.4. Price Indexes for Private Fixed Investment in Structures by Type), the Depreciation: Movable Equipment cost category by the PPI for Machinery and Equipment (BLS series code #WPU11), the Nonprofit Interest cost category by the average yield on domestic municipal bonds (Bond Buyer 20-bond index), the For-profit Interest cost category by the average yield on Moody's Aaa bonds (Federal Reserve), and the Other Capital-Related cost category by the CPI–U for Rent of Primary Residence (BLS series code #CUUS0000SEHA). We believe these are the most appropriate proxies for IRF capital-related costs that meet our selection criteria of relevance, timeliness, availability, and reliability.

We did not receive any public comments on the capital-related price proxies we proposed.

Final Decision: We are finalizing our list of capital-related price proxies as proposed.

2. Vintage Weights for Price Proxies

Because capital is acquired and paid for over time, capital-related expenses in any given year are determined by both past and present purchases of physical and financial capital. The vintage-weighted capital-related portion of the 2012-based IRF market basket is intended to capture the long-term consumption of capital, using vintage weights for depreciation (physical capital) and interest (financial capital). These vintage weights reflect the proportion of capital-related purchases attributable to each year of the expected life of building and fixed equipment, movable equipment, and interest. We proposed to use vintage weights to compute vintage-weighted price changes associated with depreciation and interest expenses.

Capital-related costs are inherently complicated and are determined by complex capital-related purchasing decisions, over time, based on such factors as interest rates and debt financing. In addition, capital is depreciated over time instead of being consumed in the same period it is purchased. By accounting for the vintage nature of capital, we are able to provide an accurate and stable annual measure of price changes. Annual non-vintage price changes for capital are unstable due to the volatility of interest rate changes and, therefore, do not reflect the actual annual price changes for IRF capital-related costs. The capital-related component of the 2012-based IRF market basket reflects the underlying stability of the capital-related acquisition process.

To calculate the vintage weights for depreciation and interest expenses, we first needed a time series of capital-related purchases for building and fixed equipment and movable equipment. We found no single source that provides an appropriate time series of capital-related purchases by hospitals for all of the above components of capital purchases. The early Medicare cost reports did not have sufficient capital-related data to meet this need. Data we obtained from the American Hospital Association (AHA) did not include annual capital-related purchases. However, we were able to obtain data on total expenses back to 1963 from the AHA. Consequently, we proposed to use data from the AHA Panel Survey and the AHA Annual Survey to obtain a time series of total expenses for hospitals. We then proposed to use data from the AHA Panel Survey supplemented with the ratio of depreciation to total hospital expenses obtained from the Medicare cost reports to derive a trend of annual depreciation expenses for 1963 through 2012. We proposed to separate these depreciation expenses into annual amounts of building and fixed equipment depreciation and movable equipment depreciation as determined earlier. From these annual depreciation amounts, we derived annual end-of-year book values for building and fixed equipment and movable equipment using the expected life for each type of asset category. While data is not available that is specific to IRFs, we believe this information for all hospitals serves as a reasonable alternative for the pattern of depreciation for IRFs.

To continue to calculate the vintage weights for depreciation and interest expenses, we also needed to account for the expected lives for Building and Fixed Equipment, Movable Equipment, and Interest for the 2012-based IRF market basket. We proposed to calculate the expected lives using Medicare cost report data from freestanding and hospital-based IRFs. The expected life of any asset can be determined by dividing the value of the asset (excluding fully depreciated assets) by its current year depreciation amount. This calculation yields the estimated expected life of an asset if the rates of depreciation were to continue at current year levels, assuming straight-line depreciation. We proposed to determine the expected life of building and fixed equipment separately for hospital-based IRFs and freestanding IRFs, and then weight these expected lives using the percent of total capital costs each provider type represents. We proposed to apply a similar method for movable equipment. Using these proposed methods, we determined the average expected life of building and fixed equipment to be equal to 23 years, and the average expected life of movable equipment to be equal to 11 years. For the expected life of interest, we believe vintage weights for interest should represent the average expected life of building and fixed equipment because, based on previous research described in the FY 1997 IPPS final rule (61 FR 46198), the expected life of hospital debt instruments and the expected life of buildings and fixed equipment are similar. We note that for the 2008-based RPL market basket, we used FY 2008 Medicare cost reports for IPPS hospitals to determine the expected life of building and fixed equipment and movable equipment (76 FR 51763). The 2008-based RPL market basket was based on an expected average life of building and fixed equipment of 26 years and an expected average life of movable equipment of 11 years, which were both calculated using data for IPPS hospitals.

Multiplying these expected lives by the annual depreciation amounts results in annual year-end asset costs for building and fixed equipment and movable equipment. We then calculated a time series, beginning in 1964, of annual capital purchases by subtracting the previous year's asset costs from the current year's asset costs.

For the building and fixed equipment and movable equipment vintage weights, we proposed to use the real annual capital-related purchase amounts for each asset type to capture the actual amount of the physical acquisition, net of the effect of price inflation. These real annual capital-related purchase amounts are produced by deflating the nominal annual

purchase amount by the associated price proxy as provided earlier in this final rule. For the interest vintage weights, we proposed to use the total nominal annual capital-related purchase amounts to capture the value of the debt instrument (including, but not limited to, mortgages and bonds). Using these capital-related purchase time series specific to each asset type, we proposed to calculate the vintage weights for building and fixed equipment, for movable equipment, and for interest.

The vintage weights for each asset type are deemed to represent the average purchase pattern of the asset over its expected life (in the case of building and fixed equipment and interest, 23 years, and in the case of movable equipment, 11 years). For each asset type, we used the time series of annual capital-related purchase amounts available from 2012 back to 1964. These data allow us to derive twenty-seven 23-year periods of capital-related purchases for building and fixed equipment and interest, and thirty-nine 11-year periods of capital-related purchases for movable equipment. For each 23-year period for building and fixed equipment and interest, or 11-year period for movable equipment, we calculate annual vintage weights by dividing the capital-related purchase amount in any given year by the total amount of purchases over the entire 23-year or 11-year period. This calculation is done for each year in the 23-year or 11-year period and for each of the periods for which we have data. We then calculate the average vintage weight for a given year of the expected life by taking the average of these vintage weights across the multiple periods of data.

We did not receive any specific comments on the proposed methodology for calculating the vintage weights for the 2012-based IRF market basket.

Final Decision: We are finalizing the vintage weights as proposed.

The vintage weights for the capital-related portion of the 2008-based RPL market basket and the 2012-based IRF market basket are presented in Table 8.

TABLE 8—2008-BASED RPL MARKET BASKET AND 2012-BASED IRF MARKET BASKET VINTAGE WEIGHTS FOR CAPITAL-RELATED PRICE PROXIES

Year	Building and fixed equipment		Movable equipment		Interest	
	2012-based 23 years	2008-based 26 years	2012-based 11 years	2008-based 11 years	2012-based 23 years	2008-based 26 years
1	0.029	0.021	0.069	0.071	0.017	0.010
2	0.031	0.023	0.073	0.075	0.019	0.012
3	0.034	0.025	0.077	0.080	0.022	0.014
4	0.036	0.027	0.083	0.083	0.024	0.016
5	0.037	0.028	0.087	0.085	0.026	0.018
6	0.039	0.030	0.091	0.089	0.028	0.020
7	0.040	0.031	0.096	0.092	0.030	0.021
8	0.041	0.033	0.100	0.098	0.032	0.024
9	0.042	0.035	0.103	0.103	0.035	0.026
10	0.044	0.037	0.107	0.109	0.038	0.029
11	0.045	0.039	0.114	0.116	0.040	0.033
12	0.045	0.041			0.042	0.035
13	0.045	0.042			0.044	0.038
14	0.046	0.043			0.046	0.041
15	0.046	0.044			0.048	0.043
16	0.048	0.045			0.053	0.046
17	0.049	0.046			0.057	0.049
18	0.050	0.047			0.060	0.052
19	0.051	0.047			0.063	0.053
20	0.051	0.045			0.066	0.053
21	0.051	0.045			0.067	0.055
22	0.050	0.045			0.069	0.056
23	0.052	0.046			0.073	0.060
24		0.046				0.063
25		0.045				0.064
26		0.046				0.068
Total	1.000	1.000	1.000	1.000	1.000	1.000

Note: Numbers may not add to total due to rounding.

The process of creating vintage-weighted price proxies requires applying the vintage weights to the price proxy index where the last applied vintage weight in Table 8 is applied to the most recent data point. We have provided on the CMS Web site an example of how the vintage weighting price proxies are calculated, using example vintage weights and example price indices. The example can be found at the following link: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.html* in the zip file titled ''Weight Calculations as described in the IPPS FY 2010 Proposed Rule.''

c. Summary of Price Proxies of the 2012-Based IRF Market Basket

As stated above, we did not receive any public comments on our proposed list of operating or capital price proxies.

Final Decision: We are finalizing the list of operating and capital price proxies as proposed.

Table 9 shows both the operating and capital price proxies for the 2012-based IRF market basket.

TABLE 9—PRICE PROXIES FOR THE 2012-BASED IRF MARKET BASKET

Cost description	Price proxies	Weight (percent)
Total—IRF12		100.0
Compensation		59.2
Wages and Salaries	ECI for Wages and Salaries for All Civilian workers in Hospitals	47.9
Employee Benefits	ECI for Total Benefits for All Civilian workers in Hospitals	11.3
Utilities		2.1
Electricity	PPI for Commercial Electric Power	1.0
Fuel, Oil, and Gasoline	Blend of the PPI for Petroleum Refineries and PPI for Natural Gas	1.1
Water & Sewage	CPI–U for Water and Sewerage Maintenance	0.1
Professional Liability Insurance		0.9
Malpractice	CMS Hospital Professional Liability Insurance Premium Index	0.9
All Other Products and Services		29.1
All Other Products		13.3
Pharmaceuticals	PPI for Pharmaceuticals for human use, prescription	5.1
Food: Direct Purchases	PPI for Processed Foods and Feeds	1.7
Food: Contract Services	CPI–U for Food Away From Home	1.0
Chemicals	Blend of Chemical PPIs	0.7
Medical Instruments	Blend of the PPI for Surgical and medical instruments and PPI for Medical and surgical appliances and supplies.	2.3
Rubber & Plastics	PPI for Rubber and Plastic Products	0.6
Paper and Printing Products	PPI for Converted Paper and Paperboard Products	1.1
Miscellaneous Products	PPI for Finished Goods Less Food and Energy	0.8
All Other Services		15.8
Labor-Related Services		8.0
Professional Fees: Labor-related	ECI for Total compensation for Private industry workers in Professional and related	3.5
Administrative and Facilities Support Services.	ECI for Total compensation for Private industry workers in Office and administrative support.	0.8
Installation, Maintenance & Repair	ECI for Total compensation for Civilian workers in Installation, maintenance, and repair.	1.9
All Other: Labor-related Services	ECI for Total compensation for Private industry workers in Service occupations	1.8
Nonlabor-Related Services		7.8
Professional Fees: Nonlabor-related.	ECI for Total compensation for Private industry workers in Professional and related	3.1
Financial services	ECI for Total compensation for Private industry workers in Financial activities	2.7
Telephone Services	CPI–U for Telephone Services	0.7
All Other: Nonlabor-related Services	CPI–U for All Items Less Food and Energy	1.3
Capital-Related Costs		8.6
Depreciation		6.4
Fixed Assets	BEA chained price index for nonresidential construction for hospitals and special care facilities—vintage weighted (23 years).	4.1
Movable Equipment	PPI for machinery and equipment—vintage weighted (11 years)	2.3
Interest Costs		1.4
Government/Nonprofit	Average yield on domestic municipal bonds (Bond Buyer 20 bonds)—vintage weighted (23 years).	0.9
For Profit	Average yield on Moody's Aaa bonds—vintage weighted (23 years)	0.5
Other Capital-Related Costs	CPI–U for Rent of primary residence	0.8

Note: Detail may not add to total due to rounding.

D. FY 2016 Market Basket Update and Productivity Adjustment

1. FY 2016 Market Basket Update

For FY 2016, we proposed to use the 2012-based IRF market basket increase factor described in section VI.C. of the proposed rule to update the IRF PPS base payment rate (80 FR 23355). Consistent with historical practice, we proposed to estimate the market basket update for the IRF PPS based on IHS Global Insight's forecast using the most recent available data. IHS Global Insight (IGI), Inc. is a nationally recognized economic and financial forecasting firm with which CMS contracts to forecast the components of the market baskets and multifactor productivity (MFP).

Based on IGI's first quarter 2015 forecast with historical data through the fourth quarter of 2014, the projected proposed 2012-based IRF market basket increase factor for FY 2016 would be 2.7 percent. Therefore, consistent with our historical practice of estimating market basket increases based on the best available data, we proposed a market basket increase factor of 2.7 percent for FY 2016. We also proposed that if more recent data are subsequently available (for example, a more recent estimate of the market basket) we would use such data, to determine the FY 2016 update in the final rule.

We received 5 comments on the proposed market basket increase factor for FY 2016.

Comment: A few commenters stated that although the proposed payment increase does not keep up with inflation, they supported and appreciated the proposed increase in baseline payments and suggested that CMS finalize this policy in the final rule. A few commenters stated that they generally concurred with the methodology CMS used to arrive at the net market basket update. One commenter stated that the market basket update does not account for the mandatory sequestration, and they encouraged CMS to consider the fact that the proposed rule does not account for the two-percent sequestration reduction to all lines of Medicare.

Response: We believe that the market basket update adequately accounts for

price inflation pressures faced by IRF providers. The productivity adjustment to the market basket update is mandated by the Affordable Care Act, and sequestration cuts are mandated by the Federal Budget. Both the productivity adjustments and sequestration cuts are outside the scope of regulatory policymaking or the market basket payment update.

Comment: One commenter noted that, for FY 2016, the Medicare Payment Advisory Commission (MedPAC) recommends that a 0-percent update be applied to IRF PPS payment rates. However, this commenter also acknowledged that a 0-percent update is not currently authorized under statute.

Response: As discussed, and in accordance with sections 1886(j)(3)(C) and 1886(j)(3)(D) of the Act, the Secretary is updating IRF PPS payment rates for FY 2016 by an adjusted market basket increase factor of 1.7 percent, as section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2016.

Final Decision: For this final rule, we are estimating the market basket update for the IRF PPS using the most recent available data. Based on IGI's second quarter 2015 forecast with historical data through the first quarter of 2015, the projected 2012-based IRF market basket increase factor for FY 2016 is 2.4 percent. Therefore, consistent with our historical practice of estimating market basket increases based on the best available data, we are finalizing a market basket increase factor of 2.4 percent for FY 2016.

For comparison, the 2008-based RPL market basket is also projected to be 2.4 percent in FY 2016; this estimate is based on IGI's second quarter 2015 forecast (with historical data through the first quarter of 2015). Table 10 compares the 2012-based IRF market basket and the 2008-based RPL market basket percent changes.

TABLE 10—2012-BASED IRF MARKET BASKET AND 2008-BASED RPL MARKET BASKET PERCENT CHANGES, FY 2010 THROUGH FY 2018

Fiscal year (FY)	2012-Based IRF market basket index percent change	2008-Based RPL market basket index percent change
Historical data:		
FY 2010	2.1	2.2
FY 2011	2.3	2.5
FY 2012	1.8	2.2
FY 2013	2.0	2.1
FY 2014	1.8	1.8
Average 2010–2014	2.0	2.2
Forecast:		
FY 2015	1.6	2.0
FY 2016	2.4	2.4
FY 2017	2.9	2.9
FY 2018	3.1	3.1
Average 2015–2018	2.5	2.6

Note: These market basket percent changes do not include any further adjustments as may be statutorily required.
Source: IHS Global Insight, Inc. 2nd quarter 2015 forecast.

The final FY 2016 market basket increase factor based on the 2012-based IRF market basket is 0.3 percentage point lower than the proposed FY 2016 market basket increase factor. The difference between the proposed and final rule updates is primarily attributable to a downward revision in the IHS Global Insight forecasted growth in wages and salaries for hospital workers. The revised methodology for the Wages and Salaries and Employee Benefits cost weights results in a market basket update that is 0.1 percentage point higher than if no changes to the methodology had been finalized.

2. Productivity Adjustment

According to section 1886(j)(3)(C)(i) of the Act, the Secretary shall establish an increase factor based on an appropriate percentage increase in a market basket of goods and services. As described in section V.C and V.D.1. of the proposed rule (80 FR 23342 through 23355), we proposed to estimate the IRF PPS increase factor for FY 2016 based on the proposed 2012-based IRF market basket. Section 1886(j)(3)(C)(ii) of the Act then requires that, after establishing the increase factor for a FY, the Secretary shall reduce such increase factor for FY 2012 and each subsequent FY, by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business MFP (as projected by the Secretary for the 10-year period ending with the applicable FY, year, cost reporting period, or other annual period) (the ''MFP adjustment''). The BLS publishes the official measure of private nonfarm business MFP. Please see *http://www.bls.gov/mfp* for the BLS historical published MFP data.

MFP is derived by subtracting the contribution of labor and capital input growth from output growth. The projections of the components of MFP are currently produced by IGI, a nationally recognized economic forecasting firm with which CMS contracts to forecast the components of the market basket and MFP. As described in the FY 2012 IRF PPS final rule (76 FR 47836, 47858 through 47859), to generate a forecast of MFP, IGI replicated the MFP measure calculated by the BLS using a series of proxy variables derived from IGI's U.S. macroeconomic models. In the FY 2012 IRF PPS final rule, we identified each of the major MFP component series employed by the BLS to measure MFP as well as provided the corresponding concepts determined to be the best available proxies for the BLS series. Beginning with the FY 2016 rulemaking cycle, the MFP adjustment is calculated using a revised series developed by IGI to proxy the aggregate capital inputs. Specifically, IGI has replaced the Real Effective Capital Stock used for Full Employment GDP with a forecast of BLS aggregate capital inputs recently

developed by IGI using a regression model. This series provides a better fit to the BLS capital inputs, as measured by the differences between the actual BLS capital input growth rates and the estimated model growth rates over the historical time period. Therefore, we are using IGI's most recent forecast of the BLS capital inputs series in the MFP calculations beginning with the FY 2016 rulemaking cycle. A complete description of the MFP projection methodology is available on CMS Web site at *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.html*. Although we discuss the IGI changes to the MFP proxy series in this final rule, in the future, when IGI makes changes to the MFP methodology, we will announce them on our Web site rather than in the annual rulemaking.

Using IGI's first quarter 2015 forecast, the MFP adjustment for FY 2016 (the 10-year moving average of MFP for the period ending FY 2016) was projected to be 0.6 percent. Thus, in accordance with section 1886(j)(3)(C) of the Act, we proposed to base the FY 2016 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the most recent estimate of the proposed 2012-based IRF market basket (estimated to be 2.7 percent in the proposed rule based on IGI's first quarter 2015 forecast). We proposed to then reduce this percentage increase by the current estimate of the MFP adjustment for FY 2016 of 0.6 percentage point (the 10-year moving average of MFP for the period ending FY 2016 based on IGI's first quarter 2015 forecast). Following application of the MFP, we further reduce the applicable percentage increase by 0.2 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act. Therefore, the estimate of the FY 2016 IRF update for the proposed rule was 1.9 percent (2.7 percent market basket update, less 0.6 percentage point MFP adjustment, less 0.2 percentage point legislative adjustment). Furthermore, we noted in the proposed rule that if more recent data were to be subsequently available (for example, a more recent estimate of the market basket and MFP adjustment), we would use such data to determine the FY 2016 market basket update and MFP adjustment in the final rule.

We did not receive any specific comments on our methodology for calculating the productivity adjustment for FY 2016. We did receive 2 comments on the application of the productivity adjustment to the market basket increase factor.

Comment: One commenter stated that while they understand that CMS is bound by the required Affordable Care Act offsets, it is unlikely that productivity improvements will be generated by rehabilitation hospital providers at a pace matching the productivity of the economy at large on an ongoing, consistent basis as currently contemplated by the Affordable Care Act. A few commenters stated that services provided in rehabilitation hospitals are very labor-intensive through the provision of hands-on care by physical therapists, occupational therapists, speech therapists, and rehabilitation nursing staff. These commenters further stated that the proposed rule would implement significant new costs related to the IRF Quality Reporting Program and that the implementation of ICD–10–CM will increase billing and coding times. The commenters stated that as health care reform continues to take shape in the coming years, many changes discussed here, and new ones yet to be implemented, will adversely impact productivity levels in IRFs. Further, the commenters stated that while there are technologies utilized in providing therapy to patients, many of the treatment plans do not lend themselves to continual productivity improvements. The commenters claimed that it will be especially challenging for efficient providers, over time, to achieve continued efficiencies at a rate that will be required by ongoing application of productivity adjustments. As a result, the commenters respectfully requested that CMS carefully monitor the impact that these productivity adjustments will have on IRFs. One of the commenters also requested that CMS provide feedback to Congress as appropriate.

Another commenter suggested that CMS remain cognizant of the intensive labor time and costs required by state and/or federal regulations to which IRFs are bound, and which may be barriers to IRFs achieving further gains in productivity efficiencies. The commenter stated that CMS should consider the unique needs of IRFs' rehabilitation patients and their interdisciplinary teams of highly skilled health care professionals when considering the productivity adjustment factor that it will apply to IRFs. In addition, the commenter stated that CMS should be mindful of the additional labor costs that IRFs will incur as a result of having more items that must be reported on the newest version of the IRF–PAI.

Response: Section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment that must be applied to the IRF PPS market basket update. We will continue to monitor the impact of the payment updates, including the effects of the productivity adjustment, on IRF provider margins as well as beneficiary access to care.

Final Decision: We are finalizing the methodology for determining the productivity adjustment as proposed. Using IGI's second quarter 2015 forecast, the MFP adjustment for FY 2016 (the 10-year moving average of MFP for the period ending FY 2016) is projected to be 0.5 percent. Thus, in accordance with section 1886(j)(3)(C) of the Act, we base the FY 2016 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the most recent estimate of the 2012-based IRF market basket (currently estimated to be 2.4 percent based on IGI's second quarter 2015 forecast). We then reduce this percentage increase by the current estimate of the MFP adjustment for FY 2016 of 0.5 percentage point (the 10-year moving average of MFP for the period ending FY 2016 based on IGI's second quarter 2015 forecast). Following application of the MFP, we further reduce the applicable percentage increase by 0.2 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act. Therefore, the estimate of the FY 2016 IRF update for this final rule is 1.7 percent (2.4 percent market basket update, less 0.5 percentage-point MFP adjustment, less 0.2 percentage-point statutory other adjustment).

For FY 2016, the Medicare Payment Advisory Commission (MedPAC) recommends that a 0-percent update be applied to IRF PPS payment rates. As discussed, and in accordance with sections 1886(j)(3)(C) and 1886(j)(3)(D) of the Act, the Secretary is updating IRF PPS payment rates for FY 2015 by an adjusted market basket increase factor of 1.7 percent, as section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2016.

E. Labor-Related Share for FY 2016

Section 1886(j)(6) of the Act specifies that the Secretary is to adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs which are attributable to wages and wage-related costs, of the prospective payment rates computed under section 1886(j)(3) for area differences in wage levels by a factor (established by the Secretary)

reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for such facilities. The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market. As stated in the FY 2015 IRF PPS final rule (79 FR 45886), the labor-related share for FY 2015 was defined as the sum of the FY 2015 relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor- Related Services, Administrative and Business Support Services, All Other: Labor-related Services, and a portion of the Capital Costs from the 2008-based RPL market basket.

Based on our definition of the labor-related share and the cost categories in the proposed 2012-based IRF market basket, we proposed to include in the labor-related share for FY 2016 the sum of the FY 2016 relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor- Related, Administrative and Facilities Support Services, Installation, Maintenance, and Repair, All Other: Labor-related Services, and a portion of the Capital-Related cost weight from the proposed 2012-based IRF market basket (80 FR 23356). As noted in Section VI.C.2.a of this final rule, for the 2012-based IRF market basket, we have created a separate cost category for Installation, Maintenance, and Repair services. These expenses were previously included in the ''All Other'' Labor-related Services cost category in the 2008-based RPL market basket, along with other services, including, but not limited to, janitorial, waste management, security, and dry cleaning/laundry services. Because these services tend to be labor-intensive and are mostly performed at the facility (and, therefore, unlikely to be purchased in the national market), we continue to believe that they meet our definition of labor-related services.

Similar to the 2008-based RPL market basket, the 2012-based IRF market basket includes 2 cost categories for nonmedical Professional fees (including, but not limited to, expenses for legal, accounting, and engineering services). These are Professional Fees: Labor-related and Professional Fees: Nonlabor-related. For the 2012-based IRF market basket, we proposed to estimate the labor-related percentage of non-medical professional fees (and assign these expenses to the Professional Fees: Labor-related services cost category) based on the same method that was used to determine the labor-related percentage of professional fees in the 2008-based RPL market basket.

To summarize, the professional services survey found that hospitals purchase the following proportion of these four services outside of their local labor market:

- 34 percent of accounting and auditing services.
- 30 percent of engineering services.
- 33 percent of legal services.
- 42 percent of management consulting services.

We proposed to apply each of these percentages to the respective Benchmark I–O cost category underlying the professional fees cost category to determine the Professional Fees: Nonlabor-related costs. The Professional Fees: Labor-related costs were determined to be the difference between the total costs for each Benchmark I–O category and the Professional Fees: Nonlabor-related costs. This is the same methodology that we used to separate the 2008-based RPL market basket professional fees category into Professional Fees: Labor-related and Professional Fees: Nonlabor-related cost categories. For more detail regarding this methodology, see the FY 2012 IRF final rule (76 FR 47861).

In addition to the professional services listed, we also classified expenses under NAICS 55, Management of Companies and Enterprises, into the Professional Fees cost category as was done in the 2008-based RPL market basket. The NAICS 55 data are mostly comprised of corporate, subsidiary, and regional managing offices, or otherwise referred to as home offices. Since many facilities are not located in the same geographic area as their home office, we analyzed data from a variety of sources to determine what proportion of these costs should be appropriately included in the labor-related share. For the 2012-based IRF market basket, we proposed to derive the home office percentages using data for both freestanding IRF providers and hospital-based IRF providers. In the 2008-based RPL market basket, we used the home office percentages based on the data reported by freestanding IRFs, IPFs, and LTCHs.

Using data primarily from the Medicare cost reports and the Home Office Medicare Records (HOMER) database that provides the address (including city and state) for home offices, we were able to determine that 38 percent of the total number of freestanding and hospital-based IRFs that had home offices had those home offices located in their respective local labor markets—defined as being in the same Metropolitan Statistical Area (MSA).

The Medicare cost report requires hospitals to report their home office provider numbers. Using the HOMER database to determine the home office location for each home office provider number, we compared the location of the provider with the location of the hospital's home office. We then placed providers into one of the following 2 groups:

- Group 1—Provider and home office are located in different MSAs.
- Group 2—Provider and home office are located in the same MSA.

We found that 62 percent of the providers with home offices were classified into Group 1 (that is, different MSAs) and, thus, these providers were determined to not be located in the same local labor market as their home office. We found that 38 percent of all providers with home offices were classified into Group 2 (that is, the same MSA). Given these results, we proposed to classify 38 percent of the Professional Fees costs into the Professional Fees: Labor-related cost category and the remaining 62 percent into the Professional Fees: Nonlabor-related Services cost category. This methodology for apportioning the Professional Fee expenses between Labor-related and Nonlabor-related categories was similar to the method used in the 2008-based RPL market basket. For more details regarding this methodology, see the FY 2012 IRF final rule (76 FR 47860 through 47863).

Using this proposed method and the IHS Global Insight, Inc. first quarter 2015 forecast for the proposed 2012-based IRF market basket, the proposed IRF labor-related share for FY 2016 is the sum of the FY 2016 relative importance of each labor-related cost category. The relative importance reflects the different rates of price change for these cost categories between the base year (FY 2012) and FY 2016.

The sum of the relative importance for FY 2016 operating costs (Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Facilities Support Services, Installation Maintenance & Repair Services, and All Other: Labor-related Services) using the proposed 2012-based IRF market basket is 65.7 percent, as shown in Table 11. We proposed to specify the labor-related share to one decimal place, which is consistent with the IPPS labor-related share (79 FR 49990) (currently the labor-related share from the RPL market

basket is specified to three decimal places).

We proposed that the portion of Capital that is influenced by the local labor market is estimated to be 46 percent, which is the same percentage applied to the 2008-based RPL market basket. Since the relative importance for Capital-Related Costs is 8.4 percent of the proposed 2012-based IRF market basket in FY 2016, we proposed to take 46 percent of 8.4 percent to determine the proposed labor-related share of Capital for FY 2016. The result would be 3.9 percent, which we proposed to add to 65.7 percent for the operating cost amount to determine the total proposed labor-related share for FY 2016. Thus, the labor-related share that we proposed to use for IRF PPS in FY 2016 would be 69.6 percent. This proposed labor-related share is determined using the same methodology as employed in calculating all previous IRF labor-related shares (see 76 FR 47862). By comparison, the FY 2015 labor-related share under the 2008-based RPL market basket was 69.294 percent. Therefore, the proposed change from the RPL market basket to the IRF market basket had only a minimal impact on the labor-related share for IRF providers.

We did not receive any specific comments on our proposed methodology for calculating the FY 2016 labor-related share using the 2012-based IRF market basket.

Final Decision: We are finalizing our methodology for determining the labor-related share as proposed.

As discussed in sections VI.C.1.a.i and VI.C1.a.ii of this final rule, we are revising the Wages and Salaries and Employee Benefits cost weights based on public comments we received. Using the proposed method and the IHS Global Insight, Inc. second quarter 2015 forecast for the 2012-based IRF market basket, the final IRF labor-related share for FY 2016 is the sum of the FY 2016 relative importance of each labor-related cost category. Table 11 compares the proposed FY 2016 labor-related share using the proposed 2012-based IRF market basket relative importance, the final FY 2016 labor-related share using the finalized 2012-based IRF market basket relative importance, and the FY 2015 labor-related share using the 2008-based RPL market basket.

The sum of the relative importance for FY 2016 operating costs (Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Facilities Support Services, Installation Maintenance & Repair Services, and All Other: Labor-related Services) using the final 2012-based IRF market basket is 67.1 percent, as shown in Table 11.

Since the relative importance for Capital-Related Costs is 8.4 percent of the 2012-based IRF market basket in FY 2016, we take 46 percent of 8.4 percent to determine the labor-related share of Capital for FY 2016. The result is 3.9 percent, which we add to the 67.1 percent operating cost amount to determine the total labor-related share for FY 2016. Thus, the labor-related share for IRF PPS in FY 2016 is 71.0 percent. By comparison, the FY 2015 labor-related share under the 2008-based RPL market basket was 69.294 percent. Therefore, the change from the RPL market basket to the IRF market basket results in an increase of approximately 1.7 percentage points to the labor-related share for IRF providers.

TABLE 11—IRF LABOR-RELATED SHARE

	FY 2016 proposed labor-related share [1]	FY 2016 final labor-related share [2]	FY 2015 final labor-related share [3]
Wages and Salaries	46.0	47.6	48.271
Employee Benefits	11.0	11.4	12.936
Professional Fees: Labor-related	3.8	3.5	2.058
Administrative and Facilities Support Services	0.9	0.8	0.415
Installation, Maintenance, and Repair	2.1	2.0	.....
All Other: Labor-related Services	1.9	1.8	2.061
Subtotal	65.7	67.1	65.741
Labor-related portion of capital (46%)	3.9	3.9	3.553
Total Labor-Related Share	69.6	71.0	69.294

[1] Based on the proposed 2012-based IRF Market Basket, IHS Global Insight, Inc. 1st quarter 2015 forecast.
[2] Based on the final 2012-based IRF Market Basket, IHS Global Insight, Inc. 2nd quarter 2015 forecast.
[3] **Federal Register** 79 FR 45886.

F. Wage Adjustment

1. Background

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage-related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget-neutral manner.

For FY 2016, we proposed to maintain the policies and methodologies described in the FY 2012 IRF PPS final rule (76 FR 47836, 47863 through 47865) related to the labor market area definitions and the wage index methodology for areas with wage data (80 FR 23358). Thus, we proposed to use the CBSA labor market area definitions and the FY 2015 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2015 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2010, and before October 1, 2011 (that is, FY 2011 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We proposed to continue to use the same methodology

discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation for the FY 2016 IRF PPS wage index. We did not receive any comments on these proposals. Therefore, we are finalizing our proposal to use the CBSA labor market area definitions and the FY 2015 pre-reclassification and pre-floor hospital wage index data for areas with wage data. We are also finalizing our proposal to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data.

2. Update

The wage index used for the IRF PPS is calculated using the pre-reclassification and pre-floor acute care hospital wage index data and is assigned to the IRF on the basis of the labor market area in which the IRF is geographically located. IRF labor market areas are delineated based on the Core-Based Statistical Areas (CBSAs) established by the Office of Management and Budget (OMB). The current CBSA labor market definitions used in FY 2015 are based on OMB standards published on December 27, 2000 (65 FR 82228).

As stated in the FY 2016 IRF PPS proposed rule (80 FR 23331), we proposed to include the 2010 Census-based CBSA changes in the IRF PPS wage index for FY 2016. On February 28, 2013, OMB issued OMB Bulletin No. 13–01, which established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and provided guidance on the use of the delineations of these statistical areas. A copy of this bulletin is available online at *http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf*. The OMB bulletin provides the delineations of all Metropolitan Statistical Areas, Metropolitan Divisions, Micropolitan Statistical Areas, Combined Statistical Areas, and New England City and Town Areas in the United States and Puerto Rico based on the standards published on June 28, 2010, in the **Federal Register** (75 FR 37246 through 37252) and Census Bureau data.

While the revisions OMB published on February 28, 2013 are not as sweeping as the changes made when we adopted the CBSA geographic designations in the FY 2006 IRF PPS final rule, the February 28, 2013 OMB bulletin does contain a number of significant changes. For example, there are new CBSAs, urban counties that become rural, rural counties that become urban, and existing CBSAs that are being split apart. However, because the bulletin was not issued until February 28, 2013, with supporting data not available until later, and because the changes made by the bulletin and their ramifications needed to be extensively reviewed and verified, these changes were not incorporated into the hospital wage index until FY 2015. In the FY 2015 IRF PPS final rule (79 FR 45886), we stated that we intended to consider changes to the wage index based on the most current OMB delineations in FY 2016. As discussed below, we are implementing the new OMB delineations as described in the February 28, 2013 OMB Bulletin No. 13–01, for the IRF PPS wage index beginning in FY 2016.

3. Implementation of New Labor Market Delineations

As discussed in the FY 2015 IRF PPS proposed rule (79 FR 26308) and final rule (79 FR 45871), we delayed implementing the new OMB statistical area delineations to allow for sufficient time to assess the new changes. We believe it is important for the IRF PPS to use the latest OMB delineations available to maintain a more accurate and up-to-date payment system that reflects the reality of population shifts and labor market conditions. While CMS and other stakeholders have explored potential alternatives to the current CBSA-based labor market system (we refer readers to the CMS Web site at *www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html*), no consensus has been achieved regarding how best to implement a replacement system. As discussed in the FY 2005 IPPS final rule (69 FR 49027), while we recognize that MSAs are not designed specifically to define labor market areas, we believe they do represent a useful proxy for this purpose. We further believe that using the most current OMB delineations would increase the integrity of the IRF PPS wage index by creating a more accurate representation of geographic variation in wage levels. We have reviewed our findings and impacts relating to the new OMB delineations, and have concluded that there is no compelling reason to further delay implementation. Because we believe that we have broad authority under section 1886(j)(6) of the Act to determine the labor market areas used for the IRF PPS wage index, and because we also believe that the most current OMB delineations accurately reflect the local economies and wage levels of the areas in which hospitals are currently located, we proposed to implement the new OMB delineations as described in the February 28, 2013 OMB Bulletin No. 13–01, for the IRF PPS wage index effective beginning in FY 2016 (80 FR 23358 through 23359). As discussed below, we proposed to implement a 1-year transition with a blended wage index for all providers and a 3 year phase-out of the rural adjustment for a subset of providers in FY 2016 to assist providers in adapting to the new OMB delineations. This proposed transition is discussed in more detail below.

We received 1 comment on the proposed policy to adopt the new OMB delineations which is summarized below.

Comment: One commenter expressed support of the proposal to adopt the new OMB delineations effective for FY 2016.

Response: We appreciate the support for our proposal to adopt the new OMB delineations. For a discussion of our policies to moderate the impact of our adoption of the new OMB delineations under the IRF PPS, we refer readers to section VI.F.4. of this final rule.

Final Decision: After consideration of the public comments we received, we are finalizing the implementation of the new OMB delineations as described in the February 28, 2013 OMB Bulletin No. 13–01, effective beginning with the FY 2016 IRF PPS wage index.

a. Micropolitan Statistical Areas

OMB defines a ''Micropolitan Statistical Area'' as a CBSA associated with at least one urban cluster that has a population of at least 10,000, but less than 50,000 (75 FR 37252). We refer to these as Micropolitan Areas. After extensive impact analysis, consistent with the treatment of these areas under the IPPS as discussed in the FY 2005 IPPS final rule (69 FR 49029 through 49032), we determined the best course of action would be to treat Micropolitan Areas as ''rural'' and include them in the calculation of each state's IRF PPS rural wage index. Thus, the IRF PPS statewide rural wage index is determined using IPPS hospital data from hospitals located in non-MSA areas, and the statewide rural wage index is assigned to IRFs located in those areas. Because Micropolitan Areas tend to encompass smaller population centers and contain fewer hospitals than MSAs, we determined that if Micropolitan Areas were to be treated as separate labor market areas, the IRF PPS wage index would have included

significantly more single-provider labor market areas. As we explained in the FY 2006 IRF PPS final rule (70 FR 47920 through 47921), recognizing Micropolitan Areas as independent labor markets would generally increase the potential for dramatic shifts in year-to-year wage index values because a single hospital (or group of hospitals) could have a disproportionate effect on the wage index of an area. Dramatic shifts in an area's wage index from year to year are problematic and create instability in the payment levels from year to year, which could make fiscal planning for IRFs difficult if we adopted this approach. For these reasons, we adopted a policy to include Micropolitan Areas in the state's rural wage area for purposes of the IRF PPS wage index, and have continued this policy through the present.

Based upon the new 2010 Decennial Census data, a number of urban counties have switched status and have joined or became Micropolitan Areas, and some counties that once were part of a Micropolitan Area, have become urban. Overall, there are fewer Micropolitan Areas (541) under the new OMB delineations based on the 2010 Census than existed under the latest data from the 2000 Census (581). We believe that the best course of action would be to continue the policy established in the FY 2006 IRF PPS final rule (70 FR 47880) and include Micropolitan Areas in each state's rural wage index. These areas continue to be defined as having relatively small urban cores (populations of 10,000 to 49,999). We do not believe it would be appropriate to calculate a separate wage index for areas that typically may include only a few hospitals for the reasons discussed in the FY 2006 IRF PPS final rule (70 FR 47880), and as previously discussed. Therefore, in conjunction with our implementation of the new OMB labor market delineations beginning in FY 2016 and consistent with the treatment of Micropolitan Areas under the IPPS, we proposed to continue to treat Micropolitan Areas as ''rural'' and to include Micropolitan Areas in the calculation of the state's rural wage index (80 FR 23359). We did not receive any comments addressing this proposal. Therefore, we are finalizing our proposal to continue to treat Micropolitan Areas as ''rural'' and to include Micropolitan Areas in the calculation of the state's rural wage index.

b. Urban Counties Becoming Rural

As previously discussed, we proposed to implement the new OMB statistical area delineations (based upon the 2010 decennial Census data) beginning in FY 2016 for the IRF PPS wage index (80 FR 23359 through 23360). Our analysis shows that a total of 37 counties (and county equivalents) that are currently considered part of an urban CBSA would be considered located in a rural area, for IRF PPS payment beginning in FY 2016 with the new OMB delineations. Table 12 lists the 37 urban counties that will be rural with the implementation of the new OMB delineations.

TABLE 12—COUNTIES THAT WILL TRANSITION FROM URBAN TO RURAL STATUS

County	State	Previous CBSA	Previous urban area (constituent counties)
Greene County	IN	14020	Bloomington, IN.
Anson County	NC	16740	Charlotte-Gastonia-Rock Hill, NC-SC.
Franklin County	IN	17140	Cincinnati-Middletown, OH-KY-IN.
Stewart County	TN	17300	Clarksville, TN-KY.
Howard County	MO	17860	Columbia, MO.
Delta County	TX	19124	Dallas-Fort Worth-Arlington, TX.
Pittsylvania County	VA	19260	Danville, VA.
Danville City	VA	19260	Danville, VA.
Preble County	OH	19380	Dayton, OH.
Gibson County	IN	21780	Evansville, IN-KY.
Webster County	KY	21780	Evansville, IN-KY.
Franklin County	AR	22900	Fort Smith, AR-OK.
Ionia County	MI	24340	Grand Rapids-Wyoming, MI.
Newaygo County	MI	24340	Grand Rapids-Wyoming, MI.
Greene County	NC	24780	Greenville, NC.
Stone County	MS	25060	Gulfport-Biloxi, MS.
Morgan County	WV	25180	Hagerstown-Martinsburg, MD-WV.
San Jacinto County	TX	26420	Houston-Sugar Land-Baytown, TX.
Franklin County	KS	28140	Kansas City, MO-KS.
Tipton County	IN	29020	Kokomo, IN.
Nelson County	KY	31140	Louisville/Jefferson County, KY-IN.
Geary County	KS	31740	Manhattan, KS.
Washington County	OH	37620	Parkersburg-Marietta-Vienna, WV-OH.
Pleasants County	WV	37620	Parkersburg-Marietta-Vienna, WV-OH.
George County	MS	37700	Pascagoula, MS.
Power County	ID	38540	Pocatello, ID.
Cumberland County	VA	40060	Richmond, VA.
King and Queen County	VA	40060	Richmond, VA.
Louisa County	VA	40060	Richmond, VA.
Washington County	MO	41180	St. Louis, MO-IL.
Summit County	UT	41620	Salt Lake City, UT.
Erie County	OH	41780	Sandusky, OH.
Franklin County	MA	44140	Springfield, MA.
Ottawa County	OH	45780	Toledo, OH.
Greene County	AL	46220	Tuscaloosa, AL.
Calhoun County	TX	47020	Victoria, TX.
Surry County	VA	47260	Virginia Beach-Norfolk-Newport News, VA-NC.

We proposed that the wage data for all hospitals located in the counties listed in Table 12 now be considered rural when their respective state's rural wage index value is calculated. This rural wage index value will be used under the IRF PPS. We did not receive any comments addressing this proposal.

Therefore, we are finalizing our proposed reassignment of these counties from urban status to rural status for purposes of the wage index based on the new OMB delineations.

c. Rural Counties Becoming Urban

With the implementation of the new OMB delineations, (based upon the 2010 decennial Census data), a total of 105 counties (and county equivalents) that are currently located in rural areas will now be located in urban areas. Table 13 below lists the 105 rural counties.

TABLE 13—COUNTIES THAT WILL TRANSITION FROM RURAL TO URBAN STATUS

County	State	New CBSA	Urban area (constituent counties)
Utuado Municipio	PR	10380	Aguadilla-Isabela, PR.
Linn County	OR	10540	Albany, OR.
Oldham County	TX	11100	Amarillo, TX.
Morgan County	GA	12060	Atlanta-Sandy Springs-Roswell, GA.
Lincoln County	GA	12260	Augusta-Richmond County, GA-SC.
Newton County	TX	13140	Beaumont-Port Arthur, TX.
Fayette County	WV	13220	Beckley, WV.
Raleigh County	WV	13220	Beckley, WV.
Golden Valley County	MT	13740	Billings, MT.
Oliver County	ND	13900	Bismarck, ND.
Sioux County	ND	13900	Bismarck, ND.
Floyd County	VI	13980	Blacksburg-Christiansburg-Radford, VA.
De Witt County	IL	14010	Bloomington, IL.
Columbia County	PA	14100	Bloomsburg-Berwick, PA.
Montour County	PA	14100	Bloomsburg-Berwick, PA.
Allen County	KY	14540	Bowling Green, KY.
Butler County	KY	14540	Bowling Green, KY.
St. Mary's County	MD	15680	California-Lexington Park, MD.
Jackson County	IL	16060	Carbondale-Marion, IL.
Williamson County	IL	16060	Carbondale-Marion, IL.
Franklin County	PA	16540	Chambersburg-Waynesboro, PA.
Iredell County	NC	16740	Charlotte-Concord-Gastonia, NC-SC.
Lincoln County	NC	16740	Charlotte-Concord-Gastonia, NC-SC.
Rowan County	NC	16740	Charlotte-Concord-Gastonia, NC-SC.
Chester County	SC	16740	Charlotte-Concord-Gastonia, NC-SC.
Lancaster County	SC	16740	Charlotte-Concord-Gastonia, NC-SC.
Buckingham County	VA	16820	Charlottesville, VA.
Union County	IN	17140	Cincinnati, OH-KY-IN.
Hocking County	OH	18140	Columbus, OH.
Perry County	OH	18140	Columbus, OH.
Walton County	FL	18880	Crestview-Fort Walton Beach-Destin, FL.
Hood County	TX	23104	Dallas-Fort Worth-Arlington, TX.
Somervell County	TX	23104	Dallas-Fort Worth-Arlington, TX.
Baldwin County	AL	19300	Daphne-Fairhope-Foley, AL.
Monroe County	PA	20700	East Stroudsburg, PA.
Hudspeth County	TX	21340	El Paso, TX.
Adams County	PA	23900	Gettysburg, PA.
Hall County	NE	24260	Grand Island, NE.
Hamilton County	NE	24260	Grand Island, NE.
Howard County	NE	24260	Grand Island, NE.
Merrick County	NE	24260	Grand Island, NE.
Montcalm County	MI	24340	Grand Rapids-Wyoming, MI.
Josephine County	OR	24420	Grants Pass, OR.
Tangipahoa Parish	LA	25220	Hammond, LA.
Beaufort County	SC	25940	Hilton Head Island-Bluffton-Beaufort, SC.
Jasper County	SC	25940	Hilton Head Island-Bluffton-Beaufort, SC.
Citrus County	FL	26140	Homosassa Springs, FL.
Butte County	ID	26820	Idaho Falls, ID.
Yazoo County	MS	27140	Jackson, MS.
Crockett County	TN	27180	Jackson, TN.
Kalawao County	HI	27980	Kahului-Wailuku-Lahaina, HI.
Maui County	HI	27980	Kahului-Wailuku-Lahaina, HI.
Campbell County	TN	28940	Knoxville, TN.
Morgan County	TN	28940	Knoxville, TN.
Roane County	TN	28940	Knoxville, TN.
Acadia Parish	LA	29180	Lafayette, LA.
Iberia Parish	LA	29180	Lafayette, LA.
Vermilion Parish	LA	29180	Lafayette, LA.
Cotton County	OK	30020	Lawton, OK.
Scott County	IN	31140	Louisville/Jefferson County, KY-IN.
Lynn County	TX	31180	Lubbock, TX.

TABLE 13—COUNTIES THAT WILL TRANSITION FROM RURAL TO URBAN STATUS—Continued

County	State	New CBSA	Urban area (constituent counties)
Green County	WI	31540	Madison, WI.
Benton County	MS	32820	Memphis, TN-MS-AR.
Midland County	MI	33220	Midland, MI.
Martin County	TX	33260	Midland, TX.
Le Sueur County	MN	33460	Minneapolis-St. Paul-Bloomington, MN-WI.
Mille Lacs County	MN	33460	Minneapolis-St. Paul-Bloomington, MN-WI.
Sibley County	MN	33460	Minneapolis-St. Paul-Bloomington, MN-WI.
Maury County	TN	34980	Nashville-Davidson—Murfreesboro—Franklin, TN.
Craven County	NC	35100	New Bern, NC.
Jones County	NC	35100	New Bern, NC.
Pamlico County	NC	35100	New Bern, NC.
St. James Parish	LA	35380	New Orleans-Metairie, LA.
Box Elder County	UT	36260	Ogden-Clearfield, UT.
Gulf County	FL	37460	Panama City, FL.
Custer County	SD	39660	Rapid City, SD.
Fillmore County.	MN	40340	Rochester, MN.
Yates County.	NY	40380	Rochester, NY.
Sussex County	DE	41540	Salisbury, MD-DE.
Worcester County	MA	41540	Salisbury, MD-DE.
Highlands County	FL	42700	Sebring, FL.
Webster Parish	LA	43340	Shreveport-Bossier City, LA.
Cochise County	AZ	43420	Sierra Vista-Douglas, AZ.
Plymouth County	IA	43580	Sioux City, IA-NE-SD.
Union County	SC	43900	Spartanburg, SC.
Pend Oreille County	WA	44060	Spokane-Spokane Valley, WA.
Stevens County	WA	44060	Spokane-Spokane Valley, WA.
Augusta County	VA	44420	Staunton-Waynesboro, VA.
Staunton City	VA	44420	Staunton-Waynesboro, VA.
Waynesboro City	VA	44420	Staunton-Waynesboro, VA.
Little River County	AR	45500	Texarkana, TX-AR.
Sumter County	FL	45540	The Villages, FL.
Pickens County	AL	46220	Tuscaloosa, AL.
Gates County	NC	47260	Virginia Beach-Norfolk-Newport News, VA-NC.
Falls County	TX	47380	Waco, TX.
Columbia County	WA	47460	Walla Walla, WA.
Walla Walla County	WA	47460	Walla Walla, WA.
Peach County	GA	47580	Warner Robins, GA.
Pulaski County	GA	47580	Warner Robins, GA.
Culpeper County	VA	47894	Washington-Arlington-Alexandria, DC-VA-MD-WV.
Rappahannock County	VA	47894	Washington-Arlington-Alexandria, DC-VA-MD-WV.
Jefferson County	NY	48060	Watertown-Fort Drum, NY.
Kingman County	KS	48620	Wichita, KS.
Davidson County	NC	49180	Winston-Salem, NC.
Windham County	CT	49340	Worcester, MA-CT.

We proposed that when calculating the area wage index, the wage data for hospitals located in these counties would be included in their new respective urban CBSAs (80 FR 23360 through 23362). This urban wage index value will be used under the IRF PPS. We did not receive any comments on this proposal. Therefore, we are finalizing our proposed reassignment of these counties from rural status to urban status for purposes of the wage index based on the new OMB delineations.

d. Urban Counties Moving to a Different Urban CBSA

As we stated in the FY 2016 IRF PPS proposed rule (80 FR 23362 through 23363), in addition to rural counties becoming urban and urban counties becoming rural, several urban counties will shift from one urban CBSA to another urban CBSA under the new OMB delineations. In other cases, applying the new OMB delineations will involve a change only in CBSA name or number, while the CBSA continues to encompass the same constituent counties. For example, CBSA 29140 (Lafayette, IN), will experience both a change to its number and its name, and would become CBSA 29200 (Lafayette-West Lafayette, IN), while all of its three constituent counties will remain the same. We are not discussing these changes in this section because they are inconsequential changes to the IRF PPS wage index. However, in other cases, adoption of the new OMB delineations shifts counties between existing and new CBSAs, changing the constituent makeup of the CBSAs.

In one type of change, an entire CBSA will be subsumed by another CBSA. For example, CBSA 37380 (Palm Coast, FL) currently is a single county (Flagler, FL) CBSA. Flagler County will be a part of CBSA 19660 (Deltona-Daytona Beach-Ormond Beach, FL) under the new OMB delineations.

In another type of change, some CBSAs have counties that will split off to become part of, or to form, entirely new labor market areas. For example, CBSA 37964 (Philadelphia Metropolitan Division of MSA 37980) currently is comprised of five Pennsylvania counties (Bucks, Chester, Delaware, Montgomery, and Philadelphia). Under the new OMB delineations, Montgomery, Bucks, and Chester counties will split off and form the new CBSA 33874 (Montgomery County-Bucks County-Chester County,

PA Metropolitan Division of MSA 37980), while Delaware and Philadelphia counties will remain in CBSA 37964.

Finally, in some cases, a CBSA will lose counties to another existing CBSA. For example, Lincoln County and Putnam County, WV, will move from CBSA 16620 (Charleston, WV) to CBSA 26580 (Huntington-Ashland, WV-KY-OH). CBSA 16620 will still exist in the new labor market delineations with fewer constituent counties. Table 14 lists the urban counties that will move from one urban CBSA to another urban CBSA under the new OMB delineations.

TABLE 14—COUNTIES THAT WILL CHANGE TO A DIFFERENT CBSA

Prior CBSA	New CBSA	County	State
11300	26900	Madison County	IN
11340	24860	Anderson County	SC
14060	14010	McLean County	IL
37764	15764	Essex County	MA
16620	26580	Lincoln County	WV
16620	26580	Putnam County	WV
16974	20994	DeKalb County	IL
16974	20994	Kane County	IL
21940	41980	Ceiba Municipio	PR
21940	41980	Fajardo Municipio	PR
21940	41980	Luquillo Municipio	PR
26100	24340	Ottawa County	MI
31140	21060	Meade County	KY
34100	28940	Grainger County	TN
35644	35614	Bergen County	NJ
35644	35614	Hudson County	NJ
20764	35614	Middlesex County	NJ
20764	35614	Monmouth County	NJ
20764	35614	Ocean County	NJ
35644	35614	Passaic County	NJ
20764	35084	Somerset County	NJ
35644	35614	Bronx County	NY
35644	35614	Kings County	NY
35644	35614	New York County	NY
35644	20524	Putnam County	NY
35644	35614	Queens County	NY
35644	35614	Richmond County	NY
35644	35614	Rockland County	NY
35644	35614	Westchester County	NY
37380	19660	Flagler County	FL
37700	25060	Jackson County	MS
37964	33874	Bucks County	PA
37964	33874	Chester County	PA
37964	33874	Montgomery County	PA
39100	20524	Dutchess County	NY
39100	35614	Orange County	NY
41884	42034	Marin County	CA
41980	11640	Arecibo Municipio	PR
41980	11640	Camuy Municipio	PR
41980	11640	Hatillo Municipio	PR
41980	11640	Quebradillas Municipio	PR
48900	34820	Brunswick County	NC
49500	38660	Guánica Municipio	PR
49500	38660	Guayanilla Municipio	PR
49500	38660	Peñuelas Municipio	PR
49500	38660	Yauco Municipio	PR

If providers located in these counties move from one CBSA to another under the new OMB delineations, there may be impacts, both negative and positive, upon their specific wage index values. As discussed below, we proposed to implement a transition wage index to adjust for these possible impacts. We did not receive any comments on the proposed reassignment of the counties listed in Table 14. Therefore, we are finalizing our proposed reassignment of these counties from one urban area to another urban area for purposes of the wage index based on the new OMB delineations.

4. Transition Period

In the FY 2016 IRF PPS proposed rule (80 FR 23363) we stated that, overall, we believe implementing the new OMB delineations will result in wage index values being more representative of the actual costs of labor in a given area. Further, we recognize that some providers will have a higher wage index due to our proposed implementation of the new labor market area delineations. However, we also recognize that more providers will experience decreases in wage index values as a result of the implementation of the new labor market area delineations. We explained that in prior years, we have provided for transition periods when adopting changes that have significant payment implications, particularly large negative impacts. As discussed in the FY 2006 IRF PPS final rule (70 FR 47921 through 47926), we evaluated several options to ease the transition to the new CBSA system.

In implementing the new CBSA delineations for FY 2016, we continue to have similar concerns as those expressed in the FY 2006 IRF PPS final rule. While we believe that implementing the latest OMB labor market area delineations will create a more accurate wage index system, we recognize that IRFs may experience decreases in their wage index as a result of the labor market area changes. Our analysis for the FY 2016 IRF PPS final rule indicates that a majority of IRFs either expect no change in the wage index or an increase in the wage index based on the new CBSA delineations. However, we found that 188 facilities will experience a decline in their wage index with 29 facilities experiencing a decline of 5 percent or more based on the CBSA changes. Therefore, we believe it is appropriate to consider, as we did in FY 2006, whether or not a transition period should be used to implement these proposed changes to the wage index.

In light of the comments received during the FY 2006 rulemaking cycle on our proposal in the FY 2006 IRF PPS proposed rule (70 FR 30238 through 30240) to adopt the new CBSA definitions without a transition period, we believe that a transition period is appropriate. Therefore, in the FY 2016 proposed rule, we proposed using a similar transition methodology to that used in FY 2006. Specifically, for the FY 2016 IRF PPS, we proposed implementing a budget-neutral 1-year transition policy. Under the proposed policy, all IRF providers would receive a 1-year blended wage index using 50 percent of their FY 2016 wage index based on the proposed new OMB delineations and 50 percent of their FY 2016 wage index based on the OMB delineations used in FY 2015. We would apply this 1-year blended wage index in FY 2016 for all geographic areas to assist providers in adapting to these proposed changes. We believe a 1-year, 50/50 blend would mitigate the short-term instability and negative payment impacts due to the implementation of the new OMB delineations. This transition policy would be for a 1-year period, going into effect October 1, 2015, and continuing through September 30, 2016.

For FY 2006, it was determined that the transition to the current wage index system would have significant negative impacts upon IRFs that were originally considered rural, but would be considered urban under the new definitions. To alleviate the potentially decreased payments associated with switching from rural status to urban status in calculating the IRF area wage index for FY 2006, we implemented a 3-year budget-neutral phase-out of the rural adjustment for FY 2005 rural IRFs that became urban IRFs in FY 2006 and that experienced a loss in payment because of this redesignation. The 3-year transition period was afforded to these facilities because, as a group, they experienced a significant reduction in payments due to the labor market revisions and the loss of the rural adjustment. This adjustment was in addition to a 1-year blended wage index (comprised of a 50/50 blend of the FY 2006 MSA-based wage index and the FY 2006 CBSA-based wage index) for all IRFs.

Our analysis for the FY 2016 final rule indicates that 22 IRFs will experience a change in either rural or urban designations. Of these, 19 facilities designated as rural in FY 2015 will be designated as urban in FY 2016. While 16 of these rural IRFs that will be designated as urban under the new CBSA delineations will experience an increase in their wage index, these IRFs will lose the 14.9 percent rural adjustment. In many cases, this loss exceeds the urban CBSA based increase in the wage index. Consistent with the transition policy adopted in FY 2006 (70 FR 47923 through 47927), we considered the appropriateness of applying a 3-year phase-out of the rural adjustment for IRFs located in rural counties that would become urban under the new OMB delineations, given the potentially significant payment impacts for these facilities. We continue to believe, as discussed in the FY 2006 IRF final rule (70 FR 47880), that the phase-out of the rural adjustment transition period for these facilities specifically is appropriate because, as a group, we expect these IRFs would experience a steeper and more abrupt reduction in their payments compared to other IRFs.

Therefore, in addition to the 1-year transition policy noted, we proposed using a budget-neutral 3-year phase-out of the rural adjustment for existing FY 2015 rural IRFs that will become urban in FY 2016 and that experience a loss in payments due to changes from the new CBSA delineations. Accordingly, the incremental steps needed to reduce the impact of the loss of the FY 2015 rural adjustment of 14.9 percent would be phased out over FYs 2016, 2017 and 2018. This policy would allow rural IRFs which would be classified as urban in FY 2016 to receive two-thirds of the 2015 rural adjustment for FY 2016, as well as the blended wage index. For FY 2017, these IRFs would receive the full FY 2017 wage index and one-third of the FY 2015 rural adjustment. For FY 2018, these IRFs would receive the full FY 2018 wage index without a rural adjustment. We believe a 3-year budget-neutral phase-out of the rural adjustment for IRFs that transition from rural to urban status under the new CBSA delineations would best accomplish the goals of mitigating the loss of the rural adjustment for existing FY 2015 rural IRFs. The purpose of the gradual phase-out of the rural adjustment for these facilities is to alleviate the significant payment implications for existing rural IRFs that may need time to adjust to the loss of their FY 2015 rural payment adjustment or that experience a reduction in payments solely because of this redesignation. As stated, this policy is specifically for rural IRFs that become urban in FY 2016 and that experience a loss in payments due to changes from the new CBSA delineations. Thus we did not propose implementing a transition policy for urban facilities that become rural in FY 2016 because these IRFs would receive the full rural adjustment of 14.9 percent beginning October 1, 2015 in addition to the 1-year blended wage index using 50 percent of their FY 2016 wage index based on the proposed new OMB delineations and 50 percent of their FY 2016 wage index based on the OMB delineations used in FY 2105.

We received 4 comments on the proposed implementation of a 1-year transition with a blended wage index for all providers and a 3-year phase-out of the rural adjustment for a subset of providers in FY 2016 to assist those providers in adjusting to the new OMB delineations, which are summarized below.

Comment: Commenters were generally supportive of CMS' efforts to implement a 1-year blended wage index to mitigate potential negative impacts from the transition to the new OMB delineations. Two commenters requested that CMS expand the 1-year budget neutral 50/50 blended wage index for a longer period of time. One commenter requested that CMS implement the new CBSA delineations over a three year transition period (rather than our proposed one year transition).

Response: We appreciate the support for our proposal to adopt the new CBSA delineations with a transition period. We explored multiple alternatives to the proposed 1-year 50/50 blended wage index. While we acknowledge that some providers will see negative impacts based upon the adoption of the new OMB delineations, we also point out that some providers will experience increases in their wage index values due

to the new OMB delineations. We believe that a transition period longer than 1 year would reduce the accuracy of the overall labor market area wage index system. The wage index is a relative measure of the value of labor in prescribed labor market areas; therefore, we believe it is important to implement the new delineations with as minimal a transition as is reasonable. We do not believe it is appropriate to expand or extend the 1-year 50/50 blended transition wage index further than what was proposed, because doing so would only further delay what we believe are the more refined and accurate labor market areas, based on the recent 2010 Census.

Comment: Commenters were generally supportive of CMS' efforts to implement a 3-year phase-out of the rural adjustment for FY 2015 rural IRFs that are transitioning to urban status in FY 2016 due to the new OMB delineations. Four commenters requested that CMS extend the 3-year phase-out of the rural adjustment for rural IRFs transitioning to urban CBSAs. The commenters were supportive of implementing the phase-out of the rural adjustment gradually over a period of years but suggested we extend the transition timeframe to a 4-year period. One commenter suggested we implement a 5-year phase-out or allow the affected facilities to apply for reclassification back to rural status for a period of 3 years.

Response: We appreciate the commenters' support for a phase-out of the rural adjustment for FY 2015 rural IRFs that will be considered urban in FY 2016. The intent of the 3-year phase-out of the rural adjustment is to mitigate potential negative payment effects on rural facilities that will be redesignated as urban facilitates, effective FY 2016. As described in more detail in the FY 2006 IRF PPS final rule (70 FR 47880), our analysis determined a 3-year budget neutral transition policy would best accomplish the goals of mitigating the loss of the rural adjustment for existing rural IRFs that will become urban under the new CBSA designations. For a complete discussion of this policy, we refer readers to the FY 2006 IRF PPS final rule (70 FR 47880, 47921 through 47925). Based on similar concerns to those we expressed during the FY 2006 rulemaking cycle to the proposed adoption of the new CBSA definitions, we considered different multi-year transition policies to provide a sufficient buffer for rural IRFs that may experience a reduction in payments due to being designated as urban. However, fewer IRFs (19) will be impacted by the transition from rural to urban status than were affected in FY 2006 (34). Additionally, the FY 2016 rural adjustment of 14.9 percent is less than the FY 2006 rural adjustment of 21.3 percent; therefore, we believe that a 3-year budget-neutral phase-out of the rural adjustment would appropriately mitigate the adverse payment impacts for these IRFs while also ensuring that payment rates for these facilities are set accurately and appropriately.

Final Decision: After consideration of the public comments we received, we are finalizing our proposals for transitioning to the wage index associated with the new OMB delineations without modification. We are finalizing our proposal to provide a 1-year blended wage index for all IRF facilities and a 3-year phase-out of the rural adjustment for IRFs that were deemed rural in FY 2015 but are considered urban under the new delineations. All IRF providers will receive a 1-year blended wage index using 50 percent of their FY 2016 wage index based on the proposed new OMB delineations and 50 percent of their FY 2016 wage index based on the OMB delineations used in FY 2015. We will apply this 1-year blended wage index in FY 2016 for all geographic areas to assist providers in adapting to these proposed changes. FY 2015 rural IRFs which will be classified as urban in FY 2016 will receive two-thirds of the FY 2015 rural adjustment in FY 2016, as well as the blended wage index. For FY 2017, these IRFs will receive the full FY 2017 wage index and one-third of the FY 2015 rural adjustment. For FY 2018, these IRFs will receive the full FY 2018 wage index without a rural adjustment.

The wage index applicable to FY 2016 is set forth in Table A available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* Table A provides a crosswalk between the FY 2015 wage index for a provider using the current OMB delineations in effect in FY 2015 and the FY 2016 wage index using the revised OMB delineations, as well as the transition wage index values for FY 2016.

To calculate the wage-adjusted facility payment for the payment rates set forth in this final rule, we multiply the unadjusted federal payment rate for IRFs by the FY 2016 labor-related share based on the 2012-based IRF market basket (71.0 percent) to determine the labor-related portion of the standard payment amount. A full discussion of the calculation of the labor-related share can be found in section VI.E of this final rule. We then multiply the labor-related portion by the applicable IRF wage index from the tables in the addendum to this final rule. The table is available through the Internet on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* The change from the proposed FY 2016 labor-related share of 69.6 percent to the final FY 2016 labor-related share of 71.0 percent results in a final FY 2016 budget-neutral wage adjustment factor of 1.0033 instead of the proposed FY 2016 budget-neutral wage adjustment factor of 1.0027.

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget-neutral manner. We calculate a budget-neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We use the listed steps to ensure that the FY 2016 IRF standard payment conversion factor reflects the update to the wage indexes (based on the FY 2011 hospital cost report data) and the labor-related share in a budget-neutral manner:

Step 1. Determine the total amount of the estimated FY 2015 IRF PPS rates, using the FY 2015 standard payment conversion factor and the labor-related share and the wage indexes from FY 2015 (as published in the FY 2015 IRF PPS final rule (79 FR 45871)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the FY 2016 standard payment conversion factor and the FY 2016 labor-related share and CBSA urban and rural wage indexes.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY 2016 budget-neutral wage adjustment factor of 1.0033.

Step 4. Apply the FY 2016 budget-neutral wage adjustment factor from step 3 to the FY 2015 IRF PPS standard payment conversion factor after the application of the adjusted market basket update to determine the FY 2016 standard payment conversion factor.

We discuss the calculation of the standard payment conversion factor for FY 2016 in section VI.G of this final rule.

We received 4 comments on the proposed IRF wage adjustment for FY 2016, which are summarized below.

Comment: One commenter, while supportive of CMS' proposed IRF wage adjustment, effective for FY 2016, recommended that CMS institute a smoothing variable to lessen year-to-year volatility in the wage index experienced by some facilities. Three commenters requested that CMS align

the timeframe for the IRF wage index with other post-acute and acute care settings. One commenter also recommended that we consider wage index policies under the current IPPS because IRFs compete in a similar labor pool as acute care hospitals. Four commenters requested that CMS grant IRFs the ability to request reclassification of their applicable CBSAs.

Response: Consistent with our previous responses to these comments (most recently published in our FY 2015 IRF PPS final rule (79 FR 45887)), we note that the IRF PPS does not account for geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. Furthermore, as we do not have an IRF-specific wage index, we are unable to determine at this time the degree, if any, to which a geographic reclassification adjustment under the IRF PPS would be appropriate. The rationale for our current wage index policies is fully described in the FY 2006 IRF PPS final rule (70 FR 47880, 47926 through 47928).

Additionally, while some commenters recommended that we adopt IPPS reclassification, we note the MedPAC's June 2007 report to the Congress, titled ''Report to Congress: Promoting Greater Efficiency in Medicare'' (available at *http://www.medpac.gov/documents/Jun07_EntireReport.pdf*), recommends that Congress ''repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish new wage index systems.'' We continue to believe it would not be prudent at this time to adopt the IPPS wage index policies, such as reclassification, and will, therefore, continue to use the CBSA labor market area definitions and the pre-reclassification and pre-floor hospital wage index data based on 2011 cost report data in this final rule.

With regard to issues mentioned about ensuring that the wage index minimizes fluctuations, matches the costs of labor in the market, and provides for a single wage index policy, section 3137(b) of the Affordable Care Act required us to submit a report to the Congress by December 31, 2011 that includes a plan to reform the hospital wage index system. The report that we submitted is available online at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html*. However, we will continue to monitor the IPPS wage index to identify any policy changes that may be appropriate for IRFs. This is consistent with our previous responses to these recurring comments.

Final Decision: After careful consideration of the comments, we are finalizing use of the FY 2015 pre-floor, pre-reclassified hospital wage index data to derive the applicable IRF PPS wage index for FY 2016.

G. Description of the IRF Standard Payment Conversion Factor and Payment Rates for FY 2016

To calculate the standard payment conversion factor for FY 2016, as illustrated in Table 15, we begin by applying the adjusted market basket increase factor for FY 2016 that was adjusted in accordance with sections 1886(j)(3)(C) and (D) of the Act, to the standard payment conversion factor for FY 2015 ($15,198). Applying the 1.7 percent adjusted market basket increase for FY 2016 to the standard payment conversion factor for FY 2015 of $15,198 yields a standard payment amount of $15,456. Then, we apply the budget neutrality factor for the FY 2016 wage index and labor-related share of 1.0033, which results in a standard payment amount of $15,507. We next apply the budget neutrality factors for the revised CMG relative weights of 0.9981, which results in the standard payment conversion factor of $15,478 for FY 2016.

TABLE 15—CALCULATIONS TO DETERMINE THE FY 2016 STANDARD PAYMENT CONVERSION FACTOR

Explanation for adjustment		Calculations
Standard Payment Conversion Factor for FY 2015		$15,198
Market Basket Increase Factor for FY 2016 (2.4 percent), reduced by 0.5 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and reduced by 0.2 percentage point in accordance with paragraphs 1886(j)(3)(C) and (D) of the Act	×	1.017
Budget Neutrality Factor for the Wage Index and Labor-Related Share	×	1.0033
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	×	0.9981
FY 2016 Standard Payment Conversion Factor	=	$15,478

We received 1 comment on the proposed FY 2016 standard payment conversion factor, which is summarized below.

Comment: One commenter expressed support for the proposed budget neutrality factors used to adjust the FY 2016 standard payment conversion factor.

Response: We appreciate the commenter's support.

Final Decision: After consideration of the public comments, we are finalizing the IRF standard payment conversion factor of $15,478 for FY 2016.

After the application of the CMG relative weights described in section IV of this final rule to the FY 2016 standard payment conversion factor ($15,478), the resulting unadjusted IRF prospective payment rates for FY 2016 are shown in Table 16.

TABLE 16—FY 2016 PAYMENT RATES

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
0101	$ 12,506.22	$ 10,953.78	$ 10,198.45	$ 9,757.33
0102	15,733.39	13,781.61	12,831.26	12,275.60
0103	17,688.26	15,493.48	14,425.50	13,800.18
0104	19,113.78	16,742.55	15,587.89	14,913.05
0105	22,433.81	19,650.87	18,295.00	17,504.07
0106	25,012.45	21,909.11	20,398.46	19,516.21
0107	28,016.73	24,540.37	22,848.62	21,858.03
0108	35,565.35	31,151.02	29,004.22	27,747.41

TABLE 16—FY 2016 PAYMENT RATES—Continued

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
0109	32,431.05	28,406.77	26,448.81	25,303.43
0110	42,722.38	37,421.16	34,842.53	33,333.42
0201	12,400.97	10,190.72	9,195.48	8,687.80
0202	16,306.07	13,397.76	12,091.41	11,422.76
0203	18,660.28	15,332.51	13,837.33	13,071.17
0204	20,573.36	16,905.07	15,255.12	14,411.57
0205	24,610.02	20,220.46	18,248.56	17,239.40
0206	29,349.38	24,114.72	21,762.07	20,557.88
0207	39,063.38	32,096.73	28,965.53	27,363.56
0301	17,290.47	14,433.24	13,235.24	12,349.90
0302	21,463.34	17,917.33	16,429.90	15,332.51
0303	25,010.90	20,878.27	19,146.29	17,866.26
0304	33,266.87	27,770.63	25,465.95	23,763.37
0401	15,007.47	12,772.45	11,696.72	10,811.38
0402	22,005.07	18,728.38	17,151.17	15,852.57
0403	35,110.30	29,881.83	27,363.56	25,294.15
0404	61,478.62	52,323.38	47,915.24	44,290.30
0405	54,815.34	46,652.24	42,722.38	39,490.57
0501	13,422.52	10,696.85	9,932.23	9,116.54
0502	17,634.09	14,052.48	13,047.95	11,976.88
0503	22,317.73	17,785.77	16,513.48	15,159.15
0504	25,623.83	20,418.58	18,959.00	17,403.46
0505	29,943.74	23,862.43	22,156.76	20,338.09
0506	42,095.52	33,545.47	31,146.38	28,590.96
0601	16,115.69	12,716.72	11,866.98	10,723.16
0602	20,646.10	16,290.60	15,202.49	13,736.73
0603	25,664.07	20,249.87	18,897.09	17,073.78
0604	33,690.96	26,583.47	24,808.14	22,415.24
0701	14,950.20	12,518.61	11,856.15	10,769.59
0702	19,392.39	16,237.97	15,378.94	13,968.90
0703	23,251.05	19,469.78	18,438.94	16,748.74
0704	30,234.73	25,317.36	23,978.52	21,779.09
0801	12,435.03	9,794.48	8,885.92	8,206.44
0802	16,346.32	12,874.60	11,681.25	10,788.17
0803	22,048.41	17,366.32	15,756.60	14,550.87
0804	19,717.42	15,529.08	14,089.62	13,012.35
0805	23,766.47	18,719.09	16,984.01	15,685.41
0806	29,536.67	23,264.98	21,107.35	19,492.99
0901	14,801.61	11,905.68	10,911.99	9,946.16
0902	19,678.73	15,827.80	14,505.98	13,224.40
0903	24,572.87	19,765.41	18,115.45	16,513.48
0904	31,048.87	24,973.75	22,888.87	20,864.34
1001	16,536.70	14,498.24	12,910.20	11,648.74
1002	20,661.58	18,115.45	16,129.62	14,555.51
1003	29,655.85	25,999.94	23,151.99	20,890.66
1101	21,565.50	21,565.50	17,131.05	16,097.12
1102	28,044.59	28,044.59	22,277.49	20,932.45
1201	15,265.95	14,821.73	13,496.82	12,591.35
1202	18,739.21	18,194.39	16,567.65	15,456.33
1203	23,114.85	22,443.10	20,435.60	19,065.80
1301	18,250.11	15,038.42	14,179.40	12,947.35
1302	23,133.42	19,061.16	17,973.05	16,411.32
1303	30,375.58	25,029.47	23,600.85	21,550.02
1401	14,037.00	11,535.75	10,432.17	9,387.41
1402	18,601.46	15,287.62	13,824.95	12,439.67
1403	22,404.41	18,412.63	16,649.68	14,982.70
1404	28,434.63	23,368.68	21,132.11	19,016.27
1501	16,292.14	13,123.80	12,083.67	11,627.07
1502	20,661.58	16,645.04	15,324.77	14,745.89
1503	24,996.97	20,136.88	18,539.55	17,839.94
1504	31,053.51	25,017.09	23,032.81	22,162.95
1601	17,607.77	12,947.35	12,719.82	11,695.18
1602	23,124.13	17,002.58	16,703.86	15,358.82
1603	29,576.91	21,746.59	21,364.28	19,644.68
1701	16,569.20	14,055.57	12,825.07	11,935.09
1702	21,509.78	18,245.47	16,648.14	15,493.48
1703	24,630.14	20,892.20	19,064.25	17,742.43
1704	32,335.09	27,428.56	25,026.38	23,291.29
1801	19,785.53	14,990.44	13,696.48	12,187.38
1802	29,109.47	22,053.05	20,150.81	17,929.72
1803	47,878.10	36,272.69	33,143.04	29,491.78

TABLE 16—FY 2016 PAYMENT RATES—Continued

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
1901	18,304.28	15,912.93	15,474.90	13,529.32
1902	34,683.10	30,152.69	29,323.07	25,636.21
1903	58,010.00	50,431.97	49,045.14	42,878.70
2001	14,320.25	11,767.92	10,854.72	9,825.43
2002	18,576.70	15,265.95	14,080.34	12,744.59
2003	23,128.78	19,006.98	17,531.93	15,869.59
2004	29,784.32	24,476.91	22,576.21	20,435.60
2101	26,546.32	26,546.32	20,605.86	19,989.84
5001				2,408.38
5101				11,199.88
5102				25,252.36
5103				11,970.69
5104				29,836.94

H. Example of the Methodology for Adjusting the Federal Prospective Payment Rates

Table 17 illustrates the methodology for adjusting the federal prospective payments (as described in sections VI.A. through VI.F. of this final rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The unadjusted federal prospective payment rate for CMG 0110 (without comorbidities) appears in Table 16.

Example: One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a Disproportionate Share Hospital (DSH) percentage of 5 percent (which would result in a LIP adjustment of 1.0156), a wage index of 0.8416, and a rural adjustment of 14.9 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0454 percent), a wage index of 0.8599, and a teaching status adjustment of 0.0784.

To calculate each IRF's labor and non-labor portion of the federal prospective payment, we begin by taking the unadjusted federal prospective payment rate for CMG 0110 (without comorbidities) from Table 16. Then, we multiply the labor-related share for FY 2016 (71.0 percent) described in section VI.E. of this final rule by the unadjusted federal prospective payment rate. To determine the non-labor portion of the federal prospective payment rate, we subtract the labor portion of the federal payment from the unadjusted federal prospective payment.

To compute the wage-adjusted federal prospective payment, we multiply the labor portion of the federal payment by the appropriate transition wage index, which may be found in Table A. The table is available on CMS Web site at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/*. The resulting figure is the wage-adjusted labor amount. Next, we compute the wage-adjusted federal payment by adding the wage-adjusted labor amount to the non-labor portion.

Adjusting the wage-adjusted federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted federal prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0784, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted federal prospective payment rates. Table 17 illustrates the components of the adjusted payment calculation.

TABLE 17—EXAMPLE OF COMPUTING THE IRF FY 2016 FEDERAL PROSPECTIVE PAYMENT

Steps			Rural Facility A (Spencer Co., IN)		Urban Facility B (Harrison Co., IN)
1	Unadjusted Federal Prospective Payment		$ 33,333.42		$ 33,333.42
2	Labor Share	×	0.71	×	0.71
3	Labor Portion of Federal Payment	=	$23,666.73	=	$23,666.73
4	CBSA-Based Wage Index (shown in the Addendum, Tables 1 and 2)	×	0.8416	×	0.8599
5	Wage-Adjusted Amount	=	$19,917.92	=	$20,351.02
6	Non-Labor Amount	+	$9,666.69	+	$9,666.69
7	Wage-Adjusted Federal Payment	=	$29,584.61	=	$30,017.71
8	Rural Adjustment	×	1.149	×	1.000
9	Wage- and Rural-Adjusted Federal Payment	=	$33,992.72	=	$30,017.71
10	LIP Adjustment	×	1.0156	×	1.0454
11	FY 2016 Wage-, Rural- and LIP-Adjusted Federal Prospective Payment Rate	=	$34,523.01	=	$31,380.51
12	FY 2016 Wage- and Rural-Adjusted Federal Prospective Payment		$33,992.72		$30,017.71
13	Teaching Status Adjustment	×	0	×	0.0784
14	Teaching Status Adjustment Amount	=	0.00	=	2,353.39
15	FY 2016 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate.	+	$34,523.01	+	$31,380.51
16	Total FY 2016 Adjusted Federal Prospective Payment	=	$34,523.01	=	$33,733.90

Thus, the adjusted payment for Facility A would be $34,523.01, and the adjusted payment for Facility B would be $33,733.90.

VII. Update to Payments for High-Cost Outliers Under the IRF PPS

A. Update to the Outlier Threshold Amount for FY 2016

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2015 IRF PPS final rules and the FY 2011 and FY 2013 notices (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, 75 FR 42836, 76 FR 47836, 76 FR 59256, and 77 FR 44618, 78 FR 47860, 79 FR 45872, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

In the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23367), to update the IRF outlier threshold amount for FY 2016, we proposed to use FY 2014 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2015. Based on an analysis of the preliminary data used for the proposed rule, we estimated that IRF outlier payments as a percentage of total estimated payments would be approximately 3.2 percent in FY 2015. Therefore, we proposed to update the outlier threshold amount from $8,848 for FY 2015 to $9,698 for FY 2016, as described in the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23367), to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2016.

We note that, as we typically do, we updated our data between the FY 2016 IRF PPS proposed and final rules to ensure that we use the most recent available data in calculating IRF PPS payments. Based on our analysis using this updated data, we now estimate that IRF outlier payments as a percentage of total estimated payments are approximately 2.9 percent in FY 2015.

We received 4 comments on the proposed update to the FY 2016 outlier threshold amount to maintain estimated outlier payments at approximately 3 percent of total estimated IRF payments, which are summarized below.

Comment: Several commenters expressed support for the proposed update to the outlier threshold amount to maintain estimated outlier payments for FY 2016 at 3 percent of total IRF PPS payments. However, some commenters expressed concern about the proposed increase in the outlier threshold and the potential financial impact this could have on IRFs with many high-cost outlier cases. One commenter suggested that CMS implement a two-year transition policy for changes to the FY 2016 outlier threshold to mitigate any financial impact on IRFs. Several commenters also expressed concerns about the distribution of outlier payments and questioned whether the IRF outlier policy is reimbursing IRFs appropriately for high-cost cases. One commenter suggested that we ensure that Medicare pays out the full 3 percent to IRFs in FY 2016.

Response: We will continue to monitor our IRF outlier policies to ensure that they continue to compensate IRFs appropriately for treating unusually high-cost patients and, thereby, promote access to care for patients who are likely to require unusually high-cost care. We note that when we updated the IRF claims data between the proposed and final rules, as we do each year, our analysis of the most recent available data indicates that an outlier threshold decrease (from $8,848 in FY 2015 to $8,658 in FY 2016) is necessary to ensure that estimated outlier payments in FY 2016 equal 3 percent of total estimated IRF PPS payments. Thus, we do not estimate any negative financial impact of this update on IRFs with many high-cost outlier cases. Nevertheless, the annual updates to the outlier threshold amount are not substantial, and we do not believe the financial impact on individual IRFs would be large enough to warrant an extended transition period for the changes. We will continue to monitor trends in IRF outlier payments to ensure that they are working as intended to compensate IRFs for treating exceptionally high-cost IRF patients, and that the IRF outlier policy continues to result in IRF outlier payments that equal approximately 3 percent of total IRF PPS payments annually.

Final Decision: Having carefully considered the public comments received and also taking into account the most recent available data, we are finalizing the outlier threshold amount of $8,658 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2016. This update is effective October 1, 2015.

B. Update to the IRF Cost-to-Charge Ratio Ceiling and Urban/Rural Averages

In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we proposed to apply a ceiling to IRFs' CCRs. Using the methodology described in that final rule, we proposed to update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2016, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2016, as discussed below.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2016, we proposed to estimate a national average CCR of 0.562 for rural IRFs, which we calculated by taking an average of the

CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we proposed to estimate a national average CCR of 0.435 for urban IRFs, which we calculated by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher costs factor more heavily into the averages than the CCRs of IRFs with lower costs. For this final rule, we have used the most recent available cost report data (FY 2013). This includes all IRFs whose cost reporting periods begin on or after October 1, 2012, and before October 1, 2013. If, for any IRF, the FY 2013 cost report was missing or had an ''as submitted'' status, we used data from a previous fiscal year's (that is, FY 2004 through FY 2012) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care.

In accordance with past practice, we proposed to set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, the national CCR ceiling would be 1.36 for FY 2016. This means that, if an individual IRF's CCR exceeds this proposed ceiling of 1.36 for FY 2016, we would replace the IRF's CCR with the appropriate national average CCR (either rural or urban, depending on the geographic location of the IRF). We calculated the national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as previously discussed) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

Step 2. Estimating the standard deviation of the national average CCR computed in step 1.

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We did not receive any comments on the proposed update to the IRF CCR ceiling and the urban/rural averages for FY 2016.

Final Decision: As we did not receive any comments on the proposed updates to the IRF CCR ceiling and the urban/rural averages for FY 2016, we are finalizing the national average urban CCR at 0.435, the national average rural CCR at 0.562, and the national CCR ceiling at 1.36 for FY 2016. These updates are effective October 1, 2015.

VIII. ICD–10–CM Implementation for IRF PPS

In the FY 2015 IRF PPS final rule (79 FR 45872), we finalized conversions from the International Classification of Diseases, 9th Revision, Clinical Modification (ICD–9–CM) to the ICD–10–CM for the IRF PPS, which will be effective when ICD–10–CM becomes the required medical data code set for use on Medicare claims and IRF–PAI submissions. We remind providers of IRF services that the implementation date for ICD–10–CM is October 1, 2015. The ICD–10–CM lists are available for download from the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html*.

IX. Revisions and Updates to the IRF QRP

A. Background and Statutory Authority

Section 3004(b) of the Affordable Care Act amended section 1886(j)(7) of the Act, requiring the Secretary to establish the IRF QRP. This program applies to freestanding IRFs, as well as IRF units affiliated with either acute care facilities or critical access hospitals (CAHs). Beginning with the FY 2014 payment determination and subsequent years, the Secretary is required to reduce any annual update to the standard federal rate for discharges occurring during such fiscal year by 2 percentage points for any IRF that does not comply with the requirements established by the Secretary.

The Act requires that for the FY 2014 payment determination and subsequent years, each IRF submit data on quality measures specified by the Secretary in a form and manner, and at a time, specified by the Secretary. The Secretary is required to specify quality measures that are endorsed by the entity that holds the contract with the Secretary under section 1890(a) of the Act. This entity is currently the NQF. Information regarding the NQF is available at *http://www.qualityforum.org/Measuring_Performance/Measuring_Performance.aspx*. The Act authorizes an exception under which the Secretary may specify non-endorsed quality measures for specified areas or medical topics determined appropriate by the Secretary for which a feasible or practical measure has not been endorsed by the NQF, as long as due consideration is given to NQF-endorsed measures or measures adopted by a consensus organization identified by the Secretary.

Additionally, section 2(a) of the Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) (Pub. L. 113–185, enacted on Oct. 6, 2014), amended title XVIII of the Act by adding section 1899B of the Act, titled Standardized Post-Acute Care (PAC) Assessment Data for Quality, Payment and Discharge Planning. Section 1899B(c)(1) of the Act requires that the Secretary specify not later than the applicable specified application date, as defined in section 1899B(a)(2)(E) of the Act, quality measures on which IRF providers are required to submit standardized patient assessment data described in section 1899B(b)(1) of the Act and other necessary data specified by the Secretary. Section 1899B(c)(2)(A) requires, to the extent possible, the submission of such quality measure data through the use of a PAC assessment instrument and the modification of such instrument as necessary to enable such use; for IRFs, this requirement refers to the IRF–PAI. In addition, section 1899B(d)(1) of the Act requires that the Secretary specify not later than the applicable specified application date, resource use and other measures on which IRF providers are required to submit any necessary data specified by the Secretary, which may include standardized assessment data in addition to claims data. Furthermore, section 2(c)(2) of the IMPACT Act amended section 1886(j)(7) of the Act by adding section 1886(j)(7)(F)(i), which requires IRF providers to submit to the Secretary data on the quality, resource use, and other measures required under sections 1899B(c)(1) and (d)(1) of the Act. Additionally, section 1886(j)(7)(F)(ii) requires that, beginning in FY 2019 and for each subsequent year, providers submit standardized patient assessment data required under section 1899B(b)(1) of the Act. Under section 1886(j)(7)(F)(iii) of the Act, the required data must be submitted in the form and manner, and at the time, specified by the Secretary.

Section 1899B(c)(1) and (d)(1) of the Act direct CMS to specify measures that relate to at least 5 stated quality domains and 3 stated resource use and other measure domains. The quality measures specified under section 1899B(c)(1) of the Act must address at least the following domains:

- Functional status, cognitive function, and changes in function and cognitive function;

- Skin integrity and changes in skin integrity;
- Medication reconciliation;
- Incidence of major falls; and
- Accurately communicating the existence of and providing for the transfer of health information and care preferences of an individual to the individual, family caregiver of the individual, and providers of services furnishing items and services to the individual when the individual transitions (1) from a hospital or CAH to another applicable setting, including a PAC provider or the home of the individual, or (2) from a PAC provider to another applicable setting, including a different PAC provider, hospital, CAH, or the home of the individual.

The resource use and other measures specified under section 1899B(d)(1) of the Act must address at least the following domains:

- Resource use measures, including total estimated Medicare spending per beneficiary;
- Discharge to community; and
- Measures to reflect all-condition risk-adjusted potentially preventable hospital readmissions rates.

Sections 1899B(c) and (d) of the Act indicate that data satisfying the eight measure domains in the IMPACT Act is the minimum data reporting requirement. Therefore, we may specify additional measures and additional domains.

Section 1899B(e)(2)(A) of the Act requires that each measure specified by the Secretary under that section be endorsed by the entity that holds the contract with the Secretary under section 1890(a) of the Act. This entity is currently the NQF. Information regarding the NQF is available at *http://www.qualityforum.org/Measuring_Performance/Measuring_Performance.aspx*. However, under section 1899B(e)(2)(B) of the Act, the Secretary may specify a measure that has not been so endorsed in the case of a specified area of medical topic determined appropriate by the Secretary for which a feasible or practical measure has not been endorsed, as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary.

Section 1899B(e)(3) of the Act mandates the use of the pre-rulemaking process of section 1890A with respect to the measures specified under sections 1899B(c) and (d) and provides that the Secretary may use expedited procedures, such as ad-hoc reviews, as necessary in the case of a measure required for data submissions during the 1-year period before the applicable specified application date. In addition, section 1899B(e)(3)(B)(ii) of the Act gives the Secretary the option to waive the pre-rulemaking process for a measure if the pre-rulemaking process (including through the use of expedited procedures) would result in the inability of the Secretary to satisfy any deadline specified in section 1899B of the Act with respect to the measure.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making data submitted under the IRF QRP available to the public, and section 1899B(g) of the Act requires public reporting of the performance of individual providers on the quality, resource use, and other measures beginning not later than 2 years after the applicable specified application date. The Secretary must ensure, including through a process consistent with the provisions of section 1886(b)(3)(B)(viii)(VII) of the Act, that each IRF is given the opportunity to review the data and information that is to be made public and to submit corrections prior to the publication or posting of this data. Public reporting of data and information under section 1899B(g)(1) of the Act must be consistent with the provisions of section 1886(j)(7)(E) of the Act. In addition, section 1899B(f)(1) of the Act, as added by the IMPACT Act, requires the Secretary to make confidential feedback reports available to post-acute providers on their performance on the measures required under section 1899B(c)(1) and (d)(1) of the Act, beginning 1 year after the applicable specified application date.

For more information on the statutory history of the IRF QRP, please refer to the FY 2015 IRF PPS final rule (79 FR 45908). More information on the IMPACT Act is available at *https://www.govtrack.us/congress/bills/113/hr4994*.

As previously stated, the IMPACT Act adds new section 1899B of the Act that imposes new data reporting requirements for certain post-acute care (PAC) providers, including IRFs. Sections 1899B(c)(1) and 1899B(d)(1) of the Act collectively require that the Secretary specify quality measures and resource use and other measures with respect to certain domains not later than the specified application date that applies to each measure domain and PAC provider setting. Section 1899B(a)(2)(E) of the Act delineates the specified application dates for each measure domain and PAC provider. The IMPACT Act also amends various sections of the Act, including section 1886(j)(7), to require the Secretary to reduce the otherwise applicable PPS payment to a PAC provider that does not report the new data in a form and manner, and at a time, specified by the Secretary. For IRFs, amended section 1886(j)(7)(A)(i) of the Act would require the Secretary to reduce the payment update for any IRF that does not satisfactorily submit the new required data.

Under the current IRF QRP, the general timeline and sequencing of measure implementation occurs as follows: Specification of measures; proposal and finalization of measures through rulemaking; IRF submission of data on the adopted measures; analysis and processing of the submitted data; notification to IRFs regarding their quality reporting compliance with respect to a particular FY; consideration of any reconsideration requests; and imposition of a payment reduction in a particular FY for failure to satisfactorily submit data with respect to that FY. Any payment reductions that are taken with respect to a FY begin approximately one year after the end of the data submission period for that fiscal year and approximately 2 years after we first adopt the measure.

To the extent that the IMPACT Act could be interpreted to shorten this timeline so as to require us to reduce an IRF's PPS payment for failure to satisfactorily submit data on a measure specified under section 1899B(c)(1) or (d)(1) of the Act beginning with the same FY as the specified application date for that measure, such a timeline would not be feasible. The current timeline previously discussed reflects operational and other practical constraints, including the time needed to specify and adopt valid and reliable measures, collect the data, and determine whether an IRF has complied with our quality reporting requirements. It also takes into consideration our desire to give IRFs enough notice of new data reporting obligations so that they are prepared to timely start reporting the data. Therefore, we intend to follow the same timing and sequence of events for measures specified under section 1899B(c)(1) and (d)(1) of the Act that we currently follow for other measures specified under the IRF QRP. We intend to specify each of these measures no later than the specified application dates set forth in section 1899B(a)(2)(E) of the Act and propose to adopt them consistent with the requirements in the Act and Administrative Procedure Act.

To the extent that we finalize a proposal to adopt a measure for the IRF QRP that satisfies an IMPACT Act measure domain, we intend to require IRFs to report data on the measure for the fiscal year that begins 2 years after the specified application date for that measure. Likewise, we intend to require IRFs to begin reporting any other data specifically required under the IMPACT Act for the FY that begins 2 years after we adopt requirements that would govern the submission of that data.

Comment: Several commenters requested the development of a comprehensive overall plan for implementation across all settings covered by the IMPACT Act. Commenters stated that a comprehensive implementation plan would give PAC providers an opportunity to plan for the potential impacts to their operations, and enable all stakeholders to understand CMS's approach in implementing the IMPACT Act across care settings. Commenters requested that CMS describe an overall strategy for identifying cross-cutting measures, timelines for data collection and timelines for reporting. One commenter requested that CMS plans be communicated as soon as possible and that CMS develop setting-specific communications to facilitate understanding of the IMPACT Act requirements.

Response: We appreciate the request for a comprehensive plan to allow PAC providers to plan for implementation of the IMPACT Act, as well as the need for stakeholder input, the development of reliable, accurate measures, clarity on the level of standardization of items and measures, and avoidance of unnecessary burden on PAC providers. Our intent has been to comply with these principles in the implementation and rollout of QRPs in the various care settings, and we will continue to adhere to these principles as the agency moves forward with implementing IMPACT Act requirements.

In addition, in implementing the IMPACT Act requirements, we will follow the strategy for identifying cross-cutting measures, timelines for data collection and timelines for reporting as outlined in the IMPACT Act. As described above, the IMPACT Act requires us to specify measures that relate to at least five stated quality domains and three stated resource use and other measure domains. The IMPACT Act also outlines timelines for data collection and timelines for reporting. We intend to adopt measures that comply with the IMPACT Act in a manner that is consistent with the sequence we follow in other quality reporting programs. We agree that outreach and education are invaluable, and we intend to continue to provide easy reference information to the public, such as a high-level walk-through of information.

In addition to the Special Open Door Forum (SODF), we hosted on the topic of the IMPACT Act, we have created a post-acute care quality initiatives Web site, which pertains primarily to the IMPACT Act required quality measures/assessment instrument domains, and allows access to a mail box for IMPACT Act provider related questions. We note that the slides used for the SODF are accessible on the IMPACT Act/Post-Acute Care Quality Initiatives Web site *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*, and that they provide high-level background and information, including timelines as they pertain to the assessment domains required under the IMPACT Act. Further, we are in the midst of developing plans for providing additional and ongoing education and outreach (to include timelines) in the near future, as suggested by commenters. For further information and future postings of such documents and information, please continue to check the Post-Acute Care Quality Initiatives Web site (listed above), as well as the IRF Quality Reporting Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html?redirect=/IRF-Quality-Reporting/*.

We also refer the public to the following Web site for updates: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*.

Comment: Several commenters asked for more opportunities for stakeholder input into various aspects of the measure development process. The commenters requested opportunities to provide input early and throughout the measure development process. One commenter requested stakeholder input on and reaction to an IMPACT Act implementation plan. Two commenters requested that CMS hold meetings with PAC providers on a frequent and regular basis to provide feedback on implementation and resolve any perceived inconsistencies in the FY 2016 IRF PPS proposed rule. One commenter specifically noted an appreciation for the listening sessions held by CMS thus far, yet requested opportunities for more extensive collaboration. Finally, one commenter suggested that CMS prioritize patient and their families as important stakeholders in the development and implementation of quality of care measures, particularly with regard to measures assessing the transfer of health information and patient care preferences.

Response: We plan to implement the IMPACT Act in a manner that is transparent and includes input from and collaboration with the PAC provider community. It is of the utmost importance to us to continue to engage stakeholders, including patients and their families, throughout the measure development process through participation in technical expert panels (TEPs), listening sessions, and public comments. We have provided multiple opportunities for stakeholder input, which include the following activities to date: Our measure development contractor(s) convened a TEP that included stakeholder experts on February 3, 2015; we convened listening sessions on February 10 and March 24, 2015; we heard stakeholder input during the February 9th 2015 ad hoc MAP meeting convened for the sole purpose of reviewing measures we had developed to comply with the IMPACT Act. Additionally, we implemented a public mail box for the submission of comments in January 2015, *PACQualityInitiative@cms.hhs.gov*, which is listed on our post-acute care quality initiatives Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*, and we held a Special Open Door Forum to seek input on the measures on February 25, 2015. The slides from the Special Open Door Forum are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*.

Comment: One commenter noted that it would be important for CMS to include in the FY 2016 IRF PPS final rule the aspects of IMPACT Act implementation relating to the timeline and sequencing of standardization of patient assessment data. One commenter suggested that CMS move quickly to reduce the burden of reporting duplicative data and to allow for better cross-setting comparisons, as well as the evolution of better quality measures.

Response: We believe that the commenter is requesting information

pertaining to specific milestones related to our efforts to meet the statutory timelines which are specified within the IMPACT Act. We intend to use the rulemaking process to establish and communicate timelines for implementation. In addition, we will continue to provide ongoing education and outreach to stakeholders through Special Open Door Forums and periodic training sessions. We will also provide information about the measures at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*.

Also, we have made additional details regarding standardization of patient assessment data and the cross-setting measure specifications available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information.html*. We plan to continue to update this information as additional measures are specified.

Comment: Several commenters supported the use of NQF-endorsed measures, while one commenter expressed concern that two of the measures proposed for FY 2018 lacked NQF endorsement. A few commenters requested that CMS only use measures that have been endorsed by NQF. Some commenters suggested that CMS use only NQF-endorsed measures that were specified for the exact setting in which they would be used and that were fully supported by the Measures Application Partnership (MAP).

Response: We will continue to propose and adopt measures that have been appropriately tested and, when possible, that have been endorsed by the NQF. However, when this is not feasible, and where, as here, due consideration has been given to measures that are endorsed or adopted by a consensus organization, the exception authority given to the Secretary in sections 1899B(e)(2)(B) and 1886(j)(7)(D)(ii) of the Act permit the Secretary to adopt a measure for the IRF QRP that is not NQF-endorsed. Additionally, when selecting cross-setting measures and assessment items, we take into consideration the variations in patient populations treated in different PAC settings. Finally, we appreciate the comment regarding using only measures that are fully supported by the MAP. We recognize and support the importance of this multi-stakeholder partnership that provides invaluable feedback to the federal government on the selection of performance measures and consider the MAP's recommendations regarding all quality measures under consideration for use in the IRF QRP.

Comment: Several commenters identified the need to have as much standardization of measures and data collection across PAC settings as possible, while recognizing that some variations among settings may be necessary. Some commenters cautioned that complete standardization among PAC settings may not be possible and suggested that CMS consider standardization around topics or domains but allow different settings to use assessment instruments that are most appropriate for the patient populations assessed.

Response: We agree that standardization is important, but would like to clarify that while the IMPACT Act requires that certain data be standardized in order to allow for interoperability and the exchange and use of such data among and by PAC providers, there will be instances in which providers in some PAC settings may need somewhat different items that are unique to their patient population. We will, however, ensure that a core set of standardized items is collected across each PAC setting.

Comment: Several commenters requested that CMS consider minimizing the burden for PAC providers when available and avoid duplication in data collection efforts.

Response: We appreciate the importance of avoiding undue burden and will continue to evaluate and consider any burden the IRF QRP places on IRFs.

B. General Considerations Used for Selection of Quality, Resource Use, and Other Measures for the IRF QRP

We refer readers to the FY 2015 IRF PPS final rule (79 FR 45911) for a detailed discussion of the considerations we use for the selection of IRF QRP quality measures. In this final rule, we apply the same considerations to the selection of quality, resource use, and other measures required under section 1899B of the Act for the IRF QRP, in addition to the considerations discussed below.

The quality measures we are adopting address the measure domains that the Secretary is required to specify under sections 1899B(c)(1) and (d)(1) of the Act. The totality of the measures considered to meet the requirements of the IMPACT Act will evolve, and additional measures will be proposed over time as they become available.

To meet the first specified application date applicable to IRFs under section 1899B(a)(2)(E) of the Act, which is October 1, 2016, we have focused on measures that:

- Correspond to a measure domain in sections 1899B(c)(1) or (d)(1) of the Act and are setting-agnostic: For example, falls with major injury and the incidence of pressure ulcers;
- Are currently adopted for 1 or more of our PAC quality reporting programs, are already either NQF-endorsed and in use or finalized for use, or already previewed by the Measure Applications Partnership (MAP) with support;
- Minimize added burden on IRFs;
- Minimize or avoid, to the extent feasible, revisions to the existing items in assessment tools currently in use (for example, the IRF–PAI); and
- Where possible, the avoidance of duplication of existing assessment items.

In our selection and specification of measures, we employ a transparent process in which we seek input from stakeholders and national experts and engage in a process that allows for pre-rulemaking input on each measure, as required by section 1890A of the Act. This process is based on a private-public partnership, and it occurs via the MAP. The MAP is composed of multi-stakeholder groups convened by the NQF, our current contractor under section 1890 of the Act, to provide input on the selection of quality and efficiency measures described in section 1890(b)(7)(B) of the Act. The NQF must convene these stakeholders and provide us with the stakeholders' input on the selection of such measures. We, in turn, must take this input into consideration in selecting such measures. In addition, the Secretary must make available to the public by December 1 of each year a list of such measures that the Secretary is considering under Title XVIII of the Act.

As discussed in section IX.A. of this final rule, section 1899B(e)(3) of the Act provides that the pre-rulemaking process required by section 1890A of the Act applies to the measures required under section 1899B of the Act, subject to certain exceptions for expedited procedures or, alternatively, waiver of section 1890A.

We initiated an ad hoc MAP process for the review of the quality measures under consideration for proposal, in preparation for adoption of those quality measures into the IRF QRP that are required by the IMPACT Act, and that must be implemented by October 1, 2016. The List of Measures under Consideration (MUC List) under the IMPACT Act was made public on February 5, 2015. Under the IMPACT Act, these measures must be standardized so they can be applied across PAC settings and must

correspond to measure domains specified in sections 1899B(c)(1) and (d)(1) of the Act. The MAP reviewed the IMPACT Act-related quality measures adopted in this final rule for the IRF QRP, in light of their intended cross-setting uses. We refer to sections IX.F. and IX.G. of this final rule for more information on the MAP's recommendations. The MAP's final report, MAP Off-Cycle Deliberations 2015: Measures under Consideration to Implement Provisions of the IMPACT Act: Final Report is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*.

As discussed in section IX.A. of this final rule, section 1899B(j) of the Act requires that we allow for stakeholder input, such as through town halls, open door forums, and mailbox submissions, before the initial rulemaking process to implement section 1899B of the Act. To meet this requirement, we provided the following opportunities for stakeholder input: Our measure development contractor(s) convened a TEP that included stakeholder experts and patient representatives on February 3, 2015; we provided 2 separate listening sessions on February 10 and March 24, 2015; we sought public input during the February 9th 2015 ad hoc MAP process provided for the sole purpose of reviewing the measures adopted in response to the IMPACT Act. Additionally, we implemented a public mail box for the submission of comments in January 2015, *PACQualityInitiative@cms.hhs.gov*, which is listed on our post-acute care quality initiatives Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*, and held a National Stakeholder Special Open Door Forum to seek input on the measures on February 25, 2015. The slides from the SODF are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*.

For measures that do not have NQF endorsement, or which are not fully supported by the MAP for the IRF QRP, we are adopting these measures for the IRF QRP for the purposes of satisfying the measure domains required under the IMPACT Act that most closely align with the national priorities identified in the National Quality Strategy (*http://www.ahrq.gov/workingforquality/*) and for which the MAP supports the measure concept. Further discussion as to the importance and high-priority status of these measures in the IRF setting is included under each quality measure proposal in this final rule. In addition, for measures not endorsed by the NQF, we have sought, to the extent practicable, to adopt measures that have been endorsed or adopted by a national consensus organization, recommended by multi-stakeholder organizations, and/or developed with the input of providers, purchasers/payers, and other stakeholders.

C. Policy for Retention of IRF QRP Measures Adopted for Previous Payment Determinations

In the CY 2013 Hospital Outpatient Prospective Payment System/Ambulatory Surgical Center (OPPS/ASC) Payment Systems and Quality Reporting Programs final rule (77 FR 68500 through 68507), we adopted a policy that would allow any quality measure adopted for use in the IRF QRP to remain in effect until the measure was actively removed, suspended, or replaced. For the purpose of streamlining the rulemaking process, when we initially adopt a measure for the IRF QRP for a payment determination, this measure will also be adopted for all subsequent years or until we propose to remove, suspend, or replace the measure. For further information on how measures are considered for removal, suspension, or replacement, please refer to the CY 2013 OPPS/ASC final rule (77 FR 68500 through 68507).

We did not propose any changes to this policy for retaining IRF QRP measures adopted for previous payment determinations.

D. Policy for Adopting Changes to IRF QRP Measures

In the CY 2013 OPPS/ASC final rule (77 FR 68500 through 68507), we adopted a subregulatory process to incorporate NQF updates to IRF quality measure specifications that do not substantively change the nature of the measure. Substantive changes will be proposed and finalized through rulemaking. Regarding what constitutes a substantive versus a nonsubstantive change, we expect to make this determination on a measure-by-measure basis. Examples of such nonsubstantive changes might include updated diagnosis or procedure codes; medication updates for categories of medications, broadening of age ranges, and changes to exclusions for a measure. The subregulatory process for nonsubstantive changes will include revision of the IRF PAI Manual and posting of updates at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

Examples of changes that we might consider to be substantive would be those in which the changes are so significant that the measure is no longer the same measure, or when a standard of performance assessed by a measure becomes more stringent, such as changes in acceptable timing of medication, procedure/process, test administration, or expansion of the measure to a new setting.

We did not propose any changes to this policy for adopting changes to IRF QRP measures. However, we received a public comment, which is discussed below.

Comment: One commenter recommended that CMS more clearly define the sub-regulatory process criteria for determining what constitutes a non-substantive change, and stated that they appreciated the need for a sub-regulatory process in order for CMS to have some flexibility in updating measures that need non-substantive changes. This commenter also recommended that CMS consider any changes to numerator definitions for measures and not just denominator changes (for example, exclusions) as substantive.

Response: We will take these recommendations into account as we further examine what constitutes a substantive versus a non-substantive change. We will propose any changes to our policy for adopting changes to IRF QRP measures in future rulemaking.

E. Quality Measures Previously Finalized for and Currently Used in the IRF QRP

1. Measures Finalized in the FY 2012 IRF PPS Final Rule

In the FY 2012 IRF PPS final rule (76 FR 47874 through 47878), we adopted applications of 2 quality measures for use in the first data reporting cycle of the IRF QRP: (1) An application of Catheter-Associated Urinary Tract Infection (CAUTI) for Intensive Care Unit Patients (NQF #0138); and (2) an application of Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). We adopted applications of these 2 measures because neither of them, at the time, was endorsed by the NQF for the IRF setting. We also discussed our plans to propose a 30-Day All-Cause Risk-Standardized Post-IRF Discharge Hospital Readmission Measure.

2. Measures Finalized in the CY 2013 OPPS/ASC Final Rule

In the CY 2013 OPPS/ASC final rule (77 FR 68500 through 68507), we adopted the following measures:

a. National Healthcare Safety Network (NHSN) Catheter Associated Urinary Tract Infection (CAUTI) Outcome Measure (NQF #0138)

In the CY 2013 OPPS/ASC final rule, we adopted the NHSN CAUTI Outcome Measure (NQF #0138) (replacing an application of this measure that we initially adopted in the FY 2012 IRF PPS (76 FR 47874 through 47886)). Data submission for the NQF-endorsed measure applies to the FY 2015 adjustments to the IRF PPS annual increase factor and all subsequent annual increase factors (77 FR 68504 through 68505). Additional information about this measure can be found at *http://www.qualityforum.org/QPS/0138*. IRFs submit their CAUTI measure data to the Centers for Disease Control and Prevention (CDC) NHSN. Details regarding submission of IRF CAUTI data to the NHSN can be found at the NHSN Web site at *http://www.cdc.gov/nhsn/inpatient-rehab/index.html*.

b. Application of Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678)

In the CY 2013 OPPS/ASC final rule (77 FR 68500 through 68507), we adopted a non-risk-adjusted application of this measure.

3. Measures Finalized in the FY 2014 IRF/PPS Final Rule

For the FY 2016 adjustments to the IRF PPS annual increase factor, we finalized the adoption of one additional measure: Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) (78 FR 47902 through 47921). In addition, for the FY 2017 adjustments to the IRF PPS annual increase factor, we finalized the adoption of 3 additional quality measures: (1) All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from Inpatient Rehabilitation Facilities; (2) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680); and (3) the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). In the FY 2014 IRF PPS final rule (78 FR 47912 through 47916), we also adopted a revised version of the IRF–PAI (Version 1.2), which providers began using as of October 1, 2014, for the FY 2017 adjustments to the IRF PPS annual increase factor and subsequent year annual increase factors.

a. Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431)

In the FY 2014 IRF PPS final rule (78 FR 47905 through 47906), we adopted the CDC-developed Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) quality measure that is collected by the CDC via the NHSN. We finalized that the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure have its own reporting period to align with the influenza vaccination season, which is defined by the CDC as October 1 (or when the vaccine becomes available) through March 31. We further finalized that IRFs submit their data for this measure to the NHSN (*http://www.cdc.gov/nhsn/*). We also finalized that for the FY 2016 adjustments to the IRF PPS annual increase factor, data collection will cover the period from October 1, 2014 (or when the vaccine becomes available) through March 31, 2015.

Details related to the use of the NHSN for data submission and information on definitions, numerator data, denominator data, data analyses, and measure specifications for the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure can be found at *http://www.cdc.gov/nhsn/inpatient-rehab/hcp-vacc/index.html* and at *http://www.qualityforum.org/QPS/0431*. While IRFs can enter information in NHSN at any point during the influenza vaccination season for the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure, data submission is only required once per influenza vaccination season. We finalized that the final deadline for data submission associated with this quality measure is May 15th of each year.

b. All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge From Inpatient Rehabilitation Facilities (NQF #2502)

In the FY 2014 IRF PPS final rule (78 FR 47906 through 47910), we adopted an All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs. This quality measure estimates the risk-standardized rate of unplanned, all-cause hospital readmissions for cases discharged from an IRF who were readmitted to a short-stay acute care hospital or LTCH, within 30 days of an IRF discharge. We noted that this is a claims-based measure that will not require reporting of new data by IRFs and thus will not be used to determine IRF reporting compliance for the IRF QRP.

c. Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680)

In the FY 2014 IRF PPS final rule (78 FR 47906 through 47911), we adopted the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680) measure for the IRF QRP.

We added the data elements needed for this measure to the ''Quality Indicator'' section of the IRF–PAI Version 1.2, which became effective on October 1, 2014. These data elements are harmonized with data elements (O0250: Influenza Vaccination Status) from the Minimum Data Set (MDS) 3.0 and the LTCH CARE Data Set Version 2.01, and the specifications and data elements for this measure are available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html* and at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

For purposes of this quality measure, the influenza vaccination season is October 1 (or when the vaccine becomes available) through March 31 each year. We also finalized that for the FY 2017 adjustments to the IRF PPS annual increase factor, data collection covers the period from October 1, 2014 (or when the vaccine becomes available) through March 31, 2015.

The measure specifications for this measure can be found on the NQF and CMS Web sites at *http://www.qualityforum.org/QPS/0680* and at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

d. Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678)

In the FY 2014 IRF PPS final rule (78 FR 47911 through 47912), we adopted the NQF-endorsed version of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), with data collection beginning October 1, 2014, using the IRF–PAI Version 1.2, for quality reporting affecting the FY 2017 adjustments to the IRF PPS annual increase factor and subsequent year annual increase factors. The measure specifications for this measure can be found on the NQF and CMS Web sites

at *http://www.qualityforum.org/QPS/0678* and at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

4. Measures Finalized in the FY 2015 IRF–PPS Final Rule

In the FY 2015 IRF–PPS final rule, we adopted 2 additional quality measures:

a. National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset Methicillin-Resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716)

In the FY 2015 IRF PPS final rule (79 FR 45911 through 45913), we adopted the NHSN Facility-Wide Inpatient Hospital-Onset MRSA Bacteremia Outcome Measure (NQF #1716), a measure of hospital-onset unique blood source MRSA laboratory-identified events among all patients in the inpatient rehabilitation facility. This measure was developed by the CDC and is NQF-endorsed. We finalized that data submission would start on January 1, 2015, and that adjustments to the IRF PPS annual increase factor would begin with FY 2017. Data are submitted via the CDC's NHSN. Details related to the procedures for using the NHSN for data submission and information on definitions, numerator data, denominator data, data analyses, and measure specifications for the NHSN Facility-Wide Inpatient Hospital-Onset MRSA Bacteremia Outcome Measure (NQF #1716) can be found at *http://www.qualityforum.org/QPS/1716* and *http://www.cdc.gov/nhsn/inpatient-rehab/mdro-cdi/index.html*.

b. National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset Clostridium Difficile Infection (CDI) Outcome Measure (NQF #1717)

In the FY 2015 IRF PPS final rule (79 FR 45913 through 45914), we adopted the NHSN Facility-Wide Inpatient Hospital-Onset CDI Outcome Measure (NQF #1717), a measure of hospital-onset CDI laboratory-identified events among all inpatients in the facility. This measure was developed by the CDC and is NQF-endorsed. We finalized that data would be submitted starting January 1, 2015, and that adjustments to the IRF PPS annual increase factor would begin with FY 2017. Providers will use the CDC/NHSN data collection and submission framework for reporting of the NHSN Facility-Wide Inpatient Hospital-Onset CDI Outcome Measure (NQF #1717). Details related to the procedures for using the NHSN for data submission and information on definitions, numerator data, denominator data, data analyses, and measure specifications for the NHSN Facility-Wide Inpatient Hospital-Onset CDI Outcome Measure (NQF #1717) can be found at *http://www.qualityforum.org/QPS/1717* and *http://www.cdc.gov/nhsn/inpatient-rehab/mdro-cdi/index.html*.

TABLE 18—QUALITY MEASURES PREVIOUSLY FINALIZED FOR AND CURRENTLY USED IN THE IRF QUALITY REPORTING PROGRAM

NQF measure ID	Quality measure title	Data submission mechanism
NQF #0138	National Health Safety Network (NHSN) Catheter-Associated Urinary Tract Infection (CAUTI) Outcome Measure.	CDC NHSN.
NQF #0431	Influenza Vaccination Coverage among Healthcare Personnel.	CDC NHSN.
NQF #0680	Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay).	IRF–PAI.
NQF #0678	Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay).	IRF–PAI.
NQF #2502	All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from Inpatient Rehabilitation Facilities*.	Claims-based.
NQF #1716	National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset Methicillin-Resistant *Staphylococcus aureus* (MRSA) Bacteremia Outcome Measure.	CDC NHSN.
NQF #1717	National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset *Clostridium difficile* Infection (CDI) Outcome Measure.	CDC NHSN.

* Claims-based measure; no additional data submission required by IRFs.

5. Continuation of Previously Adopted IRF QRP Quality Measures for the FY 2018 Payment Determination and Subsequent Years

For the FY 2018 adjustments to the IRF PPS annual increase factor, we are retaining the previously discussed measures: (1) NHSN CAUTI Outcome Measure (NQF #0138); (2) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680); (3) Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678); (4) All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502); (5) Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431); (6) NHSN Facility-Wide Inpatient Hospital-Onset MRSA Bacteremia Outcome Measure (NQF #1716), (7) and NHSN Facility-Wide Inpatient Hospital-Onset *CDI* Outcome Measure (NQF #1717) quality measures.

We received several comments on Quality Measures Previously Finalized for and Currently Used in the IRF QRP, which are summarized below.

Comment: MedPAC commented in support of outcome measures, such as avoiding preventable readmissions and hospital-acquired infections in the Quality Reporting Programs.

Response: We appreciate MedPAC for their support of outcome measures such as hospital readmissions and episodes of healthcare-acquired infections. We believe that outcomes-based measures are important in ascertaining quality and intend to continue to implement outcomes-based measures throughout

the life of the IRF QRP. For example, we proposed IRF functional outcomes as part of this rulemaking cycle and we intend to propose outcomes-based measures to satisfy the IMPACT Act domains, such as Discharge to Community and Potentially Preventable Hospital Readmissions.

Comment: Two commenters did not support the measure Percentage of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680), stating that it is not an outcome measure, not related to the specific rehabilitative care provided to the patient, and that the majority of patients admitted to the IRFs have already been vaccinated. One commenter did not support the NHSN Facility-Wide Inpatient Hospital-Onset Methicillin-Resistant Staphylococcus Aureus Bacteremia Outcome Measure (NQF #1716) or the NHSN Facility-Wide Inpatient Hospital-Onset Clostridium Difficile Infection Outcome Measure (NQF #1717), stating that they are not related to the specific rehabilitative care provided to the patient.

Response: We thank the commenters for their comments. While the main focus of IRFs is improving the functional status of the patient, it is not the sole focus. We maintain that prevention and tracking of infectious disease is the responsibility of every care setting, regardless of where they fall within the continuum of care. For a broader discussion on the importance of each of the above listed measures, we refer you to the FY 2015 IRF PPS Final Rule (79 FR 45872).

Comment: One commenter had concerns about measures that are collected via the CDC's NHSN system, noting that more data is collected through NHSN than is required for the quality measure, and that those reporting processes are not subject to rulemaking and may add additional reporting burdens.

Response: When we propose to adopt a quality measure that is collected and submitted to CMS via the CDC's NHSN, we make certain that the proposed rule provides a detailed description of the measure, and we address and respond to public comments on the reporting burden related to the measure. In addition, we make certain that the measure specifications and protocols for the measure are posted on the CDC's NHSN Web site, the CMS Web site, and the NQF Web site, as applicable, and available for public scrutiny and comment, including details related to the procedures for using NHSN for data submission and information on definitions, numerator data, denominator data, data analysis, and measure specifications for the proposed measure. Because of this, we believe that the substantive aspects of the reporting processes are subject to rulemaking.

Comment: Two commenters supported the current healthcare-associated infection (HAI) measures, reported through the CDC's NHSN.

Response: We thank the commenters for their support; we have considered all public comments submitted on the healthcare-associated infection measures previously finalized. The measures, as listed above, will continue to be part of the IRF QRP unless we propose to remove them through future rulemaking.

F. Quality Measures Previously Adopted for IRF QRP for the FY 2018 Payment Determination and Subsequent Years

For the FY 2018 payment determination and subsequent years, we proposed to adopt 2 quality measures to reflect NQF endorsement or to meet the requirements of the IMPACT Act: (1) All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502); and (2) an application of Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (NQF #0678). These quality measures are as follows:

1. Quality Measure To Reflect NQF Endorsement: All-Cause Unplanned Readmission Measure for 30 Days Post Discharge From IRFs (NQF #2502)

The All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) measure was adopted for use in the IRF QRP in the FY 2014 IRF PPS final rule (78 FR 47906 through 47910). We proposed to adopt this measure for the FY 2018 payment determination and subsequent years to reflect that it is NQF-endorsed for use in the IRF setting as of December 2014. For current specifications of this measure, please visit *http://www.qualityforum.org/QPS/2502*.

As adopted through the FY 2014 IRF PPS final rule, All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) is a Medicare Fee-For-Service (FFS) claims-based measure. IRFs would not be required to report any additional data to us because we would calculate this measure based on claims data that are already reported to the Medicare program for payment purposes. We believe there would be no additional data collection burden on providers resulting from our implementation of All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) as part of the IRF QRP. In the FY 2014 IRF PPS final rule, we stated that we would provide initial feedback to providers, prior to public reporting of this measure, based on Medicare FFS claims data from CY 2013 and CY 2014.

The description of this measure provided in the FY 2014 IRF PPS final rule (78 FR 47906 through 47910) noted this measure was the ratio of the number of risk-adjusted predicted unplanned readmissions for each individual IRF to the average number of risk-adjusted predicted unplanned readmissions for the same patients treated at the average IRF. This ratio is referred to as the standardized risk ratio (SRR). However, the measure specifications compute the risk-standardized readmission rate (RSRR) for this measure. The RSRR is the SRR multiplied by the overall national raw readmission rate for all IRF stays. The outcome is expressed as a percentage rate rather than a ratio.

This measure, which harmonizes with the Hospital-Wide All-Cause Readmission Measure (NQF #1789) currently in use in the Hospital Inpatient Quality Reporting (HIQR) Program, continues to use the CMS Planned Readmission Algorithm as the main component for identifying planned readmissions. This algorithm was refined in the FY 2015 IPPS/LTCH PPS final rule (79 FR 50211 through 50216). The All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) measure for the IRF QRP will utilize the most recently updated version of the algorithm. A complete description of the CMS Planned Readmission Algorithm, which includes lists of planned diagnoses and procedures, can be found on CMS Web site (*http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html*). The additional post-acute care planned readmission procedures specified for All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) remain the same as when first adopted through FY 2014 IRF PPS final rule. Documentation on the additional post-acute care planned readmissions for this measure is available at *http://www.qualityforum.org/QPS/2502*. *http://www.qualityforum.org/ProjectMeasures.aspx?projectID=73619*.

We sought public comments on our proposal to adopt the NQF-endorsed version of All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) for

the IRF QRP for the FY 2018 payment determination and subsequent years. The responses to public comments on this measure are discussed in this section of the final rule.

Comment: Several commenters supported the adoption of this measure. One commenter noted that many hospital readmissions are preventable and that readmissions are costly and associated with increased morbidity and mortality. Another commenter supported the measure proposal, noting that NQF endorsement by a consensus-building entity is an important prerequisite designed to ensure the measure has been appropriately reviewed by stakeholders.

Response: We agree that readmissions are preventable and associated with increased morbidity, mortality, and costs. We also appreciate the commenters' support on the measure's NQF endorsement.

Comment: Several commenters expressed concern over this measure's use of claims data which are not accessible to IRFs in real time for quality improvement. Commenters noted concerns over their ability to track patients' post-IRF discharge to know whether patients were readmitted and the reason for the readmission. These commenters noted that a facility's readmission rate alone does not provide them with the specific patient information they would need for quality improvement and suggested that CMS share data with IRFs. Specifically, commenters indicated that they would need information on whether a patient was readmitted, as well as information on demographics and diagnosis. One commenter who also noted that the claims data are outdated and not reflective of IRFs' more recent quality improvement efforts suggested that CMS work with the industry to develop a standardized mechanism to track patients after IRF discharge in ''real time.''

Response: We appreciate the commenters' concern pertaining to quality improvement and the readmissions of patients following an IRF discharge. We support the intent to seek information that will drive improved quality; however, we are currently unable to provide information pertaining to a patient's readmission episode. As part of their quality improvement and care coordination efforts, IRFs are encouraged to monitor hospital readmissions and follow up with patients post-discharge. Although this measure will not provide specific information at the patient level on a real-time basis, we believe that IRFs will be able to monitor their overall hospital readmission rates, assess their performance, and improve quality.

Comment: Several commenters expressed concern over the lack of risk adjustment for sociodemographic status factors among IRF patients, such as community factors including access to primary care, medications, and appropriate food. One commenter recommended using proxy data on these factors such as Census-derived data on income and the proportion of facilities' patients that are dually eligible for Medicare and Medicaid.

Response: While we appreciate these comments and the importance of the role that sociodemographic status plays in the care of patients, we continue to have concerns about holding providers to different standards for the outcomes of their patients of low sociodemographic status because we do not want to mask potential disparities or minimize incentives to improve the outcomes of disadvantaged populations. We routinely monitor the impact of sociodemographic status on facilities' results on our measures.

NQF is currently undertaking a 2-year trial period in which new measures and measures undergoing maintenance reviews will be assessed to determine if risk-adjusting for sociodemographic factors is appropriate for each measure. For 2 years, NQF will conduct a trial of a temporary policy change that will allow inclusion of sociodemographic factors in the risk-adjustment approach for some performance measures. At the conclusion of the trial, NQF will determine whether to make this policy change permanent. Measure developers must submit information such as analyses and interpretations as well as performance scores with and without sociodemographic factors in the risk adjustment model.

Furthermore, the HHS Office of the Assistant Secretary for Planning and Evaluation (ASPE) is conducting research to examine the impact of socioeconomic status on quality measures, resource use, and other measures under the Medicare program as directed by the IMPACT Act in section (2)(d)(1). We will closely examine the findings of these reports and related Secretarial recommendations and consider how they apply to our quality programs at such time as they are available.

Comment: One commenter expressed concern that the measure does not adequately adjust for differences in functional status.

Response: To clarify, this measure does adjust for differences in functional status by including risk adjusters based on the IRF PPS case mix groups, which incorporate patients' motor function, and in some cases cognitive function, at admission.

Comment: One commenter noted that there is inconsistency in reporting periods with the pressure ulcer and CAUTI measures; specifically, the reporting periods for the pressure ulcer and CAUTI measures is calendar year 2015 whereas the readmission measure is based on calendar years 2013–2014.

Response: With regard to the inconsistency of reporting periods with other proposed IRF QRP measures, we appreciate this feedback. To clarify, the All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502) was previously adopted in the FY 2014 IRF PPS final rule (78 FR 47906 through 47910) as part of the IRF QRP and was proposed in the FY 2016 IRF PPS proposed rule (80 FR 23373) to reflect NQF endorsement. The dates associated with this measure were based on data analysis and have not changed. The readmissions measure is a claims-based measure, and we therefore must rely on the submission of claims to CMS, and the time it takes to ensure all associated claims have been submitted to CMS. The other IRF QRP required measures are simply based on the calendar year, with quarterly submission deadlines. There is not a way to align the two types of measures, as claims for the same timeframe take an additional 6 to 9 months to mature.

Comment: Two commenters noted that this measure does not harmonize with hospital readmission measures used in other settings, such as the SNF measure (NQF #2510) and the LTCH measure (NQF #2512). Specifically, one commenter noted that the SNF measure is based on 12 months of data and the IRF measure is based on 24 months of data.

Response: We appreciate this comment regarding alignment of the PAC readmission measures. Though this measure is not identical to the hospital readmission measures being proposed for SNFs and LTCHs, it was developed to harmonize with those measures. As noted in the SNF PPS proposed rule (80 FR 22044 at 22059 through 22061), the SNF readmission measure (NQF #2510) is based on 12 months of data as this ensures an accurate sample size for calculating the RSRR. However, 24 months of data were needed in order to ensure sufficient sample sizes to reliably calculate this measure for IRFs due to the substantially lower number of IRF stays in comparison with SNF stays.

Comment: One commenter expressed concern that PAC facilities should not be penalized for readmissions that are

unrelated to the patient's initial reason for admission.

Response: In the FY 2016 IRF PPS proposed rule (80 FR 23373), we proposed a measure of all-cause unplanned readmissions for the IRF QRP. The issue of all-cause readmissions as opposed to a more focused set of readmission types has been raised in other contexts such as the Hospital-Wide Readmission Inpatient Quality Reporting (HWR IQR) measure finalized in the FY 2012 IPPS/LTCH PPS final rule (76 FR 51476). As we explained in the FY 2014 IRF PPS final rule (78 FR 47906 through 47910), discussions with technical experts have led us to prefer using an all-cause measure rather than a condition-specific readmissions measure. A measure of avoidable or related readmissions is possible when the population being measured is narrowly defined and certain complications are being targeted. For broader measures, a narrow set of readmission types is not practical. In addition, readmissions may be clinically related even if they are not diagnostically related. A patient may have comorbid conditions that are unrelated to the reason for rehabilitation. If not properly dealt with in discharge planning, a readmission for such a condition may become more likely. One of the primary purposes of a readmission measure is to encourage improved transitions at discharge, a choice among discharge destinations and care coordination. A readmission can occur that is less related to the primary condition being treated in the IRF than to the coordination of care post-discharge. That said, we have chosen to reduce the all-cause readmission set by excluding readmissions that are normally for planned or expected diagnosis and procedures. We augmented the research for the Hospital IQR set of planned readmissions for the IRF setting with recommendations and input from a TEP in the field of post-acute care (including IRFs). In the case where the readmission is due to a random event, such as a car accident, we expect these events to be randomly distributed across IRFs.

Comment: One commenter did not support a potentially preventable hospital readmission rate because this would be based on data not accessible to all IRFs and that there are factors outside the control of an IRF that result in readmission that could not be predicted during the IRF stay.

Response: We appreciate this feedback; however, we would like to clarify that the All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502) was not proposed to meet the requirements of the IMPACT Act and is not a measure of potentially preventable hospital readmissions. This measure was adopted for use in the IRF QRP in the FY 2014 IRF PPS final rule (78 FR 47906 through 47910), and was proposed in the FY 2016 IRF PPS final rule (80 FR 23373) to reflect NQF endorsement for the IRF setting.

Final Decision: Having carefully considered the comments we received on the NQF-endorsed version of All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502), we are finalizing the adoption of this measure for use in the IRF QRP for the FY 2018 payment determination and subsequent years.

2. Quality Measure Addressing the Domain of Skin Integrity and Changes in Skin Integrity: Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678)

Section 1899B(c)(1) of the Act directs the Secretary to specify quality measures on which PAC providers are required under the applicable reporting provisions to submit standardized patient assessment data and other necessary data specified by the Secretary to 5 quality domains, one of which is skin integrity and changes in skin integrity. The specified application date by which the Secretary must specify quality measures to address this domain for IRFs, SNFs, and LTCHs is October 1, 2016, and for HHAs is January 1, 2017. To satisfy these requirements, we proposed to adopt the measure Percent of Residents or Patients with Pressure Ulcers that are New or Worsened (Short-Stay) (NQF #0678) that we have already adopted for the IRF QRP as a cross-setting quality measure that satisfies the domain of skin integrity and changes in skin integrity (80 FR 23373 through 23375). The reporting of data for this measure would affect the payment determination for FY 2018 and subsequent years. For the IRF setting, the measure assesses the percent of patients with stage 2 through stage 4 pressure ulcers that are new or worsened since admission.

As described in the FY 2012 IRF PPS final rule (76 FR 47876 through 47878), pressure ulcers are high-cost adverse events and are an important measure of quality. For information on the history and rationale for the relevance, importance, and applicability of this measure in the IRF QRP, we refer readers to the FY 2012 IRF PPS final rule and the FY 2014 IRF PPS final rule (78 FR 47911 through 47912). Details regarding the specifications for this measure are available on the NQF Web site at *http://www.qualityforum.org/QPS/0678*.

The IMPACT Act requires the implementation of quality measures and resource use and other measures that are standardized in order to enable interoperability across PAC settings, as well as the reporting of standardized patient assessment data and other necessary data specified by the Secretary. This requirement is in line with the NQF Steering Committee report, which stated: ''to understand the impact of pressure ulcers across providers, quality measures addressing prevention, incidence, and prevalence of pressure ulcers must be harmonized and aligned.'' [4] The Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) measure is NQF-endorsed for the IRF setting and has been successfully implemented using a harmonized set of data elements in three PAC settings (IRF, LTCH and SNF). As discussed in section IX.E. of this final rule, an application of this measure was adopted for the IRF QRP in the FY 2012 IRF PPS final rule (76 FR 47876 through 47878) for the FY 2014 payment determination and subsequent years, and the current NQF-endorsed version of the measure was finalized in the FY 2014 IRF PPS final rule (78 FR 47911 through 47912) for the FY 2017 payment determination and subsequent years. The measure has been in use in the IRF QRP since October 1, 2012, and currently, IRFs are submitting data for this measure using the IRF–PAI.

The Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) measure was adopted for use in the LTCH QRP in the FY 2012 IPPS/LTCH PPS final rule (76 FR 51748 through 51756) for the FY 2014 payment determination and subsequent years, and has been successfully submitted by LTCHs using the LTCH Continuity Assessment Record and Evaluation (CARE) Data Set since October 2012. It has also been implemented in CMS' Nursing Home Quality Initiative, using the MDS 3.0 since 2011, and is currently reported on CMS' Nursing Home Compare at *http://www.medicare.gov/nursinghomecompare/search.html*.

A TEP convened by our measure development contractor in February 2015 provided input on the measure specifications and the feasibility and

[4] National Quality Forum. National voluntary consensus standards for developing a framework for measuring quality for prevention and management of pressure ulcers. April 2008. Available from *http://www.qualityforum.org/Projects/Pressure_Ulcers.aspx*.>

clinical appropriateness of implementing the measure as a cross-setting quality measure under the IMPACT Act of 2014, for use across PAC settings, including the IRF setting. The TEP supported the implementation of this measure across PAC providers and also supported our efforts to standardize this measure for cross-provider development. Additionally, the MAP, convened by the NQF, met on February 9, 2015 and provided input to CMS. The MAP supported the use of Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) in the IRF QRP as a cross-setting quality measure to be specified in accordance with the IMPACT Act of 2014. MAP noted that this measure addresses one of its previously identified PAC/LTC core concepts as well as an IMPACT Act domain. More information about the MAP's recommendations for this measure is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*.

We proposed that that data collection for Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) would continue to occur through the quality indicator section of the IRF–PAI submitted through the Quality Improvement Evaluation System (QIES) Assessment Submission and Processing (ASAP) system. IRFs have been submitting data on the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) measure (NQF #0678) through the quality indicator section of the IRF–PAI since October 2012. For more information on IRF reporting using the QIES ASAP system refer to *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html* and *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html*.

In an effort to further harmonize the data elements across PAC providers, we proposed an update to the IRF–PAI items used to calculate the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) measure (NQF #0678) to align with the items included in the LTCH CARE Data Set and the MDS 3.0. The proposed modified IRF–PAI items used to identify new or worsened pressure ulcers consist of: M0800A: Worsening in Pressure Ulcer Status Since Admission, Stage 2; M0800B: Worsening in Pressure Ulcer Status Since Admission, Stage 3; and M0800C: Worsening in Pressure Ulcer Status Since Admission, Stage 4. We did not propose a change to the IRF–PAI items used to risk adjust this quality measure. These items consist of: FIM® Item 39I (Transfers: Bed, Chair, and Wheelchair), FIM® Item 32 (Bowel Frequency of Accidents), I0900A (Peripheral Vascular Disease (PVD)), I0900B (Peripheral Arterial Disease (PAD)), I2900A (Diabetes Mellitus), 25A (Height), and 26A (Weight). More information about the IRF–PAI items is available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*. For more information about the changes to the IRF–PAI, see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

The specifications and data elements for the Percent of Residents or Patients with Pressure Ulcers that are New or Worsened (Short-Stay) (NQF #0678), are available in the IRF–PAI training manual at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*, as well as at*http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

We sought public comment on our proposal to specify and adopt the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) measure for the IRF QRP for the FY 2018 payment determination and subsequent years to fulfill the requirements in the IMPACT Act. The responses to public comments on this measure are discussed below.

Comment: Several comments supported our proposal to implement Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) to fulfill the requirements of the IMPACT Act. The commenters stated that this measure is NQF-endorsed and has been supported by the MAP for use in the IRF QRP. One commenter highlighted that this measure has also been adopted for use in quality reporting programs in other PAC settings, specifically pointing to the use of this measure in the LTCH QRP and the Nursing Home Quality Initiative.

Response: We agree that this measure fulfills the requirements of the IMPACT Act to implement quality measures that are standardized to enable interoperability across PAC settings. As the commenters stated, this measure is NQF-endorsed, is supported by the MAP for use in the IRF QRP, and has been endorsed for quality reporting programs in the nursing home, LTCH and IRF settings.

Comment: One commenter supported CMS's proposal to adopt the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) measure in the IRF QRP. However, the commenter noted that the measure only focuses on Stage 2 through Stage 4 pressure ulcers and recommended that IRFs monitor all stages of pressure ulcers.

Response: We agree with the commenter that it is important for all healthcare providers to monitor all stages of pressure ulcers and implement clinically appropriate practices to maintain skin integrity to prevent and manage all changes to skin integrity. However, our review of the relevant literature and feedback from our TEP and clinical advisors suggest that providers have difficulty objectively identifying and measuring Stage 1 pressure ulcers. Therefore, Stage 1 pressure ulcers have been excluded from the measure. Although we do not include Stage 1 pressure ulcers in the measure calculation, the proposed IRF–PAI version 1.4 tracks Stage 1 pressure ulcers at the time of admission and discharge for preventative purposes and to assist providers in care planning. The National Pressure Ulcer Advisory Panel (NPUAP) classifies unstageable or unclassified pressure ulcers as an additional category or stage of pressure ulcer in the United States. As currently specified, unstageable pressure ulcers are also excluded from the proposed quality measure Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). However, we invited comment on our proposal for future measure development to include unstageable pressure ulcers, including suspected deep tissue ulcers, in the numerator of the quality measure. We appreciate the commenter's feedback and support of including unstageable pressure ulcers in the numerator of this proposed quality measure as new or worsened pressure ulcers. We would like to note that the proposed IRF–PAI version 1.4 includes reporting of unstageable pressure ulcers at the time of admission and discharge.

Comment: Commenters expressed concerns about the measure not being standardized across PAC settings, for example, specifically noting differences in the payers that are required to report patient/resident data for this measure resulting in differences in the denominators for each setting. The commenter suggested measures include all patients, regardless of payer.

Response: We appreciate the comments pertaining to the differences in the pressure ulcer quality measure denominators by payer type across the IRF, SNF and LTCH settings. Additionally, we appreciate the commenters' suggested expansion of the population used to calculate all measures to include payer sources beyond Medicare Part A and agree that quality measures that include all persons treated in a facility are better able to capture the health outcomes of that facility's patients or residents, and that quality reporting on all patients or residents is a worthy goal. Although we had not proposed all payer data collection through this current rulemaking, we will take this recommendation into consideration for future rulemaking.

Comment: Several commenters were concerned that the pressure ulcer measure is not standardized across PAC settings. The commenters stated that although the measure appears to meet the goals and the intent of the IMPACT Act, it does not use a single data assessment tool.

One commenter specifically mentioned the frequency of assessments, highlighting the fact that the LTCH and IRF versions of the measure are calculated using assessments at two points in time (admission and discharge), while the SNF version uses assessments at more than two points in time. The commenter expressed concern that the higher frequency of assessments for the MDS could potentially result in higher rates of pressure ulcer counts for SNFs. Another commenter expressed particular concerns regarding differences in the look-back periods for the items used on the IRF, SNF and LTCH assessments (MDS = 7 day assessment period, IRF = 3 day assessment period, LTCH = 3 day assessment period) and suggested that this would result in different rates of detection of new or worsened ulcers. Commenters encouraged CMS to address all of these discrepancies, and suggested that we should switch to using only an admission and discharge assessment in the SNF version of the measure.

Response: While the IMPACT Act requires the modification of PAC assessment instruments to revise or replace certain existing patient assessment data with standardized patient assessment data as soon as practicable, it does not require a single data collection tool. We intend to modify the existing PAC assessment instruments as soon as practicable to ensure the collection of standardized data. While we agree that it is possible that within the PAC assessment instruments certain sections could incorporate a standardized assessment data collection tool, for example, the Brief Interview for Mental Status (BIMS), we have not yet concluded whether this kind of modification of the PAC assessment instruments is necessary.

As to the concern that the pressure ulcer measure calculation is based on more frequent assessments in the SNF setting than in the LTCH and IRF settings, we wish to clarify that the result of the measure calculation for all three PAC providers is the same. For all three PAC (SNF, LTCH, and IRF) providers, the measure calculation ultimately shows the difference between the number of pressure ulcers present on admission and the number of new or worsened pressure ulcers present on discharge. While the SNF measure calculation arrives at that number differently than does the measure calculation in the IRF and LTCH settings, ultimately all three settings report the same result—as noted, the difference between the number of pressure ulcers present on admission and the new or worsened pressure ulcers at discharge. To explain, in IRFs and LTCHs, pressure ulcer assessment data is obtained only at 2 points in time—on admission and on discharge. Therefore, the calculation of the measure includes all new or worsened pressure ulcers since admission. In contrast, in SNFs pressure ulcer assessment data is obtained on admission, at intervals during the stay (referred to as ''interim assessments''), and at discharge. Each interim assessment and the discharge assessment only look back to whether there were new or worsened pressure ulcers since the last interim assessment. The sum of the number of new or worsened pressure ulcers identified at each interim assessment and at the time of discharge yields the total number of new or worsened pressure ulcers that occurred during the SNF stay and that were present on discharge. In other words, the collection of pressure ulcer data in LTCHs and IRFs is cumulative, whereas in SNFs, data collection is sequential. In all cases the calculation for SNFS, IRFs and LTCHs reaches the same result—the total number of new or worsened pressured ulcers between admission and discharge. With respect to the commenter's concern that the use of interim assessment periods on the MDS will result in a higher frequency of pressure ulcers for SNF residents, we clarify that pressure ulcers found during interim assessments that heal before discharge are not included in the measure calculation.

In regards to the commenter's concern about different look-back periods, we acknowledge that although the LTCH CARE Data Set and IRF–PAI allow up to the third day starting on the day of admission as the assessment period and the MDS allows for an assessment period of admission up to day 7, we note that the training manuals for SNFs, LTCHs and IRFs provide specific and equivalent-coding instructions related to the items used to calculate this measure (found in Section M—skin conditions for all three assessments). These instructions ensure that the assessment of skin integrity occurs at the initiation of patients' or residents' PAC stays regardless of setting. All three manuals direct providers to complete the skin assessment for pressure ulcers present on admission as close to admission as possible, ensuring a harmonized approach to the timing of the initial skin assessment. Regardless of differences in the allowed assessment periods, providers across PAC settings should adhere to best clinical practices, established standards of care, and the instructions in their respective training manuals, to ensure that skin integrity information is collected as close to admission as possible. Although the manual instructions are harmonized to ensure assessment at the beginning of the stay, based on the commenter's feedback, we will take into consideration the incorporation of uniform assessment periods for this section of the assessments.

Comment: Several commenters stated that collection of data for the proposed quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), is burdensome for IRFs. Commenters expressed that the transitions needed to meet the proposed changes to the IRF–PAI items used to calculate this measure will be financially burdensome for IRFs and will require a significant investment of time and updates to electronic medical records (EMRs). Commenters noted that even small changes to the data set can result in significant changes in the logic and flow of the data collection and require re-training of staff to complete the new items. The commenters also pointed out that the possible future addition of unstageable pressure ulcers in the numerator of the measure represents an additional potential change and additional added burden for IRFs.

Response: We recognize the commenter's concern pertaining to

burden due to data set revisions, data collection, or training of staff due to the revisions in the proposed quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). We recognize the importance of education and will continue to disseminate information on assessment or quality measure revisions by means of training sessions, training manuals, webinars, open door forums, and help desk support. It should be noted that standard clinical practice requires providers to conduct thorough skin assessments, comprehensively document and track skin integrity, including pressure ulcers, and to adhere to pressure ulcer prevention and management guidelines. Thus, the documentation of pressure ulcer status as required by the IRF–PAI aligns with standard clinical practice, which we expect all PAC providers to adhere to. Although we recognize that the items have changed, pressure ulcer data has been collected in IRFs since October 2012, and the new items measure the same concepts as the pressure ulcer items in the current version of the IRF–PAI. In addition, in an effort to minimize burden of these items, we continue to include a gateway question and have a skip pattern. If the answer is [0-No] to IRF–PAI version 1.4 item number M0210: Unhealed Pressure Ulcer(s)—Does this patient have one or more unhealed pressure ulcer(s) at Stage 1 or higher?, the IRF staff will be able to skip several items in section M, including the M0300 and M0800 items. The skip pattern means that for many patients, IRF staff will not be required to complete the M0300 and M0800 items.

While we applaud the use of EMRs, we do not require that providers use EMRs to populate assessment data. It should be noted that with each assessment release, we provide free software to our providers that allows for the completion and submission of any required assessment data. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html*. Whether to take further steps than required to submit the assessment data—for example, the use of a vendor to design software that extracts data from a provider's EMR to populate the CMS quality assessment—is a business decision that is made solely by the provider. We only require that assessment data be submitted via the QIES ASAP system in a specific compatible format. To submit the required assessment data, providers can choose to use our free software, or the data submission specifications we provide that allow providers and their vendors to develop their own software, while ensuring compatibility with the QIES ASAP system.

Implementing quality measures and data collection tools that are consistent with standard clinical practice, support positive outcomes, and are standardized across PAC settings are key objectives in our quality initiatives. It should be noted that the changes to the IRF–PAI were proposed in an effort to further standardize the data elements across PAC providers. Feedback relating to provider burden will be taken into account as we consider future updates to the quality measure, the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), including the consideration to add unstageable pressure ulcers, which includes suspected deep tissue injuries (sDTIs), in the numerator. In an effort to minimize provider burden, we will make every effort to utilize items that will already be in the IRF–PAI for this possible future change.

Comment: Several commenters questioned whether the pressure ulcer measure is representative of the quality of care provided by IRFs. Some commenters shared that based on analysis of IRF–PAI data in the Uniform Data System for Medical Rehabilitation database, less than 1 percent of Medicare IRF cases are identified with a new or worsened pressure ulcer at discharge and questioned if improvement below 1 percent would be a meaningful indication of quality to consumers. One commenter suggested that pressure ulcer history would be a more appropriate measure of outcomes, compared to the proposed measure, because history is not taken at a single point in time.

Response: We believe that pressure ulcer development and the worsening of pressure ulcers is an issue that is highly relevant to the IRF setting, as well as all post-acute care settings. Pressure ulcers are high-cost adverse events across the spectrum of health care settings from acute hospitals to home health. Specifically, patients in an IRF setting may have medically complex conditions and severe functional limitations and are, therefore, at high risk for the development, or worsening, of pressure ulcers. Pressure ulcers are serious medical conditions and an important measure of quality. Pressure ulcers can lead to severe, life-threatening infections, which substantially increase the total cost of care. Even if the proportion of patients in IRFs with new or worsening pressure ulcers is small, any such cases are particularly troubling. The National Quality Strategy identifies patient safety one of six priorities for quality measurement and assessment.[5] In addition, section 1899B(c)(1)(B) of the Act directs CMS to specify measures that relate to skin integrity and changes in skin integrity, and section 1899B(g) of the Act requires public reporting of PAC provider performance on these measures. Therefore, we proposed the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). The proposed quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), considers pressure ulcers that developed or worsened during the entire stay, holding PAC facilities accountable for the entirety of pressure ulcer care provided rather than looking at a snapshot or prevalence measure (that is, a measure of the proportion of a population who have, or had, a specific characteristic in a given time period) of pressure ulcers on a given date or time. We are open to stakeholder feedback on measure development and encourage all stakeholders to submit comments via email at *PACQuality Initiative@cms.hhs.gov*.

Comment: Several commenters supported the intent of the measure, but had concerns regarding the risk adjustment of this measure. One commenter recommended the inclusion of pressure ulcer history, rather than the presence of severe pressure ulcers at admission, as a risk factor for pressure ulcer outcomes. Another commenter was concerned that the measure is limited to only high risk patients or residents, and that the denominator size is decreased by excluding individuals who are low risk. The commenter indicated that pressure ulcers do develop in low risk individuals and that this exclusion will impact each PAC setting differently because the prevalence of low risk individuals varies across settings. The commenter recommended that CMS use a logistic regression model for risk adjustment to allow for an increase in the measure sample size by including all admissions,

[5] US Department of Health and Health Services. *National Strategy for Quality Improvement in Health Care 2014 Annual Progress Report to Congress.* September 2014. Accessed July 2015. *http://www.ahrq.gov/workingforquality/reports/annual-reports/nqs2014annlrpt.pdf.*

take into consideration low-volume providers, and capture the development of pressure ulcers in low-risk individuals. The commenter stated that a patient's or resident's risk is not dichotomous (for example, high-risk vs. low-risk) and recommended that CMS grade risk using an ordinal scale related to an increasing number and severity of risk factors. The commenter also expressed that the populations and types of risk for pressure ulcers varies significantly across PAC settings, and that using a logistic regression model would be a more robust way to include a wide range of risk factors to better reflect the population across PAC settings. The commenter noted that the cross-setting pressure ulcer TEP also recommended that CMS consider modifying the risk adjustment model and discussed excluding or risk adjusting for hospice patients and those at the end of life.

Response: We appreciate the commenters' recommendations regarding risk adjustment for this measure.

In regards to the recommendation that we risk adjust using a logistic regression model and incorporate low risk patients into the measure, we believe that this comment may have been submitted on the wrong quality measure. The comments apply to the quality measure Percent of High Risk Residents with Pressure Ulcers (Long Stay) (NQF #0679), which is not the measure that we proposed for the IRF QRP. The proposed measure is Percent of Residents or Patients with Pressure Ulcers that are New or Worsened (NQF #0678). This measure is currently risk adjusted using a logistic regression that includes low-risk patients or residents. In the model, patients or residents are categorized as either high- or low-risk for four risk factors: Functional limitation; bowel incontinence; diabetes or peripheral vascular disease/ peripheral arterial disease; and low body mass index (BMI). The measure is not risk adjusted for severe pressure ulcers at admission. An expected score is calculated for each patient or resident using that patient or resident's risk level on the four risk factors described above. The patient/resident-level expected scores are then averaged to calculate the facility-level expected score, which is compared to the facility-level observed score to calculate the adjusted score for each facility. Additional detail regarding risk adjustment for this measure is available in the measure specifications, available at *http://www.cms.gov/ Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*. We have determined that risk adjustment is appropriate for this measure and we have carefully developed and implemented the risk adjustment model previously described. When developing the risk adjustment model for this measure, we reviewed the relevant medical and scientific literature, conducted analyses to test additional risk factors, convened technical expert panels to seek stakeholder input, and obtained clinical guidance from subject matter experts and other stakeholders to identify additional risk factors. We will continue to analyze this measure as more data is collected and will consider changing the risk adjustment model, expanding the risk stratifications, and testing the inclusion of other risk factors as additional risk adjustors for future iterations of the measure. We will also take into consideration the TEP discussion and this commenter's feedback regarding the exclusion or risk adjustment for hospice patients and those at the end of life. As we transition to standardized data collection across PAC settings to meet the mandate of the IMPACT Act, we intend to continue our ongoing measure development and refinement activities to inform the ongoing evaluation of risk adjustment models and methodology. This continued refinement of the risk adjustment models will ensure that the measure remains valid and reliable to inform quality improvement within and across each PAC setting, and to fulfill the public reporting goals of quality reporting programs, including the IRF QRP. We remain committed to conducting ongoing testing and measure development activities in an effort to improve the risk adjustment of quality measures implemented through the quality reporting programs.

Comment: A few commenters expressed concern regarding the reliability and validity of this measure across different PAC settings. The commenters were concerned that the reliability and validity testing for this measure was only conducted in the SNF setting.

Response: We appreciate the commenters' concern that the SNF, LTCH and IRF populations are not identical and that some differences may exist in the reliability and validity of the measure across settings. However, the NQF has expanded its endorsement of this measure to include the IRF and LTCH settings, and has agreed that the similarities between the facilities and the potential overlap in patients, along with nonclinical factors that affect where a patient is treated, suggest that research regarding SNF/nursing home residents and the use of the MDS assessment is applicable to the use of the IRF–PAI in IRFs and LTCH CARE Data Set in LTCHs.

All NQF-endorsed measures must meet strict reliability and validity criteria at regular intervals, in order to maintain NQF endorsement. Our measure development contractor is currently conducting measure and item level testing for this measure across PAC settings in preparation for NQF Endorsement Maintenance Review. Initial findings reviewed in 2014 suggest that the measure is both valid and reliable in the SNF, LTCH, and IRF settings. Details regarding this testing will be made available to stakeholders once testing is complete, as part of the NQF maintenance and review process. We agree that it is important to conduct ongoing evaluations of the measure across PAC settings, and we remain committed to conducting ongoing measure testing to inform future measure development. It should be noted that we are working towards the development of a more fully standardized data set for this measure. As such, we continue to conduct measure development and testing to explore differences to determine the best way to standardize quality measurement, while ensuring measure reliability and validity and appropriately accounting for unique differences in populations across different PAC settings.

Comment: A few commenters expressed concerns that although the MAP supports cross-setting use of this measure, it is only NQF-endorsed for the SNF setting and suggested that CMS delay implementing the cross-setting measure until it is NQF-endorsed across all PAC settings. One commenter also pointed out that the specifications available on the NQF Web site are dated October 2013.

Response: Although the proposed measure was originally developed for the SNF/nursing home resident population, it has been re-specified for the LTCH and IRF settings and received NQF endorsement for expansion to the LTCH and IRF settings by the NQF Consensus Standards Approval Committee (CSAC) on July 11, 2012 [6] and was subsequently ratified by the NQF Board of Directors for expansion to the LTCH and IRF settings on August 1, 2012.[7] As reflected on the NQF Web

[7] National Quality Forum. NQF Removes Time-Limited Endorsement for 13 Measures; Measures Now Have Endorsed Status. August 1, 2012. Available; *http://www.qualityforum.org/News_And_Resources/Press_Releases/2012/NQF_Removes_*

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site, the endorsed settings for this measure include Post-Acute/Long Term Care Facility: Inpatient Rehabilitation Facility, Post Acute/Long Term Care Facility: Long Term Acute Care Hospital, Post Acute/Long Term Care Facility: Nursing Home/Skilled Nursing Facility.[8] NQF endorsement of this measure indicates that NQF supports the use of this measure in the LTCH and IRF settings, as well as in the SNF setting. In addition, this measure was fully supported by the MAP for cross-setting use at its meeting on February 9, 2015. With regard to the measure specifications posted on the NQF Web site, the most up-to-date version of the measure specifications were posted for stakeholder review at the time of the proposed rule on the CMS Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Downloads/Inpatient-Rehabilitation-Facility-Quality-Reporting-Program-Specifications-for-the-Quality-Measures-Proposed-Through-the-Fiscal-Year-2016-Notice-of-Proposed-Rulemaking-report.pdf*. The specifications currently posted on the NQF Web site are computationally equivalent and have the same measure components as those posted on the CMS Web site at the time of the proposed rule. However, we provided more detail in the specifications posted with the proposed rule, in an effort to more clearly explain aspects of the measure that were not as clear in the NQF specifications. Additionally, we clarified language to make phrasing more parallel across settings, and updated item numbers and labels to match the 2016 data sets (MDS 3.0, LTCH CARE Data Sets, and IRF–PAI). We are working closely with NQF to make updates and ensure that the most current language and clearest version of the specifications are available on the NQF Web site.

Comment: Multiple commenters expressed concern or requested clarification regarding changes to Section M of the IRF–PAI. Commenters were concerned that changes in pressure ulcer documentation, definitions, and guidance in the IRF–PAI and relevant training materials, may lead to increased confusion for clinicians, ultimately resulting in decreased data consistency and validity. These changes also make it difficult to compare data over time, or to use historic data for benchmarking purposes. Commenters noted the importance of providing clear guidance in manuals and training materials. One commenter did not object to the proposed changes, but requested that CMS clarify any minor changes to the IRF–PAI items and instructions through the final rule and sub-regulatory mechanisms (for example, the IRF–PPAI Training Manual) and noted that there are several modifications that need clarification.

One commenter was concerned that the NPUAP staging system should not be used as the sole determinant of wound severity status and pointed out that there are many important pieces of information to consider, including wound size, worst tissue type and if a wound is open to the environment. The commenter also encouraged CMS to consider tools beyond the IRF–PAI to determine wound status and encouraged CMS to implement new tools for wound image documentation. They highlighted the fact that there is new technology available that would make it easier for CMS to standardize across facilities to ensure quality, transparency and accuracy in pressure ulcer prevention and care. The commenter also recommended several changes to the IRF–PAI, aimed at ensuring that all pressure ulcers are tracked from the beginning to the end of the stay.

Response: We are committed to providing information and support that will allow providers to accurately interpret and complete quality reporting items. To increase provider understanding, we intend to provide comprehensive training, as we do each time the assessment items change for the IRF–PAI. In addition, we understand the importance of education and will continue to disseminate information on assessment or quality measure revisions through training sessions, training manuals, webinars, open door forums, and help desk support. It should be noted that the changes to the IRF–PAI were proposed in an effort to further standardize the data elements across PAC providers. Additionally, the new items measure the same concepts as the pressure ulcer items in the current version of the IRF–PAI and the quality measure has not changed. We believe that the standard CMS training activities, along with increased public outreach, will increase the accuracy of coding of the assessments, which will increase the reliability of the data submitted to us. As noted, the new IRF–PAI items measure the same concepts as the pressure ulcer items in the current version of the IRF–PAI, and the quality measure specifications, measure calculations, and scoring have not changed. This consistency will facilitate accurate and reliable data collection and reporting over time.

The measure utilizes NPUAP staging, an important indicator of the severity of pressure ulcers, to identify new or worsened pressure ulcers. However, the purpose of the measure is not to capture all details regarding pressure ulcer severity, prevention, management, or documentation. We encourage all providers to engage in best practices to manage and track pressure ulcers within each facility, and we applaud the use of advanced technologies to facilitate improved quality and accuracy in pressure ulcer management and documentation. We will take all recommendations into consideration when updating future quality measures and the IRF–PAI assessment instrument. We appreciate stakeholder feedback on measure development and encourage everyone to submit comments to our comment email: *PACQualityInitiative@cms.hhs.gov*.

Final Decision: Having carefully considered the comments we received on the measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

As part of our ongoing measure development efforts, we are considering a future update to the numerator of the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). This update would hold providers accountable for the development of unstageable pressure ulcers, including suspected deep tissue injuries (sDTIs). Under this possible future change, the numerator of the quality measure would be updated to include unstageable pressure ulcers, including sDTIs, that are new or developed in the facility, as well as Stage 1 or 2 pressure ulcers that become unstageable due to slough or eschar (indicating progression to a Stage 3 or 4 pressure ulcer) after admission. In the FY 2016 IRF PPS proposed rule, we did not propose the implementation of this change (that is, including unstageable pressure ulcers, including sDTIs, in the numerator) in the IRF QRP, but sought public comment on this potential area of measure development.

Our measure development contractor convened a cross-setting pressure ulcer TEP that strongly recommended that we hold providers accountable for the development of new unstageable pressure ulcers by including these pressure ulcers in the numerator of the quality measure. Although the TEP acknowledged that unstageable pressure

Time-Limited_Endorsement_for_13_Measures;_Measures_Now_Have_Endorsed_Status.aspx.

[8] National Quality Forum. Percent of Residents or Patients with Pressure Ulcers that are New or Worsened (Short-Stay). Available: *http://www.qualityforum.org/QPS/0678*.

ulcers, including sDTIs, cannot and should not be assigned a numeric stage, panel members recommended that these be included in the numerator of the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), as a new pressure ulcer if it developed in the facility. The TEP also recommended that a Stage 1 or 2 pressure ulcer that becomes unstageable due to slough or eschar should be considered worsened, because the presence of slough or eschar indicates a full thickness (equivalent to Stage 3 or 4) wound.[9] [10] These recommendations were supported by technical and clinical advisors and the NPUAP.[11] Furthermore, exploratory data analysis conducted by our measure development contractor suggests that the addition of unstageable pressure ulcers, including sDTIs, would increase the observed incidence of new or worsened pressure ulcers at the facility level and may improve the ability of the quality measure to discriminate between poor- and high-performing facilities.

We sought public comment to inform our future measure development efforts to include unstageable pressure ulcers, including sDTIs, in the numerator of the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). The responses to public comments on future development of the measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), are discussed below in this section of the final rule.

Comment: Several commenters were supportive of our proposal to include unstageable pressure ulcers (we understand their comments to be referring to unstageable pressure ulcers due to slough or eschar and due to non-removable dressing/device) in the numerator of the quality measure as an area for future measure development, but expressed reservations about the possible future inclusion of suspected deep tissue injuries (sDTIs) in the numerator of the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). One commenter cited literature suggesting that sDTIs can take between 72 hours and seven days to become visible, indicating that there is no reliable and consistent way to determine whether an sDTI at admission is facility-acquired or not. Another commenter indicated that providers should not be penalized for sDTIs because much is still unknown about sDTIs, including if there is an actual deep tissue injury. Additionally, many sDTIs heal without opening. One commenter requested more information regarding the way this change would be incorporated into the measure specification, the impact the change would have on the reliability and validity of the measure, and how the change may impact the risk adjustment methodology. Finally, the commenter encouraged CMS to submit any proposed changes through NQF review and specify all details in future rulemaking.

Response: We thank the commenters for their support of the proposal to include unstageable pressure ulcers and for providing input regarding this proposed area for measure development. We also appreciate the recommendations regarding the approach to future implementation. At this time we are only soliciting feedback on this concept for possible measure development and will continue to conduct analyses and solicit input before making any final decisions. We intend to continue monitoring the literature, conduct reliability and validity testing, seek input from subject matter experts and stakeholders, and participate in ongoing refinement activities to inform this measure before proposing to adopt any changes. Should we move forward with the addition of unstageable pressure ulcers, including sDTIs, to the measure numerator, we will provide more details regarding the specifications for this change prior to implementation. We intend to submit any changes for NQF review and will seek public comment on future measure concepts or revisions.

With regard to the commenters' concerns regarding sDTIs, we believe that it is important to do a thorough admission assessment on each patient who is admitted to an IRF, including a thorough skin assessment documenting the presence of any pressure ulcers of any kind, including sDTIs. When considering the addition of sDTIs to the measure numerator, we convened cross-setting TEPs in June and November 2013, and obtained input from clinicians, experts, and other stakeholders. While we agree that ongoing research and exploration of the clinical evidence is needed, sDTIs are a serious medical condition. Given their potential impact on mortality, morbidity, and quality of life, it may be detrimental to the quality of care to exclude sDTIs from future quality measures. Currently, we are only considering including sDTIs in the measure numerator, and will continue to conduct analyses, monitor the literature and clinical evidence, and solicit input before making any final decisions. We thank the commenters and will take all comments into account as we consider potential measure development and revisions.

Comment: One commenter does not support the addition of unstageable pressure ulcers in the numerator of the quality measure, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). Although the commenter supports the collection of new or worsened pressure ulcer data in the IRF–PAI, they stated that some sDTIs and unstageable pressure ulcers due to non-removable dressing or devices may not be identifiable on admission, and expressed concern that these may then be incorrectly assigned as ''new or worsened.'' As CMS considers this future possible update, the commenter emphasizes the importance of ensuring that any clinical or coding guidance provided is reflective of the most recent evidence-based processes for recording pressure ulcers and sDTIs as detection methodology is updated continuously to reflect current medical evidence.

Response: We thank the commenter for their input regarding this proposed area for future measure development, their support of the inclusion of these items in the IRF–PAI, and their recommendations regarding implementation. As noted, at this time we are only soliciting feedback on this concept for possible measure development. Should we move forward with the addition of unstageable pressure ulcers, including sDTIs, to the

[9] Schwartz, M., Nguyen, K.H., Swinson Evans, T.M., Ignaczak, M.K., Thaker, S., and Bernard, S.L.: Development of a Cross-Setting Quality Measure for Pressure Ulcers: OY2 Information Gathering, Final Report. Centers for Medicare & Medicaid Services, November 2013. Available: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/Development-of-a-Cross-Setting-Quality-Measure-for-Pressure-Ulcers-Information-Gathering-Final-Report.pdf.*

[10] Schwartz, M., Ignaczak, M.K., Swinson Evans, T.M., Thaker, S., and Smith, L.: The Development of a Cross-Setting Pressure Ulcer Quality Measure: Summary Report on November 15, 2013, Technical Expert Panel Follow-Up Webinar. Centers for Medicare & Medicaid Services, January 2014. Available: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/Development-of-a-Cross-Setting-Pressure-Ulcer-Quality-Measure-Summary-Report-on-November-15-2013-Technical-Expert-Pa.pdf.*

[11] Schwartz, M., Nguyen, K.H., Swinson Evans, T.M., Ignaczak, M.K., Thaker, S., and Bernard, S.L.: Development of a Cross-Setting Quality Measure for Pressure Ulcers: OY2 Information Gathering, Final Report. Centers for Medicare & Medicaid Services, November 2013. Available: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/Development-of-a-Cross-Setting-Quality-Measure-for-Pressure-Ulcers-Information-Gathering-Final-Report.pdf.*

measure numerator, we will submit any changes for NQF review and seek public comment on future measure concepts or revisions.

We thank the commenters and will take all comments into account as we consider potential measure development and revisions.

G. Additional IRF QRP Quality Measures for the FY 2018 Payment Determination and Subsequent Years

We proposed to adopt 6 additional quality measures beginning with the FY 2018 payment determination. These new quality measures are: (1) An Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674); (2) an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015); (3) IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review); (4) IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review); (5) IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015); and (6) IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015).

1. Quality Measure Addressing the Domain of the Incidence of Major Falls: An Application of Percent of Residents Experiencing One or More Falls With Major Injury (Long-Stay) (NQF #0674)

Section 1899B(c)(1) of the Act directs the Secretary to specify quality measures on which PAC providers are required, under the applicable reporting provisions, to submit standardized patient assessment data and other necessary data specified by the Secretary with respect to five quality domains, one of which is the incidence of major falls. The specified application date by which the Secretary must specify quality measures to address this domain for IRFs, SNFs, and LTCHs is October 1, 2016, and for HHAs is January 1, 2019. To satisfy these requirements, we proposed to adopt an Application of Percent of Residents Experiencing One of More Falls with Major Injury (Long-Stay) (NQF #0674) in the IRF QRP as a cross-setting quality measure that addresses the IMPACT Act domain of incidence of major falls. Data collection would start on October 1, 2016. The reporting of data for this measure would affect the payment determination for FY 2018 and subsequent years. As described in more detail in section IX.I.2. of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016), and the subsequent data collection periods are 12 months in length and follow the calendar year (that is, January 1 to December 31). For the IRF setting, this measure would report the percentage of patients who experienced 1 or more falls with major injury during the IRF stay. This measure was developed by us and is NQF-endorsed for long-stay residents of nursing facilities.

Research indicates that fall-related injuries are the most common cause of accidental death in people aged 65 and older, responsible for approximately 41 percent of accidental deaths annually.[12] Rates increase to 70 percent of accidental deaths among individuals aged 75 and older.[13] In addition to death, falls can lead to fracture, soft tissue or head injury, fear of falling, anxiety, and depression.[14] It is estimated that 10 percent to 25 percent of nursing facility resident falls result in fractures and/or hospitalization.[15] For IRFs, a study of 5,062 patients found that 367 patients (7.25 percent) had 438 falls. Among these 438 falls, 129 (29.5 percent of the falls) resulted in an injury, of which 25 (5.7 percent of all falls and 19 percent of all falls with injury) were serious.[16] A separate study of 754 stroke patients in an IRF reported 117 patients (15.5 percent) experienced 159 falls. Among these 159 falls, 13 (8 percent of falls) resulted in a minor injury, and 3 (2 percent of falls) resulted in a serious injury.[17]

Falls also represent a significant cost burden to the entire health care system, with injurious falls accounting for 6 percent of medical expenses among those age 65 and older.[18] In their 2006 work, *Sorensen et al.,* estimate the costs associated with falls of varying severity among nursing home residents. Their work suggests that acute-care costs range from $979 for a typical case with a simple fracture to $14,716 for a typical case with multiple injuries.[19] A similar study of hospitalizations of nursing home residents due to serious fall-related injuries (intracranial bleed, hip fracture, other fracture) found an average cost of $23,723.[20]

According to *Morse,*[21] 78 percent of falls are anticipated physiological falls. Anticipated physiological falls are falls among individuals who scored high on a risk assessment scale, meaning their risk could have been identified in advance of the fall. To date, studies have identified a number of risk factors for falls.[22 23 24 25 26 27 28 29 30] The identification of such risk factors suggests the potential for health care facilities to reduce and prevent the incidence of falls with injuries for their patients. In light of the evidence previously discussed, we proposed to adopt the quality measure, an Application of Percent of Residents

[12] Currie LM. Fall and injury prevention. Annu Rev Nurs Res. 2006;24:39–74.

[13] Fuller GF. Falls in the elderly. Am Fam Physician. Apr 1 2000;61(7):2159–2168, 2173–2154.

[14] Love K, Allen J. Falls: why they matter and what you can do. Geriatr Nurs, 2011; 32(3): 206–208

[15] Vu MQ, Weintraub N, Rubenstein LZ. Falls in the nursing home: are they preventable? J Am Med Dir Assoc. 2004 Nov–Dec; 5(6):401–6. Review.

[16] Frisina PG, Guellnitz R, Alverzo J. A time series analysis of falls and injury in the inpatient rehabilitation setting. Rehab Nurs. 2010; 35(4):141–146.

[17] Rabadi MH, Rabadi FM, Peterson M. An analysis of falls occurring in patients with stroke on an acute rehabilitation unit. Rehab Nurs. 2008; 33(3):104–109.

[18] Tinetti ME, Williams CS. The effect of falls and fall injuries on functioning in community-dwelling older persons. J Gerontol A Biol Sci Med Sci. 1998 Mar;53(2):M112–9.

[19] Sorensen SV, de Lissovoy G, Kunaprayoon D, Resnick B, Rupnow MF, Studenski S. A taxonomy and economic consequence of nursing home falls. Drugs Aging. 2006;23(3):251–62.

[20] Quigley PA, Campbell RR, Bulat T, Olney RL, Buerhaus P, Needleman J. Incidence and cost of serious fall-related injuries in nursing homes. Clin Nurs Res. Feb 2012;21(1):10–23.

[21] Morse, J. M. (2002) Enhancing the safety of hospitalization by reducing patient falls. Am J Infect Control 2002; 30(6): 376–80.

[22] Rothschild JM, Bates DW, Leape LL. Preventable medical injuries in older patients. Arch Intern Med. 2000 Oct 9; 160(18):2717–28.

[23] Morris JN, Moore T, Jones R, et al. Validation of long-term and post-acute care quality indicators. CMS Contract No: 500–95–0062/T.O. #4. Cambridge, MA: Abt Associates, Inc., June 2003.

[24] Avidan AY, Fries BE, James ML, Szafara KL, Wright GT, Chervin RD. Insomnia and hypnotic use, recorded in the minimum data set, as predictors of falls and hip fractures in Michigan nursing homes. J Am Geriatr Soc. 2005 Jun; 53(6):955–62.

[25] Fonad E, Wahlin TB, Winblad B, Emami A, Sandmark H. Falls and fall risk among nursing home residents. J Clin Nurs. 2008 Jan; 17(1):126–34.

[26] Currie LM. Fall and injury prevention. Annu Rev Nurs Res. 2006;24:39–74.

[27] Ellis AA, Trent RB. Do the risks and consequences of hospitalized fall injuries among older adults in California vary by type of fall? J Gerontol A Biol Sci Med Sci. Nov 2001;56(11):M686–692.

[28] Chen XL, Liu YH, Chan DK, Shen Q, Van Nguyen H. Chin Med J (Engl). Characteristics associated with falls among the elderly within aged care wards in a tertiary hospital: a retrospective. 2010 Jul;123(13):1668–72.

[29] Frisina PG, Guellnitz R, Alverzo J. A time series analysis of falls and injury in the inpatient rehabilitation setting. Rehabil Nurs. 2010 JulAug;35(4):141–6, 166.

[30] Lee JE, Stokic DS. Risk factors for falls during inpatient rehabilitant Am J Phys Med Rehabil. 2008 May;87(5):341–50; quiz 351, 422.

Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), for the IRF QRP, with data collection starting on October 1, 2016 and affecting the payment determination for FY 2018 and subsequent years.

The IMPACT Act requires the specification of quality measures and resource use and other measures that are standardized and interoperable across PAC settings, as well as the reporting of standardized patient assessment data and other necessary data specified by the Secretary. The Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674) quality measure is NQF-endorsed for long-stay residents in nursing homes and has been successfully implemented in nursing facilities for long-stay residents. The NQF-endorsed measure has been in use as part of CMS' Nursing Home Quality Initiative since 2011. In addition, the measure is currently reported on CMS' Nursing Home Compare Web site at *http://www.medicare.gov/nursinghomecompare/search.html*. Further, the measure was adopted for use in the LTCH QRP in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50874 through 50877). In the FY 2015 IPPS/LTCH PPS final rule (79 FR 50290), we revised the data collection period for this measure with data collection to begin starting April 1, 2016.

We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed cross-setting quality measures focused on falls with a major injury. We are unaware of any other cross-setting quality measures for falls with major injury that have been endorsed or adopted by another consensus organization. Therefore, we proposed the quality measure, an Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), under the Secretary's authority to select non-NQF-endorsed measures.

A TEP convened by our measure development contractor provided input on the measure specifications, including the feasibility and clinical appropriateness of implementing the measure across PAC settings, which include the IRF setting. The TEP supported the implementation of this measure across PAC settings, including the IRF setting, and also supported our efforts to standardize this measure for cross-setting development. Additionally, the NQF-convened MAP met on February 9, 2015 and provided input to us on this measure. The MAP conditionally supported the use of the quality measure, an Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), in the IRF QRP as a cross-setting quality measure. More information about the MAP's recommendations for this measure is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*.

More information on the quality measure, Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), is located at the NQF Web site at *http://www.qualityforum.org/QPS/0674*. Details regarding the changes made to modify the quality measure, Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), and updated specifications are located at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*. We proposed that data for this quality measure would be collected using the IRF–PAI with submission through the QIES ASAP system. More information on IRF reporting using the QIES ASAP system is located at the Web site *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html* and *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html*.

Data collected through a revised IRF–PAI would be used to calculate this quality measure. Consistent with the IRF–PAI reporting requirements, the Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), will apply to all Medicare patients discharged from IRFs. Data items in the revised IRF–PAI would include: J1800: Any Falls Since Admission, and J1900: Number of Falls Since Admission.

The calculation of the proposed quality measure would be based on item J1900C: Number of Falls with Major Injury since Admission. The specifications and data elements for the quality measure, the Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*. For more information on the proposed data collection and submission timeline for the proposed quality measure, please see section IX.I.2 of this final rule.

We sought public comment on our proposal to adopt the quality measure, an Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), with data collection beginning on October 1, 2016, for the IRF QRP for FY 2018 payment determination and subsequent years to fulfill the requirements in the IMPACT Act. The responses to public comments on this measure are discussed below in this section of the final rule.

Comment: One commenter supported measuring falls in IRFs, but believed that all falls should be documented, not just those with major injury.

Response: We appreciate the commenter's position that all falls should be measured. The proposed quality measure, an Application of the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), assesses falls with major injuries, satisfying the domain delineated in the IMPACT Act, Incidence of Major Falls. We believe this domain mandates a quality measure related to major falls. However, the data elements included in the IRF–PAI version 1.4 do enable IRFs to track all falls, regardless of injury. As part of best clinical practice, we agree that IRFs should track falls for multiple purposes, such as those that satisfy regulatory requirements, quality improvement, risk assessment, and clinical decisions support.

Comment: Several commenters supported the proposed quality measure, an Application of the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), but believed that the measure should be risk-adjusted. One commenter noted that quality of care is not the only determinant of risk of falls; a variety of other clinical factors that are not within the control of the provider may increase the risk for falls. Commenters asserted that risk adjustment creates a ''level playing field'' that allows for fair comparisons. Some commenters recommended risk adjustment as a strategy for minimizing disincentives to IRFs to accept cognitively impaired patients. Several commenters suggested risk adjustment for populations that are at a higher risk for falls, such as IRF patients with nervous system disorders (for example, stroke and spinal cord injury or brain injury), low FIM® scores, and patients with amputations. Commenters pointed out that the TEP convened in February 2015 recommended risk adjustment for cognitive impairment, which several commenters also supported. One commenter asked whether the TEP was

presented the current specification of the cross-setting falls measure. One commenter provided support for risk adjustment by pointing out that the references cited in the rule indicate that risk for falls varies by patient characteristics. That commenter asserted that the PAC–PRD research indicated that the risk of falls with injury differs across post-acute settings. Several commenters also noted that the measure should be risk adjusted, claiming that risk adjustment is required by the IMPACT Act and that the MAP suggested that the measure should be risk adjusted.

Response: To clarify, the proposed quality measure pertains to falls with a major injury, satisfying the IMPACT Act domain, Incidence of Major Falls. Thus, falls with no injury, such as those that may be considered near-falls, are not included in the measure. The application of risk adjustment for this measure as required by the IMPACT Act is ''as determined appropriate by the Secretary,'' as stated in section 1899B(c)(3)(B) of the Act.

While we acknowledge that patient characteristics that elevate risk for falls with major injury vary across the IRF population, a short-stay and long-stay Nursing Home TEP, convened in 2009 by our measurement development contractor, concluded that risk adjustment for this quality measure concept was inappropriate because it is each facility's responsibility to take steps to reduce the rate of injurious falls, especially since such events are considered to be ''never events'' (see *http://psnet.ahrq.gov/primer.aspx?primerID=3* for further details on the origins and use of the term ''never event'').

We note that the PAC–PRD did not assess falls with major injury, as falls with major injury was not an item that was tested. However, as the commenter pointed out, the prevalence of a *history of falls* prior to the PAC admission did vary across post-acute settings (as assessed by item B7 from the PAC–PRD CARE tool: ''History of Falls. Has the patient had two or more falls in the past year or any fall with injury in the past year?''). Nonetheless, as part of best clinical practice, IRFs should assess patients for falls risk and take steps to prevent future falls and falls with major injury. In the most recent TEP (2015) that discussed falls as a cross-setting measure aligned with the IMPACT Act, the numerator, denominator, and exclusion definitions provided are virtually identical to the specifications we proposed to adopt for this measure and did not include risk adjustment. Although 2 out of 11 TEP members supported risk adjustment of the falls measure for cognitive impairment, that was not the majority position. More information about the specifications and the convening of the TEP is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/SUMMARY-OF-FEEDBACK-FROM-THE-TECHNICAL-EXPERT-PANEL-TEP-REGARDING-CROSS-SETTING-MEASURES-ALIGNED-WITH-THE-IMPACT-ACT-OF-2014-Report.pdf*.

Factors that increase the risk of falling, such as cognitive impairment, should be included by facilities in their risk assessment to support proper care planning. Although it is possible that risk adjusting for cognitive impairment would reduce disincentives for caring for such patients in IRFs, it could also have the unintended consequence of leading to insufficient risk prevention efforts by the provider.

We do not pay hospitals for the higher costs associated with treating patients for hospital-acquired conditions, including falls resulting in intracranial injuries, fractures and dislocations, and these payment reductions are not risk adjusted. More specifically, for Medicare FFS patients discharged from a hospital on or after October 1, 2008, under the Deficit Reduction Act: Hospital-Acquired Conditions-Present on Admission Indicator Program (please see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalAcqCond/index.html* and *http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/wPOAFactSheet.pdf*), hospitals do not receive additional payment for treating injuries (fracture, dislocation, intracranial injury, crushing injury, burns, or other injuries) resulting from falls and trauma when these injuries were deemed to be a hospital-acquired condition (that is, when the injuries resulting from falls were not present on admission and were acquired during the hospital stay). The MAP feedback regarding risk adjustment for this quality measure applied to the home health setting, not IRFs.[31] We note that a more recent Cochrane review by Cameron *et al.*,[32] which included 9 randomized controlled trials of multifactorial interventions in care facilities, found mixed evidence but did note that within care facilities, multifactorial interventions have the potential to reduce rates of falls and risk of falls. Specifically, two studies showed a statistically significant reduction in the rate of falls, 2 found statistically significant reductions in the risk of falling, 1 showed a statistically significant increase in the rate of falls, and the remainder did not find a significant result.

Comment: Several commenters supported the measure in concept, but suggested changes to the specifications, including mentioning ''patients'' (as opposed to residents), clarifying the list of major injuries covered under the measure, and providing the full specifications of the numerator, denominator, and exclusions. One commenter suggested that the measure be specified across settings, using the same assessment tool at admission and discharge, and the same numerator and denominator definitions, noting that there are differences between settings in terms of the payers. One commenter asserted that the item used in the IRF specification asks about the occurrence of two or more falls in the past year and whether a patient had major surgery, and that the exclusions listed in the specification were different in different settings, when they are the same.

Response: The occurrence of 2 or more falls in the past year, and major surgery prior to admission, are not risk adjustors for this proposed quality measure. However, the occurrence of two or more falls in the past year, and major surgery prior to admission, are risk adjusters for the function outcomes measures, IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review) and IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015), which were also proposed in the FY 2016 IRF PPS Proposed Rule (80 FR 23368). For the proposed quality measure, an Application of the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), the single exclusion criterion (patients/residents with missing data) is standardized across the IRF, LTCH, and SNF settings.

[31] Measure Applications Partnership. MAP Off-Cycle Deliberations 2015: Measures Under Consideration to Implement Provisions of the IMPACT Act. March 2015. Available at: *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Off-Cycle_Deliberations_2015_-_Final_Report.aspx*.

[32] Cameron ID, Gillespie LD, Robertson MC, Murray GR, Hill KD, Cumming RG, Kerse N. Interventions for preventing falls in older people in care facilities and hospitals. Cochrane Database of Systematic Reviews 2012, Issue 12. Art. No.: CD005465. DOI: 10.1002/14651858.CD005465.pub3.

The term ''resident'' is in the title of the measure because the proposed quality measure, an Application of the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF# 0674), is an application of the existing NQF-endorsed quality measure, Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), which is a long-stay nursing home quality measure that uses the term ''resident.'' However, as the measure is harmonized across settings, we are using both patient and resident in the descriptions of the measure specifications.

The complete list of major injuries in the quality measure is: bone fractures, joint dislocations, closed head injuries with altered consciousness, or subdural hematoma.

Although the measure is calculated using only J1900C (number of falls with major injury), the measure was developed using all three categories (no injury, minor injury, and major injury) to ensure that major injuries are accurately assessed. During item development, testing revealed that to obtain accurate data, different types of falls had to be assessed separately. Thus, the measure was designed this way because psychometric item development testing showed it was imperative to stratify the types of falls. To omit the other two categories of falls would be inconsistent with how the measure was designed and could disable the ability to calculate the data in a way that the information has been evaluated to be usable.

Comment: Commenters expressed concerns about the measure not being standardized across PAC settings, for example, specifically noting differences in the payers that are required to report patient/resident data for this measure resulting in differences in the denominators for each setting. Several commenters suggested that CMS standardize numerator and denominator definitions across settings.

Response: The general issue raised by commenter with respect to standardization of the cross setting measures has been addressed under the comments and responses to the finalization of the measure Percent of Patients or Residents with Pressure Ulcers that are New or Worsened (NQF #0678) above.

Comment: Several commenters expressed concern that the measures do not comply with the IMPACT Act requirements for standardization and discussed the frequency of assessments as one area where there is lack of standardization. Commenters recommended that measures be ''consistently stated (same wording, same timeframe, and same item set) and measured across all PAC settings to meet the requirements of the IMPACT Act.''

Response: The quality measure, an Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), and the data collection items used to calculate this measure are harmonized across settings and assessment instruments, (that is, use of only admission and discharge assessments in IRFs and LTCHs versus admission/re-entry, interim, and discharge assessments in SNFs). As to the concern that the falls with major injury measure calculation is based on more frequent assessments in the SNF setting than in the LTCH and IRF settings, we wish to clarify that result of the measure calculation for all three PAC providers is the same. For all three PAC (SNF, LTCH, and IRF) providers, the measure calculation ultimately shows the total number of falls during the stay. While the SNF measure calculation arrives at that number differently than does the measure calculation in the IRF and LTCH settings, ultimately all three settings report the same result—as noted, the total number of falls during the stay. To explain, in IRFs and LTCHs, falls data is obtained only at discharge and looks back to admission. Therefore, the calculation of the measure includes all falls since admission. In contrast, in SNFs, falls data is obtained on admission, at intervals during the stay (referred to as ''interim assessments''), and at discharge. Each interim assessment and the discharge assessment only look back to whether there were falls since the last interim assessment. The sum of the number of falls identified at each interim assessment and at the time of discharge yields the total number of falls that occurred during the stay. In other words, the collection of falls data in LTCHs and IRFs is cumulative, whereas in SNFs, data collection is sequential. In all cases the calculation for SNFs, IRFs and LTCHs reaches the same result—the total number of falls between admission and discharge.

We made additional details regarding the measure specifications for the quality measure, an Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674) available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

Comment: One commenter that suggested CMS should use one standard assessment tool that asks questions in a consistent manner across all PAC settings in order to meet the requirements of the IMPACT Act.

Response: We intend to modify the existing PAC assessment instruments as soon as practicable to ensure the collection of standardized data. While we agree that it is possible that within the PAC assessment instruments certain sections could incorporate a standardized assessment data collection tool, for example, the Brief Interview for Mental Status (BIMS), we have not yet concluded whether this kind of modification of the PAC assessment instruments is necessary.

Comment: Several commenters supported this measure in concept, but stated their position that the measure should be validated and endorsed by NQF prior to implementing the measure in the IRF setting. Several commenters expressed concerns about the measure not having been adequately tested in the IRF population.

Response: We appreciate the commenters' position that the cross-setting falls measure should be tested in the short-stay IRF population prior to adoption. We also appreciate the commenters' concerns pertaining to the reliability and validity of the proposed measure, an Application of the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674) across PAC settings. We note that the TEP convened by the measurement development contractor in 2011 supported measuring falls with major injury in IRFs, and agreed that falls with major injury is a ''never event.'' The TEP also concurred that facilities need to take responsibility to not only prevent falls, but to ensure that if they do occur, protections are in place so that the fall does not result in injury.

With regard to the adequacy of the measure's testing for use in the short-stay nursing home population, the item-level testing during the development of the MDS 3.0 showed near-perfect inter-rater reliability for the MDS item (J1900C) used to identify falls with major injury. The NQF measure evaluation criteria do not require measure-level reliability if item reliability is high. However, we believe that, given the overlap in the IRF and SNF populations and item-level testing results, the application of this measure for IRF patients will be reliable. That said, we intend to continue to test the measure once data collection begins and as part of ongoing maintenance of the measure. We appreciate the commenters' recommendations

regarding NQF endorsement in the IRF setting and recognize that it is an important step in the measure development process. However, falls with major injury is an important patient safety concern in IRFs, and given the lack of availability of NQF-endorsed measures for the IRF setting or measures endorsed by any other consensus organizations, we proposed to adopt this measure under the exception authority given to the Secretary.

Comment: One commenter noted that there are many risk factors for falls, including different diagnoses (such as cognitive impairment), and that rehabilitation hospitals tend to have a higher incidence of falls than acute-care settings. The commenter requested that CMS only review fall rates in IRFs in comparison to other IRFs.

Response: We thank the commenter for their comment, and appreciate the commenter's position that fall rates in IRFs should only be compared to rates in other IRFs. The intent of the IRF quality reporting program is, in part, to support such comparisons—so that providers receive important feedback on how they are performing relative to similar providers. In addition, the IMPACT Act requires the Secretary to standardize the domain, Incidence of Major Falls, across PAC settings. Therefore, fall rates data must be collected in order to allow for comparison across PAC settings. Also, NQF strongly suggests a coordinated strategy among PAC settings that includes prevention of falls. Reporting falls with major injury across PAC settings will inform providers, policymakers, and researchers in the post-acute care field on collaborating to improve rates of falls. As we continue to develop and test constructs pertaining to falls, we will consider these factors.

Comment: Several commenters suggested that IRFs should not be required to collect data on all falls. Some noted that it seemed to be inappropriate because the measure is focused on falls with major injury. Others stated that it seemed inappropriate because patients in IRFs are encouraged to exert themselves to meet their functional goals, which inevitably leads to unintended falls. Moreover, IRFs may need to teach patients how to fall. Commenters noted that because of the rehabilitation needs of their patients, some providers may have a higher proportion of ''assisted'' falls.

Response: We agree that the rehabilitation process requires that patients be allowed to be as mobile and independent as possible, and some patients may need to learn how to fall safely. However, this measure is focused on falls with major injury. In proposing this measure to satisfy the IMPACT Act domain, Incidence of Major Falls, we are encouraging IRFs to balance the need to foster patient mobility and independence with the need to avoid major injuries (bone fractures, joint dislocations, closed head injuries with altered consciousness, and subdural hematoma), which are considered ''never events.''

Collecting data on all falls can be useful in informing providers about falls in general, as a considerable proportion of falls are preventable. Persons who have a history of falls, regardless of injury status, have a greater likelihood of falling again; thus, gathering data on all falls is a way to collect important and relevant data on risk factors. As part of best clinical practice, IRFs should track falls for multiple purposes, such as those that satisfy regulatory requirements, quality improvement, risk assessment, and clinical decisions support, including those that are assisted/non-assisted and preventable/non-preventable. For the purposes of this quality measure, the assessment instrument includes an item about whether any fall took place (J1800) as a gateway item. If there were any falls, the assessor then completes the next set of items (J1900) indicating the number of falls by injury status. As discussed previously, facilities must report the data associated with all these items to avoid issues with missing data and as a way to ensure accurate data collection, but only the data on falls with major injury are used in calculating the quality measure.

Comment: One commenter pointed out that the proposed rule included a statement that could be misinterpreted as stating that 19 percent of falls in IRFs are serious.

Response: In the FY 2016 IRF PPS proposed rule (80 FR 23375), the original sentences read as follows: ''For IRFs, a study of 5,062 patients found 367 patients (7.25 percent) had 438 falls. Among these 438 falls, 129 (29.5 percent of the falls) resulted in an injury, of which 25 (19 percent of falls) were serious.'' To clarify, the second sentence in question should have read: ''Among these 438 falls, 129 (29.5 percent of the falls) resulted in an injury, of which 25 (5.7 percent of all falls and 19 percent of all falls with injury) were serious.'' The commenter correctly pointed out that 25 seriously injurious falls out of 438 total falls equals a 5.7 percent incidence of seriously injurious falls in the cited study of 5,062 IRF patients.[33]

Final Decision: Having carefully considered the comments we received on the application of the quality measure, the Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

2. Quality Measure Addressing the Domain of Functional Status, Cognitive Function, and Changes in Function and Cognitive Function: Application of Percent of Long-Term Care Hospital Patients With an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; Endorsed on July 23, 2015)

Section 1899B(c)(1) of the Act directs the Secretary to specify quality measures on which PAC providers are required under the applicable reporting provisions to submit standardized patient assessment data and other necessary data specified by the Secretary with respect to 5 quality domains, one of which is functional status, cognitive function, and changes in function and cognitive function. To satisfy these requirements, we proposed to specify and adopt an application of the quality measure, Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), in the IRF QRP as a cross-setting quality measure that addresses the domain of functional status, cognitive function, and changes in function and cognitive function. The reporting of data for this measure would affect the payment determination for FY 2018 and subsequent years. This quality measure reports the percent of patients with both an admission and a discharge functional assessment and a goal that addresses function.

The National Committee on Vital and Health Statistics, Subcommittee on Health,[34] noted: ''[i]information on functional status is becoming increasingly essential for fostering healthy people and a healthy population. Achieving optimal health and well-being for Americans requires an understanding across the life span of the effects of people's health conditions on their ability to do basic activities and

[33] Frisina PG, Guellnitz R, Alverzo J. A time series analysis of falls and injury in the inpatient rehabilitation setting. Rehab Nurs. 2010; 35(4):141–146.

[34] Subcommittee on Health National Committee on Vital and Health Statistics, ''Classifying and Reporting Functional Status'' (2001).

participate in life situations, that is, their functional status.'' This statement is supported by research showing that patient functioning is associated with important patient outcomes such as discharge destination and length of stay in inpatient settings,[35] as well as the risk of nursing home placement and hospitalization of older adults living in the community.[36] Functioning is important to patients and their family members.[37] [38] [39]

The majority of patients and residents who receive PAC services, such as care provided by SNFs, HHAs, IRFs and LTCHs, have functional limitations, and many of these patients are at risk for further decline in function due to limited mobility and ambulation.[40] The patient populations treated by SNFs, HHAs, IRFs and LTCHs vary in terms of their functional abilities at the time of the PAC admission and their goals of care. For IRF patients and many SNF residents, treatment goals may include fostering the patient's ability to manage his or her daily activities so that the patient can complete self-care and/or mobility activities as independently as possible, and if feasible, return to a safe, active, and productive life in a community-based setting. For HHA patients, achieving independence within the home environment and promoting community mobility may be the goal of care. For other HHA patients, the goal of care may be to slow the rate of functional decline to allow the person to remain at home and avoid institutionalization.[41] Lastly, in addition to having complex medical care needs for an extended period of time, LTCH patients often have limitations in functioning because of the nature of their conditions, as well as deconditioning due to prolonged bed rest and treatment requirements (for example, ventilator use). The clinical practice guideline *Assessment of Physical Function*[42] recommends that clinicians should document functional status at baseline and over time to validate capacity, decline, or progress. Therefore, assessment of functional status at admission and discharge and establishing a functional goal for discharge as part of the care plan (that is, treatment plan) is an important aspect of patient and resident care in all of these PAC providers.

Given the variation in patient and resident populations across the PAC providers, the functional activities that are typically assessed by clinicians for each type of PAC provider may vary. For example, the activity of rolling left and right in bed is an example of a functional activity that may be most relevant for low-functioning patients or residents who are chronically critically ill. However, certain functional activities, such as eating, oral hygiene, lying to sitting on the side of the bed, toilet transfers, and walking or wheelchair mobility, are important activities for patients and residents in each PAC provider.

Although functional assessment data are currently collected in SNFs, HHAs, IRFs and LTCHs, this data collection has employed different assessment instruments, scales, and item definitions. The data collected cover similar topics, but are not standardized across PAC settings. Further, the different sets of functional assessment items are coupled with different rating scales, making communication about patient functioning challenging when patients transition from one type of provider to another. Collection of standardized functional assessment data across SNFs, HHAs, IRFs and LTCHs, using common data items, would establish a common language for patient functioning, which may facilitate communication and care coordination as patients transition from one type of provider to another. The collection of standardized functional status data may also help improve patient or resident functioning during an episode of care by ensuring that basic daily activities are assessed at the start and end of each episode of care with the aim of determining whether at least one functional goal is established.

The functional assessment items included in the proposed functional status quality measure were originally developed and tested as part of the Post-Acute Care Payment Reform Demonstration (PAC–PRD) version of the CARE Item Set, which was designed to standardize assessment of patients' status across acute and post-acute providers, including SNFs, HHAs, IRFs and LTCHs. The functional status items on the CARE Item Set are daily activities that clinicians typically assess at the time of admission and/or discharge to determine a patient's or resident's needs, evaluate patient or resident progress, and prepare a patient or resident and the patient's/resident's family for a transition to home or to another provider.

The development of the CARE Item Set and a description and rationale for each item is described in a report entitled ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set: Volume 1 of 3.''[43] Reliability and validity testing were conducted as part of CMS' Post-Acute Care Payment Reform Demonstration, and we concluded that the functional status items have acceptable reliability and validity. A description of the testing methodology and results are available in several reports, including the report entitled ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on Reliability Testing: Volume 2 of 3''[44] and the report entitled ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on Care Item Set and Current Assessment Comparisons: Volume 3 of 3.''[45] The reports are available on CMS' Post-Acute Care Quality Initiatives Web page at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/CARE-Item-Set-and-B-CARE.html*.

The cross-setting function quality measure we proposed to adopt for the FY 2018 payment determination and subsequent years is a process measure that is an application of the quality measure, Percent of LTCH Patients with an Admission and Discharge Functional

[35] Reistetter TA, Graham JE, Granger CV, Deutsch A, Ottenbacher KJ. Utility of Functional Status for Classifying Community Versus Institutional Discharges after Inpatient Rehabilitation for Stroke. *Archives of Physical Medicine and Rehabilitation,* 2010; 91:345–350.

[36] Miller EA, Weissert WG. Predicting Elderly People's Risk for Nursing Home Placement, Hospitalization, Functional Impairment, and Mortality: A Synthesis. Medical Care Research and Review, 57; 3:259–297.

[37] Kurz, A. E., Saint-Louis, N., Burke, J. P., & Stineman, M. G. (2008). Exploring the personal reality of disability and recovery: a tool for empowering the rehabilitation process. *Qual Health Res, 18*(1), 90–105.

[38] Kramer, A. M. (1997). Rehabilitation care and outcomes from the patient's perspective. *Med Care, 35*(6 Suppl), JS48–57.

[39] Stineman, M. G., Rist, P. M., Kurichi, J. E., & Maislin, G. (2009). Disability meanings according to patients and clinicians: imagined recovery choice pathways. *Quality of Life Research, 18*(3), 389–398.

[40] Kortebein P, Ferrando A, Lombebeida J, Wolfe R, Evans WJ. Effect of 10 days of bed rest on skeletal muscle in health adults. JAMA; 297(16):1772–4.

[41] Ellenbecker CH, Samia L, Cushman MJ, Alster K. Patient safety and quality in home health care. Patient Safety and Quality: An Evidence-Based Handbook for Nurses. Vol 1.

[42] Kresevic DM. Assessment of physical function. In: Boltz M, Capezuti E, Fulmer T, Zwicker D, editor(s). Evidence-based geriatric nursing protocols for best practice. 4th ed. New York (NY): Springer Publishing Company; 2012. p. 89–103. Retrieved from *http://www.guideline.gov/content.aspx?id=43918*

[43] Barbara Gage *et al.,* ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set'' (RTI International, 2012).

[44] Ibid.

[45] Ibid.

Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015). This quality measure was developed by the CMS. It reports the percent of patients with both an admission and a discharge functional assessment and a treatment goal that addresses function. The treatment goal provides documentation that a care plan with a goal has been established for the patient.

This process measure requires the collection of admission and discharge functional status data using standardized clinical assessment items, or data elements that assess specific functional activities, that is, self-care and mobility activities. The self-care and mobility function activities are coded using a 6-level rating scale that indicates the patient's level of independence with the activity; higher scores indicate more independence. For this quality measure, documentation of a goal for one of the function items reflects that the patient's care plan addresses function. The function goal is recorded at admission for at least one of the standardized self-care or mobility function items using the 6-level rating scale.

To the extent that a patient has an incomplete stay (for example, for the purpose of being admitted to an acute care facility), collection of discharge functional status data might not be feasible. Therefore, for patients with incomplete stays, admission functional status data and at least one treatment goal would be required, and discharge functional status data would not be required to be reported.

A TEP convened by our measure development contractor provided input on the technical specifications of this quality measure, including the feasibility of implementing the measure across PAC settings, which included the IRF setting. The TEP supported the implementation of this measure across PAC providers and also supported our efforts to standardize this measure for cross-setting use. Additionally, the MAP met on February 9, 2015 and provided input to us on the quality measure. The MAP conditionally supported the specification of an application of the quality measure, Percent of LTCH Patients With an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015) for use in the IRF QRP as a cross-setting measure. The MAP conditionally supported this measure pending NQF-endorsement and resolution of concerns about the use of two different functional status scales for quality reporting and payment purposes. The MAP reiterated its support for adding measures addressing function, noting the group's special interest in this PAC/LTC core concept. More information about the MAPs recommendations for this measure is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*.

This quality measure was developed by CMS. The specifications are available for review at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed cross-setting quality measures focused on assessment of function for PAC patients. We are also unaware of any other cross-setting quality measures for functional assessment that have been endorsed or adopted by another consensus organization. Therefore, we proposed to specify and adopt this functional assessment measure for use in the IRF QRP for the FY 2018 payment determination and subsequent years under the Secretary's authority to select non-NQF-endorsed measures. As described in more detail in section IX.I.2, of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016), and the subsequent data collection periods are 12 months in length and follow the calendar year (that is, January 1 to December 31).

We proposed that data for this proposed quality measure be collected using the IRF–PAI, with submission through the QIES ASAP system. For more information on IRF QRP reporting through the QIES ASAP system, we refer readers to *http://cms.gov/Medicare/Quality-Initiatives-PatientAssessment-Instruments/IRF-QualityReporting/index.html* and *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

The measure calculation algorithm are: (1) For each IRF stay, the records of Medicare patients discharged during the 12-month target time period are identified and counted; this count is the denominator; (2) the records of Medicare patients with complete stays are identified, and the number of these patient stays with complete admission functional assessment data and at least one self-care or mobility activity goal and complete discharge functional assessment data is counted; (3) the records of Medicare patients with incomplete stays are identified, and the number of these patient records with complete admission functional status data and at least one self-care or mobility goal is counted; (4) the counts from step 2 (complete IRF stays) and step 3 (incomplete IRF stays) are summed; the sum is the numerator count; and (5) the numerator count is divided by the denominator count and multiplied by 100 to calculate this quality measure. (Please note that part of step 5, the conversion to a percent value, was accidentally omitted from the FY 2016 IRF PPS proposed rule).

For purposes of assessment data collection, we proposed to add a new section into the IRF–PAI. The new proposed section will include new functional status data items that will be used to calculate the quality measure, the Application of the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), should this proposed measure be adopted. The items to be added to the IRF–PAI, which assess specific self-care and mobility activities, would be based on functional items included in the PAC–PRD version of the CARE Item Set.

The specifications and data elements for the quality measure are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

The proposed function items to be included within the IRF–PAI do not duplicate existing items currently used for data collection within the IRF–PAI. While many of the items to be included have labels that are similar to existing items on the IRF–PAI, there are several key differences between the two assessment item sets that may result in variation in the patient assessment results. Key differences include: (1) The data collection and associated data collection instructions; (2) the rating scales used to score a patient's level of independence; and (3) the item definitions. A description of these differences is provided with the measure specifications on CMS Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

This measure is calculated using data from two points in time, at admission and discharge (see Section IX.I: Form, Manner, and Timing of Quality Data Submission of this final rule). The items would assess specific self-care and mobility activities, and would be based on functional items included in the PAC–PRD version of the CARE Item Set.

The items have been developed and tested for reliability and validity in SNFs, HHAs, IRFs, and LTCHs. More information pertaining to item testing is available on our Post-Acute Care Quality Initiatives Web page at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/CARE-Item-Set-and-B-CARE.html*.

For more information on the data collection and submission timeline for the adopted quality measure, refer to section IX.I.2 of this final rule. Additional information regarding the items to be added to the IRF–PAI may be found on CMS Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

Lastly, in alignment with the requirements of the IMPACT Act to develop quality measures and standardize data for comparative purposes, we believe that evaluating outcomes across the post-acute settings using standardized data is an important priority. Therefore, in addition to proposing a process-based measure for the domain in the IMPACT Act of ''[f]unctional status, cognitive function, and changes in function and cognitive function,'' which is included in this year's final rule, we also intend to develop outcomes-based quality measures, including functional status and other quality outcome measures to further satisfy this domain. These measures will be proposed in future rulemaking to assess functional change for each care setting as well as across care settings.

We sought public comments on our proposal to adopt the application of the quality measure, Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015) for the IRF QRP, with data collection starting on October 1, 2016, for the FY 2018 payment determination and subsequent years. The responses to public comments on this measure are discussed below in this section of the final rule. We note that we received many comments about the standardized (that is CARE) items that pertain to several of the 5 proposed function quality measures. Many of these comments are provided in this final rule as part of review of comments about this quality measure, an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015).

Comment: MedPAC did not support the adoption of the function process measure in the IRF QRP and urged CMS to adopt outcomes measures focused on changes in patient physical and cognitive functioning while under a provider's care.

Response: We appreciate MedPAC's preference for moving toward the use of functional outcome measures to assess the patient's physical and cognitive functioning under a provider's care, and we believe that using this process measure at this time will give us the data we need to develop a more robust outcome-based quality measure on this topic in the future. The proposed function quality measure, the Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), has attributes to enable outcomes-based evaluation by the provider. Such attributes include the assessment of functional status at two points in time, admission and discharge, enabling the provider to identify, in real time, changes, improvement or decline, as well as maintenance. Additionally, the proposed quality measure requires that the provider indicate at least one functional goal associated with a functional activity, and the provider can calculate the percent of patients who meet goals. Such real time use enables providers to engage in person-centered goal setting and the ability to use the data for quality improvement efforts. With regard to burden, we would like to note that this process measure primarily uses the same data elements as the functional outcome measures that were also proposed for the IRF QRP. IRF providers only need respond to each data item once on admission and discharge in order to inform multiple measures. The reporting of at least one functional assessment goal and the wheelchair mobility items are the only data required for this measure that are unique to this measure.

Comment: Several commenters expressed their support for cross-setting quality measure data because they facilitate their goal of providing high-quality care and conforming to best practices, and conveyed their request that CMS ensure the implementation of cross setting measures using standardized data and common definitions. Some of these commenters questioned whether the proposed function items were standardized and interoperable. One commenter noted that the four functional outcome measures were not proposed for SNFs or LTCHs, nor was there a time frame discussed for including them in the future.

Response: We agree with the importance of cross-setting standardization and we agree that assessment items and quality measure should promote best practices. The quality measure, an Application of Percent of LTCH Patients With an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015), which is being proposed as a cross-setting measure for SNFs, IRFs and LTCHs is an application of a measure that was NQF-endorsed on July 23, 2015 (*http://www.qualityforum.org/QPS/2631*). The specifications for this cross-setting measure are available on the IRF QRP Web page at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*. The IMPACT Act requires interoperability through the use of such standardized data. There will be instances in which some provider types may need more or less standardized items than other provider types—but where required by the IMPACT Act we will work to ensure that such core items are standardized. For example, we proposed functional outcome measures for IRFs and are currently developing functional outcome measures, including self-care and mobility quality measures for use in the SNF setting. These outcome function quality measures are intentionally being designed to use the same standardized functional assessment items that are included in the proposed function process measure, which will result in a limited additional reporting burden. To clarify which function items are included in each function measure for each QRP, we added a table to the document entitled, Inpatient Rehabilitation Facility Quality Reporting Program: Specifications of Quality Measures Adopted in the FY 2016 Final Rule, which clearly identifies which functional assessment items are used in the cross-setting process measure, as well as the setting-specific IRF outcome measures. The document is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

Comment: One commenter supported the concept of measuring function and monitoring the percentage of patients with completed functional assessments.

This commenter was pleased that the quality measure, an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631, endorsed on July 23, 2015), was proposed for multiple PAC settings in accordance with the IMPACT Act. This commenter noted that the proposed quality measure is an application of the LTCH measure under review at NQF, and that fewer functional assessment items are in the proposed measure when compared to the LTCH process quality measure, the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function. For example, the commenter noted that the Confusion Assessment Method (CAM©) items and the Bladder Continence items are not included in the proposed application of the quality measure. Several commenters questioned why the CARE function items on the proposed IRF–PAI, MDS 3.0 and LTCH CARE Data Set are not the same set of items and believed the measure, an Application of The Percent of LTCH Patients With an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015), should be the same set of items.

Response: The proposed function process measure, specified as a cross-setting quality measure, is an application of the measure, Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed July 23, 2015). The application includes only selected function items from the measure, and thus is not exactly the same. The application of the measure is standardized across multiple settings. We believe that standardization of assessment items across the spectrum of post-acute care is an important goal. In the cross-setting process quality measure, there is a common core subset of function items that will allow tracking of patients' functional status across settings. We recognize that there are some differences in patients' clinical characteristics, including medical acuity, across the LTCH, SNF and IRF settings, and that certain functional items may be more relevant for certain patients. Decisions regarding item selection for each quality measure were based on our review of the literature, input from a TEP convened by our measure contractor, our experiences and review of data in each setting from the PAC–PRD, and public comments.

As to the comments regarding the PAC assessment instruments, a core set of mobility and self-care items are proposed for IRFs, SNFs, and LTCHs, and are nested in the proposed Section GG of the IRF–PAI. Additional function items are included on the IRF–PAI and LTCH CARE Data Set due to the proposal or adoption of various other outcome-based quality measures in those specific settings. Therefore, we believe that the core set of items in the proposed Section GG are standardized to one another by item and through the use of the standardized 6-level rating scale. We will work to harmonize the assessment instructions that better guide the coding of the assessment(s) as we believe that this will lead to accurate and reliable data, allowing us to compare the data within each setting. To clarify which function items are included in each function measure for each QRP, we added a table to the document entitled, Inpatient Rehabilitation Facility Quality Reporting Program: Specifications of Quality Measures Adopted in the FY 2016 Final Rule, which clearly identifies which functional assessment items are used in the cross-setting process measure, as well as the setting-specific IRF outcome quality measures. The document is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

Comment: One commenter noted that the reason for standardized assessment items ''would establish a common language for patient and resident functioning, which may facilitate communication and care coordination as patients and residents transition from one type of provider to another,'' and asked CMS to provide data on the number of percent of patients/residents that transition from one type of provider to another. The commenter further requested information about why the current measures fail to provide clinicians with the information needed.

Response: Several studies have documented patient/resident transition patterns following discharge from the hospital and continuing for 30, 60, or 90 days.[46] [47] [48] While the exact proportions discharging to each type of care vary slightly across the years, the proportion of acute hospital admissions being discharged to PAC has grown from 35 percent in 2006 to 43 percent in more recent years (MedPAC, 2014). Among those discharged to PAC, the majority are discharged to SNFs or HHAs, and a much smaller proportion is discharged to IRFs and LTCHs. Further, many individuals in PAC settings continue to transition to subsequent sites of care. Common discharge patterns from the IRF, for example, include over 75 percent of cases continuing into HHA or outpatient therapy services. SNF cases are commonly discharged home with either outpatient therapy or home health services. A 2009 report outlining these issues *http://aspe.hhs.gov/health/reports/09/pacihs/report.pdf* includes a summary of the most common PAC transition patterns for Medicare FFS Beneficiaries in 2006.[49] This report shows that over 20 percent of all hospital admissions in 2008 were discharged to a SNF, IRF, or LTCH. Among those 3 settings, over two-thirds of each were discharged from a SNF to another PAC setting or readmitted directly to the acute hospital. Specifically, 66 percent of all SNF FFS admissions, 91 percent of IRF post-acute admissions, and 73 percent of LTCH post-acute admissions continued on to additional post-care. These materials document the various patterns of care for Medicare beneficiaries using PAC. The episode trajectories underscore the importance of using standardized language to measure patient/resident complexity across all settings.

Comment: One commenter noted that the proposed function measure includes reporting of a function goal as a way to document that patients have a care plan that addresses function, and that this reporting of function goals was not part of the original PAC–PRD. This commenter further noted that reporting of only one goal was not ideal, because many patients have goals for multiple functional limitations and the number

[46] Gage, B., Morley, M., Ingber, M., & Smith, L. (2011). Post-Acute Care Episodes Expanded Analytic File: RTI International. Prepared for the Assistant Secretary for Planning and Evaluation. Retrieved from *http://aspe.hhs.gov/health/reports/09/pacihs/report.pdf.*

[47] Gage, B., Morley, M., Constantine, R., Spain, P., Allpress, J., Garrity, M., & Ingber, M. (2008). Examining Relationships in an Integrated Hospital System: RTI International. Prepared for the Assistant Secretary for Planning and Evaluation. Retrieved from *http://aspe.hhs.gov/health/reports/08/examine/report.html.*

[48] Gage, B., Pilkauskas, N., Dalton, K., Constantine, R., Leung, M., Hoover, S., & Green, J. (2007). Long-Term Care Hospital (LTCH) Payment System Monitoring and Evaluation Phase II Report RTI International. Prepared for the Centers for Medicare & Medicaid Services. Retrieved from *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/LongTermCareHospitalPPS/downloads/rti_ltchpps_final_rpt.pdf.*

[49] Gage, B., Morley, M., Spain, P., & Ingber, M. (2009) Examining Post Acute Care Relationships in an Integrated Hospital System. Prepared for the Assistant Secretary for Planning and Evaluation. Retrieved from *http://aspe.hhs.gov/health/reports/09/pacihs/report.pdf.*

of standardized functional assessment items is limited compared to the full set of function items tested as part of the PAC–PRD. Finally, this commenter indicated that goals of care may be to improve function, or may be focused on maintenance of a patient's function.

Response: The proposed function process measure requires a minimum of 1 goal per patient stay; however, clinicians can report goals for every self-care and mobility item included in the proposed Section GG of the IRF–PAI. The IMPACT Act specifically mentions goals of care as an important aspect of the use of standardized assessment data, quality measures, and resource use to inform discharge planning and incorporate patient preference. We agree that for many PAC patients, the goal of therapy is to improve function and we also recognize that, for example, for a PAC patient with a progressive neurologic condition, delaying decline may be the goal. We believe that individual, person-centered goals exist in relation to individual preferences and needs. We will provide instructions about reporting of goals in a training manual and in training sessions to clarify that goals set at admission may be focused on improvement of function or maintenance of function.

Comment: Several commenters suggested that CMS, in lieu of collecting the proposed five functional measures, conduct a study of a nationally-representative sample of IRFs to collect data on both the FIM® and CARE Tool items. Some commenters suggest that the CARE data could be used to develop a FIM®/CARE crosswalk, and a new case mix classification system. Other commenters discouraged CMS from developing a FIM®/CARE crosswalk.

Response: We recognize the potential contribution of developing a crosswalk to transform the FIM® data to CARE data and will take this recommendation under advisement.

Comment: One commenter suggested that CMS conduct additional testing of the CARE function items with specific patient subpopulations. This commenter also suggested research studies that compare CARE items with other instruments across diverse PAC populations. They suggested this data be used to improve the CARE items or replace them with other items to address any potential floor or ceiling effects. This commenter also suggested studies that compare models of care for subpopulations so as to elicit best practices related to complex conditions.

Response: We agree that adoption of the proposed function quality measures would offer many opportunities to examine best practices for caring for IRF patients. Examining the data for any floor and ceiling effects in special populations is also a very worthy research idea. With regard to examining the CARE data against other functional assessment instrument data, as part of the PAC–PRD analyses, we compared data from the existing items (that is MDS, OASIS and the FIM® instrument) with data from the analogous CARE items. More specifically, we ran cross tabulations of FIM® scores and CARE scores for the patients in the PAC–PRD to compare scores. A full description of the analyses and the results are provided in the report, The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set and Current Assessment Comparisons Volume 3 of 3, and the report is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/CARE-Item-Set-and-B-CARE.html*.

Comment: Two commenters suggested further reliability and validity testing of the function items. Some commenters noted concerns that the CARE item inter-rater reliability does not exhibit satisfactory inter-rater reliability among clinicians in IRFs, and suggested CMS utilize existing items until further modifications can be made to the CARE functional scale. Another commenter was concerned that no external reliability or validity testing of the CARE tool items had been done to assess its applicability across sites and provider types, outside of the inter-rater reliability assessed for the PAC–PRD.

Response: The reliability testing results mentioned by these commenters was only one of several reliability analyses conducted on these items as part of the PAC–PRD, which can be found at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/The-Development-and-Testing-of-the-Continuity-Assessment-Record-and-Evaluation-CARE-Item-Set-Final-Reporton-Reliability-Testing-Volume-2-of-3.pdf*. That particular result was a reflection of the small sample size available for analysis. In addition to the inter-rater reliability study mentioned by these commenters, we examined inter-rater reliability of the CARE items using videotaped case studies, which included 550 assessments from 28 facilities, of which 237 assessments were from 8 IRFs. We also conducted analyses of the internal consistency of the function data. The results of these analyses indicate moderate to substantial agreement, which suggests sufficient reliability for the CARE items. In addition to the PAC–PRD analyses, as part of the NQF application process, we conducted additional analyses focused on the 6 submitted IRF and LTCH function quality measures, including item-level, scale-level and facility-level analyses testing the reliability and validity of the CARE function data. A description of the analyses and the results are available on the NQF Web site's Person- and Family-Centered Care project at *http://www.qualityforum.org/ProjectMeasures.aspx?projectID=73867*. Therefore, given the overall findings of the reliability analyses, we believe that the proposed function measure is sufficiently reliable for the IRF QRP.

We understand the importance of education in assisting providers to collect accurate data and we worked in the past with public outreach including training sessions, training manuals, webinars, open door forums and help desk support. Further, we note that as part of the IRF QRP, we intend to evaluate the national-level data for this quality measure submitted by IRFs to CMS. These data will inform ongoing measure development and maintenance efforts, including further analysis of reliability and validity of the data elements and the quality measure. Finally, we agree that ongoing reliability and validity testing is critical for all items used to calculate quality measures. For external reliability and validity, we encourage stakeholders to design and conduct reliability testing. We are aware that 1 external entity conducted CARE function data reliability testing on the SNF population and reported the testing procedures and results in NQF measure documents which can be found on the NQF's Person- and Family-Centered Care project at *http://www.qualityforum.org/ProjectMeasures.aspx?projectID=73867*.

Comment: Several commenters were concerned that the measure, an Application of the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015) was not NQF-endorsed.

Response: We agree that the NQF endorsement process is an important part of measure development. We have proposed *an application* of the quality measure, Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function. This quality measure was ratified by the NQF Board of Directors on July 22, 2015, and has

been endorsed by NQF effective July 23, 2015.

Comment: One commenter noted that IRFs are already required to develop a care plan and this commenter did not support requiring additional documentation of the care plan as part of the measure, an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015).

Response: To clarify, the proposed function measure requires reporting of a minimum of one self-care or mobility goal. We are ensuring that a minimum of one goal is represented in the plan of care, which is a best practice.

Comment: Several commenters were concerned that the measure, an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631, endorsed on July 23, 2015), does not guarantee that the patient's plan of care will be reflective of the functional assessment or contain goals associated with the assessment. Several commenters expressed concerns regarding the lack of benchmarks for goal-setting for the CARE function items. One commenter expressed concerns regarding the requirement to document a functional goal in the quality measure in the absence of data to guide goal-setting. One commenter noted that this process measure does not have a process to ensure a patient's plan of care includes a functional goal; this commenter noted a preference for outcome measures.

Response: We appreciate the commenter's concern about establishing function goals for IRF patients. The proposed quality measure requires a minimum of 1 self-care or mobility goal per patient stay. The documentation of a functional goal requires a valid numeric score indicating the patient's expected level of independence at discharge. With regard to benchmarks and having data to guide goal-setting, licensed clinicians can establish a patient's discharge goal(s) based on the admission assessment, discussions with the patient and family, by using their professional judgment and the professionals' standard of practice. For example, a patient may require the assistance of 2 helpers to get from a sitting to standing position on admission (Level 1 for Sit to Stand) and the goal is for the patient to progress to requiring supervision for the same activity by discharge (level 4 for Sit to Stand). National benchmarks could be developed over time based on national data.

Comment: One commenter was concerned that no data was provided clearly linking improved outcomes to this process measure.

Response: We believe that there is evidence that conducting functional assessments is a best practice for improving functional outcomes. The NQF requirement for endorsing process measures is that the process should be evidence-based, such as processes that are recommended in clinical practice guidelines. As part of the NQF process, we submitted several such clinical practice guidelines [50] [51] [52] to support this measure, and referenced another cross-cutting clinical practice guideline in the proposed rule. The clinical practice guideline Assessment of Physical Function [53] recommends that clinicians should document functional status at baseline and over time to validate capacity, decline, or progress. Therefore, assessment of functional status at admission and discharge and establishing a functional goal for discharge as part of the care plan (that is, treatment plan) is an important aspect of patient/resident care for all PAC providers.

Comment: Several commenters expressed concern that the proposed function process measure, an Application of the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), does not meet the requirements of the IMPACT Act because measures must be outcome based. One commenter asserted that the proposed measure did not satisfy the specified IMPACT Act domain, as the measure is not able to report on changes in function, and another commenter claimed that the measure does not satisfy the reporting of data on functional status. Finally, a comment stated that the measure does not have an appropriate numerator, denominator, or exclusions, lacks NQF endorsement, fails to be based on a common standardized assessment tool, is not risk adjusted, and lacks evidence that associates the measure with improved outcomes. One commenter claims that because the specifications for the proposed measure are inconsistent with the measure specifications posted by NQF for the measure that is under endorsement review, we failed to meet the requirements under the IMPACT Act to provide measure specifications to the public, and further asserts that one cannot determine the specifications that are associated with the proposed measure, which is an application of the NQF version of the measure.

Response: We believe that the proposed function measure meets the requirements of the IMPACT Act. Although we have specified this measure as a process measure, the measure itself has attributes that enable outcomes-based evaluation by the provider. Such attributes include the assessment of functional status at two points in time, admission and discharge, enabling the provider to identify, in real time, changes, improvement or decline, as well as maintenance. Additionally, the proposed quality measure requires that the provider indicate at least one functional goal associated with a functional activity, and providers can calculate the percent of patients who meet and exceed goals. Such real time use enables providers to engage in person-centered goal setting and the ability to use the data for quality improvement efforts. Therefore, we disagree with the observation that the proposed process quality measure does not satisfy the domain requirements specified in the IMPACT Act associated with functional status and functional change.

We also intend to use the data we collect on this measure to better inform our development of a better outcome-based cross-setting function measure. To the extent that commenters are concerned that the proposed function measure is not outcome-based because it is not risk adjusted, the TEP that reviewed this measure considered, but did not recommend, that the measure be risk-adjusted because completion of a functional assessment is not affected by the medical and functional complexity of the resident/patient. Rather, clinicians are able to report that an

[50] Kresevic DM. Assessment of physical function. In: Boltz M, Capezuti E, Fulmer T, Zwicker D, editor(s). Evidence-based geriatric nursing protocols for best practice. 4th ed. New York (NY): Springer Publishing Company; 2012. p. 89–103. Retrieved from *http://www.guideline.gov/content.aspx?id=43918.*

[51] Centre for Clinical Practice at NICE (UK). (2009). Rehabilitation after critical illness (NICE Clinical Guidelines No. 83). Retrieved from *http://www.nice.org.uk/guidance/CG83.*

[52] Balas MC, Casey CM, Happ MB. Comprehensive assessment and management of the critically ill. In: Boltz M, Capezuti E, Fulmer T, Zwicker D, editor(s). Evidence-based geriatric nursing protocols for best practice. 4th ed. New York (NY): Springer Publishing Company; 2012. p. 600–27. Retrieved from *http://www.guideline.gov/content.aspx?id=43919.*

[53] Kresevic DM. Assessment of physical function. In: Boltz M, Capezuti E, Fulmer T, Zwicker D, editors(s). Evidence-based geriatric nursing protocols for best practice. 4th ed. New York (NY): Springer Publishing Company; 2012. p. 89-103. Retrieved from *http//www.guideline.gov/content.aspx?id=43918.*

activity was not attempted due to the resident's or patient's medical condition or a safety concern (including patient or clinician safety), and clinicians take this complexity into account when setting goals.

We disagree with the commenter that we failed to meet the requirements under the IMPACT Act to provide measure specifications to the public. The specifications were identified in the FY 2016 IRF PPS proposed rule (80 FR 23332) as being posted at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*. Also, we would like to clarify that the proposed function process quality measure is an application of the measure posted on the NQF Web site, which is the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed July 23, 2015). The measure, NQF #2631, which was developed for LTCHs was proposed and finalized in the FY 2015 IPPS/LTCH PPS final rule (79 FR 50291 through 50298) for adoption in the LTCH QRP. An application of this measure, the cross-setting measure, was proposed in the FY 2016 IRF PPS proposed rule (80 FR 23376 through 23379), and similarly it was proposed in the FY 2016 IPPS/LTCH PPS proposed rule (80 FR 24602 through 24605) and the FY 2016 SNF QRP proposed rule (80 FR 22073through 22075). This cross-setting version, *an application* of the LTCH QRP quality measure, was proposed based on guidance from multiple TEPs convened by our measure contractor, RTI International.

Finally, we have addressed the comment regarding modifying the various PAC setting patient assessment instruments to use a single standardized assessment tool in response to similar comments above.

Comment: Several commenters noted the significance of adequate training, stressing the importance of appropriate coding of the new items used to calculate the proposed measures, and one commenter specifically asked for clarification on which health care professional would be responsible for performing the assessment, while another asked that the IRF–PAI Training Manual be provided with the necessary coding and assessment instructions for the provider's reference in a timely manner. One commenter suggested transparency with regard to how CMS will implement the new quality measures and stated that training for all providers, including instructions for the revised IRF–PAI Training Manual, would be needed. The commenter suggested open door forums and training webinars for providers. One commenter recommended that training be available at least 5 months prior to implementation, as both national and local training would be needed.

Response: We agree with the importance of thorough and comprehensive training, and we intend to provide such training in the near future for all updates to the IRF–PAI and assessment requirements. In addition to the manual and training sessions, we will provide training materials through the CMS webinars, open door forums, and help desk support. We welcome ongoing input from stakeholders on key implementation and training considerations, which can be submitted via email: *PACQualityInitiative@cms.hhs.gov*.

Comment: Several commenters noted that the items included in the IRF–PAI differ from those tested during the PAC–PRD and represented a limited set of items from the original CARE Tool. One of these commenter suggested that the contributions of occupational therapy may not be measureable with the limited set of items. Another commenter suggested that the assessment time frame used in the PAC–PRD is different than the assessment time frame for the proposed items and noted that the definition of level 1 was modified to include the assistance of 2 or more helpers.

Response: The PAC–PRD tested a range of items, some of which were duplicative, to identify the best performing items in each domain. Select items were removed from the item set where testing results and clinician feedback suggested the need for fewer items to be included in a particular measure or scale. We also received feedback on the items proposed for inclusion on the process quality measure from a cross-setting TEP convened by our measure development contractor, RTI International during this year's pre-rulemaking process. The proposed measure was based on these analyses and input. Other changes from the original PAC–PRD items included incorporating instructional detail from the manual and training materials directly into the data collection form and updating skip patterns to minimize burden. We agree that the contribution of occupational therapy, as well as other clinical disciplines, should be reflected in all item and measure development. During the PAC–PRD, clinicians from many different disciplines collected CARE data, including occupational therapists (OTs). In addition, the items were developed with the input from those individuals who would be performing the assessments, including OTs.

With regard to the assessment time frame for the CARE function items, we instructed clinicians during the PAC–PRD to use a 2-day time frame if the patients were admitted before 12 p.m. (noon) or 3 calendar days if the patients were admitted after 12 p.m. (noon). Our exit interviews revealed that most patients were admitted to the IRF after 12 p.m. and that clinicians used 3 calendar days. Therefore, we proposed to use the assessment time frame that most clinicians used during the PAC–PRD. With regard to the definition of level 1 to include the assistance of 2 or more helpers, this instruction was provided in the CARE Training Manual, but was not on the CARE Tool assessment form. User feedback included a suggestion to add this phrase onto the data set itself so that clinicians were aware of this scoring example.

Comment: Several commenters were concerned about the potential for confusion between the FIM® and the CARE rating scales.

Response: During the PAC–PRD, our training included a discussion of CARE functional items and scales, as well as differences between the FIM® and CARE items and rating scale. We share the commenters' concerns related to ensuring data accuracy. We intend to conduct comprehensive training prior to implementation of the CARE function items, as well as develop comprehensive training materials. Further, to ensure data accuracy, we intend to propose through future rulemaking a process and program surrounding data validation and accuracy analysis.

Comment: Several commenters were concerned that historical FIM® data for benchmarking will be lost if the FIM® instrument is replaced by CARE items in the future.

Response: We appreciate the commenters' concerns about the historical availability of FIM® data. When the IRF–PAI was implemented in 2002, researchers examined differences in IRF data prior to and after 2002 to better understand adjustments that would be needed to make fair comparisons of IRF data across these years.[54] [55]

[54] Granger, C.V., Deutsch, A., Russell, C., Black, T., & Ottenbacher, K.J. Modifications of the FIM instrument under the inpatient rehabilitation facility prospective payment system. American Journal of Physical Medicine & Rehabilitation, 2007; 86(11), 883–892.

Continued

Comment: A few commenters stated that FIM® instrument functional data should satisfy measure requirements, because the NQF measure requires valid function scores.

Response: To clarify, the proposed function quality measure, an Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), reports standardized functional assessment (that is, CARE) data at admission and discharge as well as at least one functional status discharge goal. This description is consistent with the technical description submitted to NQF for the measure, Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan (NQF #2631; endorsed on July 23, 2015), which is available on the Patient- and Family-Centered Care Project Measures Web site at *http://www.qualityforum.org/ProjectMeasures.aspx?projectID=73867*. In our NQF Measure Information Form, we defined the valid scores using the CARE 6-level rating scale, along with activity not attempted codes, and we listed the names of the CARE function items (see Numerator Statement Detail—Section 5.6 of the NQF Measure Information Form). The commenter's description of the use of ''valid codes'' for the measure seems to refer to the Numerator Statement (section 5.4) on the NQF Measure Information Form, which is intended to be a brief narrative of the description of the numerator. The Numerator Statement Detail (Section 5.6) includes the following details: Valid scores/codes for the self-care items are: 06—Independent, 05—Setup or clean-up assistance, 04—Supervision or touching assistance, 03—Partial/moderate, assistance, 02—Substantial/maximal assistance, 01—Dependent, 07—Patient Refused, 09—Not applicable, 88—Not attempted due to medical condition or safety concerns. Valid scores/codes for the mobility items are: 06—Independent, 05—Setup or clean-up assistance, 04—Supervision or touching assistance, 03—Partial/moderate assistance, 02—Substantial/maximal assistance, 01—Dependent, 07—Patient Refused, 09—Not applicable, 88—Not attempted due to medical condition or safety concerns. Therefore, we disagree that other function items or rating scales could be used to calculate this measure. The calculation of this measure is based on the CARE scores/codes and labels and stem as a result of item testing conducted and provided in the NQF application materials, which are available at *http://www.qualityforum.org/ProjectMeasures.aspx?projectID=73867*.

Comment: One commenter expressed concerns regarding the CARE function rating scale and clinician safety. The commenter expressed concern over the CARE coding that uses the patient's ''usual performance'' versus use of ''most dependent performance'' to determine functional status coding and the effect on discharge planning. The commenter expressed concerns regarding clinician difficulty in using the CARE function rating scale during pilot testing of CARE function items and makes suggestions regarding rating scale modification. The commenter also considered the definition of the Substantial/Maximal Assistance to be too broad and insufficiently precise.

Response: We share the commenters' commitment to ensuring patient and clinician safety, and this is of utmost importance to us. With regard to the assessment of usual versus the most dependent performance, consistent with current clinical practices, we would encourage IRF clinicians to monitor for variation in patient functioning at different times of the day or in different environment (that is, therapy gym and the patient's room). We agree that clinicians' observation of any variation should be shared with the patient and family member at the time of discharge, including the amount of variation and the time of day or environment. For example, 1 patient who has a co-existing condition of osteoarthritis may require more assistance with toilet transfers in the morning than the evening, while a patient after a stroke may require more assistance with toilet transfers in the evening compared to the morning due to fatigue. A single function score alone does not convey all the information that should be shared with the patient and family. In addition, variations in patient functioning should also be documented in the patient's medical record. With regard to using the concerns about the CARE rating scale, we would like to note that we conducted exit interviews as part of the PAC–PRD, and that clinical coordinators ''commented positively about the coding approach of determining whether a patient could do at least half the task or not, and if they could, whether they could safely leave the patient to complete the task without supervision. For the definition of Substantial/maximal assistance, the LTCH staff appreciated being able to note small changes from complete dependence to being able to complete a task with much assistance (over half the task was completed by the helper), particularly for the most impaired populations.'' (March 2012—Post-Acute Care Payment Reform Demonstration: Final Report Volume 1 of 4, *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/Downloads/PAC-PRD_FinalRpt_Vol1of4.pdf*.)

We intend to provide training that would include descriptions and examples of the CARE rating scale in order to clarify any concerns about the rating levels. The development of the CARE function items, including the definitions for each activity, were selected based on a review of all existing items used by LTCHs, IRFs, SNFs and HHAs, a review of the relevant literature, and input from stakeholders such as clinicians and researchers. The items were designed to focus on a single activity rather than multiple activities, so that clinicians completing assessments did not have to determine a person's level of independence with multiple activities to then compute a composite score based on different levels of independence in these component activities. For example, the FIM® includes an item called ''Grooming'' that addresses washing hands and face, combing hair, brushing teeth, shaving, applying makeup. To score this item, the clinician needs to consider how much help was needed for each of these component activities and then derive a composite overall assessment of the patient's status for the activities as a whole for the FIM® score. For the CARE item, one activity is considered, oral hygiene, and there is one score reported that reflects the person's overall level of help needed for that activity. The CARE function rating scale was also developed based on input from the clinical communities and research that used the existing rating scales. During PAC–PRD on-site training, when we explained differences between the existing and CARE rating scales, we received positive feedback about the CARE rating scale. We additionally conducted alpha and beta testing of the items before the PAC–PRD began in order to select rating scale, items and definitions that made sense to clinicians and were consistent with clinical logic. We also maintained a help desk and had frequent phone calls with site coordinators to ensure that we clarified any coding issues or item definitions. We also conducted extensive exit interviews with

[55] Deutsch, A., Granger, C.V., Russell, C., Heinemann, A.W., & Ottenbacher, K.J. Apparent changes in inpatient rehabilitation facility outcomes due to a change in the definition of program interruption. Archives of physical medicine and rehabilitation, 2008; 89(12), 2274–2277.

participating sites. This feedback was incorporated into the CARE items that we have proposed for the cross-setting function measure. Based on our experiences, we believe that the CARE items and associated rating scale represent a simple, but comprehensive method of documenting functional abilities at admission and discharge.

Comment: One commenter stated that the CARE items duplicate the existing IRF–PAI Items. This commenter indicated that CMS' description of the differences between the CARE items and the existing IRF–PAI items are not actually differences.

Response: As noted in the proposed rule, the key differences between the IRF–PAI and the CARE function items include: (1) The data collection and associated data collection instructions; (2) the rating scales used to score a patient's level of independence; and (3) the item definitions. We believe that the proposed standardized (that is, CARE) function items do not duplicate existing items currently used for data collection within the IRF–PAI. While many of the items to be included have labels that are similar to existing items on the IRF–PAI, there are several key differences between the assessment item sets that may result in variation in the patient assessment results. For example, the standardized CARE items are scored using a 6-level rating scale, while the existing IRF–PAI items are scored using a 7-level rating scale. The CARE items include 4 items focused on the activity or walking and 2 items focused on wheelchair mobility. The walking items are Walking 10 feet (even surfaces), walking 50 feet with two turns, Walking 150 feet and Walking 10 feet on uneven surfaces, and the wheelchair mobility items are Wheel 50 feet with 2 turns and Wheel 150 feet. The FIM® includes 1 item that is scored based on either walking, wheelchair mobility, or both.

Comment: One commenter disagreed with the CMS's statement in the proposed rule that ''[w]e are not aware of any other quality measures for functional assessment that have been endorsed or adopted by another consensus organization for the IRF setting.'' The commenter notes that the FIM® tool is endorsed by the American Academy of Physical Medicine and Rehabilitation and the American Congress of Rehabilitation Medicine, and that both of these organizations are considered consensus organizations in the IRF industry. The commenter also noted that a recent NQF meeting included discussions of the FIM® instrument and the CARE function items.

Response: The FIM is an assessment tool, and we believe that such a tool is different from a quality measure. A quality measure can be developed using an instrument or a set of items, but a quality measure has defined specifications beyond the instrument or items. For this reason, we believe our statement in the proposed rule is accurate.

Comment: One commenter questioned the utility of the data collected under this process measure ''Percent of LTCH Patients With an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function'' (NQF #2631; endorsed on July 23, 2015).

Response: We believe that monitoring facility and provider activities using process measures initially will allow for the development of more robust outcome-based quality measures. By using the data collected with this quality measure, the IRF staff can calculate the percent of patients who meet or exceed their discharge functional status goals, which were established at admission with the patient and family. The function goal is established at admission by the IRF clinicians with input from the patient and family, demonstrating person and family-centered care. It should be noted, we proposed functional outcome measures, specifically self-care and mobility quality measures, in addition to this proposed cross-setting process measure. These outcome function quality measures are intentionally being designed to use the same standardized functional assessment items that are included in the proposed cross-setting process measure in order to capitalize on the data collected using the currently proposed process measure, which will inform further development while allowing for the consideration of limited additional burden.

Comment: Several commenters requested specific guidance on scoring IRF–PAI items, such as the cognitive patterns items and the self-care and mobility items.

Response: We provide scoring guidance in training manuals, training sessions, and through the help desks. We intend to provide comprehensive training as they do each time the assessment items change, and we will address these types of inquiries as part of our training efforts.

Comment: Many commenters expressed concerns regarding the burden associated with the addition of the standardized (that is, CARE) function items to the IRF–PAI for quality reporting purposes. Many of these commenters indicated they support outcomes-based quality measures focused on function, but did not support the proposed cross-setting process measure. Several commenters noted their lack of support was due to the burden of collecting overlapping items for function, but with different scales. Many commenters stated that adding the CARE function items to the IRF–PAI would result in data duplication, because the IRF–PAI includes FIM® function items, which are used for payment. Commenters expressed concerns regarding the subtle differences between the 6-level rating scale for the CARE function items and the 7-level rating scale for the FIM® function items, indicating that simultaneous use of the 2 scales could result in clinician confusion, potential risk to accuracy of clinical communication and data, potential risk to patient and clinician safety, and questionable validity and reliability of both scales. Several noted the importance of minimizing administrative burden on providers to limit duplication of effort and the risk of error associated with dual data entry. Additional comments included the increased length of the IRF–PAI from 8 to 18 pages; cost burden, as many IRFs may need to hire additional full-time clinical staff; potential for inconsistency associated with clinicians collecting and completing risk adjustment data for the function quality measures; time and cost burden and resources associated with training clinicians in use of the CARE function items, in addition to the usual training clinicians have to undergo to learn the FIM® instrument; costs associated with updating electronic medical records; and potential for data collection requirements to take away from direct patient care time. One commenter suggested CMS to consider the effect of the cost of compliance with the new data collection requirements on smaller-sized IRF units, including cost implications and their ability to provide quality care to beneficiaries. One commenter suggested adopting only one function measure to reduce burden. Several commenters recommended using the FIM® for quality reporting, including FIM® change and length of stay efficiency measures in IRFs, LTCHs and SNFs. One commenter noted that Medicare has a goal of improving the quality or care, but was concerned that the proposed regulations would be burdensome and require additional clerical staff. One commenter recommended that CMS suspend any measure not required by the IMPACT Act and those that are not critical to the mission of IRFs. The commenter also suggested adopting the minimum

number of quality measures necessary to meet the IMPACT Act to minimize burden on IRFs.

Response: We believe that the 6-level scale and the additional items in section GG allow us to better distinguish change at the highest and lowest levels of patient functioning by documenting minimal change from no change at the low end of the scale. [56] This is important for measuring progress in some of the most complex cases treated in PAC. The items in section GG were developed with input from the clinical therapy communities to better measure the change in function, regardless of the severity of the individual's impairment. We do not agree with the commenters' assertions that the inclusion of items that inform 2 different rating scales will cause issues of patient safety.

To reduce potential burden associated with collecting additional items, we have included several mechanisms in the new section GG to reduce the number of items that apply to any one patient. First, in section GG, there are gateway questions pertaining to walking and wheelchair mobility that allow the clinician to skip items that ask if the patient does not walk or does not use a wheelchair, respectively. For example, in Section GG, there is an item that asks whether or not the patient walks. If the resident does not walk, items in Section GG related to walking ability are skipped. Second, Section GG items will only be collected at admission and discharge. The gateway questions and skip patterns mean that only a subset of items are needed for most patients. However, by including all of them in the form, the standardized versions are available when appropriate for an individual patient.

We would like to clarify an issue related to the expected burden of collecting the additional items. At least one commenter had estimated that the additional staff needed to complete the additional items was estimated to be 280 hours per year and would require over 4 additional FTE to collect this data. Using an estimate of 2080 hours per FTE, the additional time for data collection of these items should add 0.10 percent additional FTE per year.

We appreciate the comments pertaining to EMRs. While we applaud the use of EMRs, we do not require that providers use EMRs to populate assessment data. It should be noted that with each assessment release, we provide free software to our providers that allows for the completion and submission of any required assessment data. The use of a vendor to design software that extracts data from a provider's EMR to populate our quality assessments, is a business decision that is made solely by the provider. We only require that assessment data be submitted via the QIES ASAP system in a specific compatible format. Providers can choose to use our free software (the Inpatient Rehabilitation Validation and Entry (IRVEN) software product are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-ServicePayment/InpatientRehabFacPPS/Software.html*.), or the data submission specifications we provide that allow providers and their vendors to develop their own software, while ensuring compatibility with the QIES ASAP system.

Comment: One commenter stated that the CARE item set in the proposed IRF–PAI Version 1.4 does not assess eating, bladder, or bowel control at discharge. The commenters expressed concerns that eating and bladder outcomes cannot be assessed using the CARE function items.

Response: We would like to clarify that the CARE self-care item set on the proposed IRF–PAI Version 1.4 does include the item ''eating'' at both admission and discharge, allowing monitoring of eating outcomes. Additionally, clinicians have the opportunity to establish a discharge goal for eating, if relevant for the patient. Bladder and bowel continence are only assessed at admission on the proposed IRF–PAI Version 1.4 because these data will only be used for risk adjustment for the IRF self-care and mobility quality measures. We are interested in developing quality measures focused on bladder and bowel function and management. Bladder and bowel functioning have been shown to be an independent construct from motor activities, such as self-care and mobility. While some functional assessment instruments analyses include bladder or bowel function as motor activities, Rasch analysis has shown that these items ''misfit,'' suggesting they do not measure the same constructs as the motor items.[57] Quality measures that focus uniquely on bladder and bowel function would allow collection of data specific to bladder and bowel management, and would be more actionable for providers to improve quality of care and patient outcomes.

Comment: One commenter expressed concern regarding the burden of collecting both the existing as well as new proposed function items, suggesting that CMS address duplication with a gradual removal of the current function items and replacing them with the new function items across the item sets for all of the post-acute settings, expressing that achieving such standardization and exchangeable patient data will enable cross-setting data comparison and improved quality measures with consistent risk adjustment so as to achieve the intent of the IMPACT Act.

Response: We interpret the comment to mean that IRFs already collect functional assessment data that is setting-specific. We intend to work with providers as we implement the requirements of reporting standardized data as part of the IMPACT Act. We would like to clarify that while the IMPACT Act requires the enablement of interoperability through the use of standardized data, there will be instances in which some provider types may need more or less standardized items than other provider types.

With regard to risk-adjustment, as noted in our previous response, the TEP that reviewed this measure did not recommend that the measure be risk-adjusted, because completion of a functional assessment is not affected by the medical and functional complexity of the resident/patient. Rather, clinicians are able to report that an activity was not attempted due to a medical condition or a safety concern, and clinicians take this complexity into account when setting goals. Further, we are aware that patients/resident may have acute events that trigger unplanned discharges, and this measure does not require a functional assessment to be completed in these circumstances. For medically acute patients, functional assessment data are not required. This specification is clearly noted in our specifications document. Finally, we have included skip patterns on the assessment instrument that take into account patient complexity. For example, we have a gateway question that asks if the patients walk. If the patient/resident does not walk, then several walking and stairs items are not required to be completed.

Comment: One commenter focused on the need to measure cognitive functioning and link functional assessment, care planning and goals to address patient functioning. This commenter noted that such a measure would be important for achieving the

[56] Barbara Gage et al., ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set'' (RTI International, 2012).

[57] Linacre JM, Heinemann AW, Wright BD, Granger CV and Hamilton. The Structure and Stability of the Functioning Independence Measure. Arch of Phys Med and Rehab 75(2):127–132, 1994.

best outcomes and for discharge planning.

Response: We would like to clarify that the Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631, endorsed on July 23, 2015) is for use as a cross-setting quality measure that includes self-care and mobility activities that are primarily focused on motor function. The quality measure does not include items that are focused on cognitive functioning. We do plan to develop quality measures focused on cognitive functioning. We are always open to stakeholder feedback on measure development and encourage everyone to submit comments to our comment email: *PACQualityInitiative@cms.hhs.gov*.

Comment: Several commenters noted additional areas of function that are key to patients, including cognition, communication, and swallowing. One commenter encouraged CMS to consider cognition and expressive and receptive language and swallowing as items of function and not exclusively as risk adjustors, and offered their expertise to CMS for discussions and to develop goals. Another commenter examined the SNF, IRF, HHA and LTCH assessment instruments and noted that cognitive function is measured differently across the settings in terms of content, scoring process, and intended calibration of each tool, and encouraged CMS to align items and quality measurement of cognition.

Response: We are working toward developing quality measures that assess areas of cognition and expression, recognizing that these quality topic domains are intrinsically linked or associated to the domain of function and cognitive function. We appreciate the commenter's suggestion to align cognition items across the PAC settings. We appreciate the commenter's offer for assistance and encourage the submission of comments and measure specification details to our comment email: *PACQualityInitiative@cms.hhs.gov*.

Comment: Two commenters requested that CMS continue engaging with stakeholders, and one requested increased engagement with regard to the IMPACT Act and measures that CMS considers. One of the commenters criticized CMS, expressing that although CMS engaged with stakeholders, the proposals were rushed. The other commenter requested that CMS continue to collaborate with stakeholders, stating their appreciation for inclusion and opportunity to work with CMS during the implementation phases of the IMPACT Act. One commenter also recommended that CMS establish a more formal stakeholder group to include rehabilitation professionals who can provide expertise on the provision of rehabilitation therapy in nursing facilities. This commenter noted that the more opportunities stakeholders have to dialogue and recommend CMS on the quality measures, the greater the possibility that the measures will be accurate and helpful to determining care quality.

Response: We appreciate the continued involvement of stakeholders in all phases of measure development and implementation and we recognize the value in strong public-private partnerships. We appreciate the request for increased engagement and for a formal stakeholder group. We very much agree that outreach and education are invaluable, and we intend to continue to provide easy reference information, such as a high-level walk-through information pertaining to our implementation of the IMPACT Act.

In addition to the SODF we hosted on the topic of the IMPACT Act, we have created a post-acute care quality initiatives Web site, which pertains primarily to the IMPACT Act required quality measures/assessment instrument domains, and allows access to a mail box for IMPACT Act provider related questions. We have additionally provided nearly a dozen presentations with various stakeholders upon their request since January, and during these presentations we have provided similar information specific to the IMPACT Act requirements, as they pertain to data standardization. We note that the slides used for the SODF are accessible on the IMPACT Act/Post-Acute Care Quality Initiatives Web site *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014-and-Cross-Setting-Measures.html*, and these do provide high-level background and information, including timelines as they pertain to the assessment domains required under the IMPACT Act. Further, CMS is in the midst of developing plans for providing additional and ongoing education and outreach (to include timelines) in the near future, as suggested by commenters. For further information and future postings of such documents and information, please continue to check the Post-Acute Care Quality Initiatives Web site (listed above), as well as the IRF Quality Reporting Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html?redirect=/IRF-Quality-Reporting/*.

We will take these suggestions into consideration as we continue to implement the IMPACT Act.

Final Decision: Having carefully considered the comments we received on the application of the Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), we are finalizing the adoption of this measure as proposed for use in the IRF QRP as proposed.

3. IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; Under Review)

The third quality measure that we proposed for the FY 2018 payment determination and subsequent years is an outcome measure entitled IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review). This quality measure estimates the risk-adjusted mean change in self-care score between admission and discharge among IRF patients. This measure was proposed under the authority of section 1886(j)(7)(C) of the Act, and is currently under review by the NQF. A summary of the measure specifications can be accessed on the NQF Web site at *http://www.qualityforum.org/qps/2633*. Detailed specifications for this quality measure can be accessed at *http://www.qualityforum.org/ProjectTemplateDownload.aspx?SubmissionID=2633*.

IRFs are designed to provide intensive rehabilitation services to patients. Patients seeking care in IRFs are those whose illness, injury, or condition has resulted in a loss of function, and for whom rehabilitative care is expected to help regain that function. Examples of conditions treated in IRFs include stroke, spinal cord injury, hip fracture, brain injury, neurological disorders, and other diagnoses characterized by loss of function.

Given that the primary goal of rehabilitation is improvement in functional status, IRF clinicians have traditionally assessed and documented patients' functional status at admission and discharge to evaluate the effectiveness of the rehabilitation care provided to individual patients, as well as the effectiveness of the rehabilitation unit or hospital overall. Differences in IRF patients' functional outcomes have been found by geographic region, insurance type, and race/ethnicity after adjusting for key patient demographic

characteristics and admission clinical status. Therefore, we believe there is an opportunity for improvement in this area. For example, Reistetter [58] examined discharge motor function and functional gain among IRF patients with stroke and found statistically significant differences in functional outcomes by U.S. geographic region, by insurance type, and race/ethnicity group after risk adjustment. O'Brien and colleagues [59] found differences in functional outcomes across race/ethnicity groups in their analysis of Medicare assessment data for patients with stroke after risk adjustment. O'Brien and colleagues [60] also noted that the overall IRF length of stay decreased 1.8 days between 2002 and 2007 and that shorter IRF stays were significantly associated with lower functioning at discharge.

The functional assessment items included in this quality measure were originally developed and tested as part of the Post-Acute Care Payment Reform Demonstration version of the CARE Tool,[61] which was designed to standardize assessment of patients' status across acute and post-acute providers, including IRFs, SNFs, HHAs and LTCHs. The functional status items on the CARE Tool are daily activities that clinicians typically assess at the time of admission and/or discharge to determine patients' needs, evaluate patient progress and prepare patients and families for a transition to home or to another provider.

This outcome measure requires the collection of admission and discharge functional status data by trained clinicians using standardized clinical assessment items, or data elements that assess specific functional self-care activities (for example, eating, oral hygiene, toileting hygiene). The self-care function items are coded using a 6-level rating scale that indicates the patient's level of independence with the activity; higher scores indicate more independence. In addition, this measure requires the collection of risk factors data, such as patient functioning prior to the current reason for admission, bladder continence, communication ability and cognitive function, at the time of admission.

This self-care quality measure will also standardize the collection of functional status data, which can improve communication when patients are transferred between providers. Most IRF patients receive care in an acute care hospital prior to the IRF stay, and many IRF patients receive care from another provider after the IRF stay. Use of standardized clinical data to describe a patient´s status across providers can facilitate communication across providers. Rehabilitation programs have traditionally conceptualized functional status in terms of the need for assistance from another person. This is the conceptual basis for the IRF–PAI/FIM®* instrument (used in IRFs), the MDS function items (used in nursing homes), and the Outcome and Assessment Information Set (OASIS) function items (used in home health). However, the functional status items on the IRF–PAI, MDS and OASIS are different even when items are similar; the item definitions and rating scales are different. In a patient-centered health care system, there is a need for standardized terminology and assessment items because patients often receive care from more than 1 provider. The use of standardized items and terminology facilitates clinicians speaking a common language that can be understood across clinical disciplines and practice settings.

We released draft specifications for the function quality measures, and requested public comment between February 21 and March 14, 2014. We received 40 responses from stakeholders with comments and suggestions during the public comment period and have updated the specifications based on these comments and suggestions. This quality measure was submitted to the NQF on November 9, 2014, has been undergoing review at NQF.

Based on the evidence previously discussed, we proposed to adopt the quality measure entitled IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review), for the IRF QRP for the FY 2018 payment determination and subsequent years. As described in more detail in section IX.I.2. of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016) for the FY 2018 payment determination, and the subsequent data collection periods are 12-months in length and follow the calendar year (that is, January 1 to December 31).

The list of measures under consideration for the IRF QRP, including this quality measure, was released to the public on December 1, 2014, and early comments were submitted between December 1 and December 5, 2014. The MAP met on December 12, 2014, sought public comment on this measure from December 23, 2014 to January 13, 2015, and met on January 26, 2015. The NQF provided the MAP's input to us as required under section 1890A(a)(3) of the Act in the final report, MAP 2015 Considerations for Selection of Measures for Federal Programs: Post-Acute/Long-Term Care, which is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*. The MAP conditionally supported this measure. Refer to section IX.B. of this final rule for more information on the MAP.

In section 1886(j)(7)(D)(ii) of the Act, the exception authority provides that in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary. We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed quality measures focused on assessment of functional status for patients in the IRF setting. There are related measures, but they are not endorsed for IRFs and several focus on 1 condition (for example, knee or shoulder impairment). We are not aware a of any other quality measures for functional assessment that have been endorsed or adopted by another consensus organization for the IRF setting. Therefore, we proposed to adopt this measure, IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review), for use in the IRF QRP for the FY 2018 payment determination and subsequent years under the Secretary's authority to select non-NQF-endorsed measures.

The specifications and data elements for the quality measure are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

We proposed that data for the quality measure be collected using the IRF–PAI, with the submission through the QIES

[58] Reistetter T.A., Karmarkar A.M., Graham J.E., et al. Regional variation in stroke rehabilitation outcomes. *Arch Phys Med Rehabil*.95(1):29–38, Jan. 2014.

[59] O'Brien S.R., Xue Y., Ingersoll G., et al. Shorter length of stay is associated with worse functional outcomes for medicare beneficiaries with stroke. *Physical Therapy*. 93(12):1592–1602, Dec. 2013.

[60] O'Brien S.R., Xue Y., Ingersoll G., et al. Shorter length of stay is associated with worse functional outcomes for medicare beneficiaries with stroke. *Physical Therapy*. 93(12):1592–1602, Dec. 2013.

[61] Barbara Gage et al., ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set'' (RTI International, 2012).

ASAP system. For more information on IRF QRP reporting through the QIES ASAP system, refer to the CMS Web site at *http://cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html and http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

We proposed to revise the IRF–PAI to include new items that assess functional status and the risk factor items. The function items, which assess specific self-care functional activities, are based on functional items included in the Post-Acute Care Payment Reform Demonstration version of the CARE Item Set.

We sought public comments on our proposal to adopt the quality measure entitled IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review) for the IRF QRP, with data collection starting on October 1, 2016, for the FY 2018 payment determination and subsequent years. Refer to section IX.I.2. of this final rule for more information on the proposed data collection and submission timeline for this quality measure. The responses to public comments on this measure are discussed below in this section of the final rule. We note that we received many comments about the standardized (that is, CARE) items that pertain to several of the 5 proposed function quality measures. Many of these comments are provided above in section IX.G.2. of this final rule as part of the review of comments about the quality measure, an Application Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015). We also received many comments pertaining to more than 1 of the 4 functional outcomes measures. We provide these comments and our responses below as well as 1 comment that uniquely applies to this measure, IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review).

Comment: MedPAC expressed support for the 4 function outcome measures that we proposed for the IRF QRP, and noted measures added to the IRF QRP should contribute to meaningful differences in IRF patients' outcomes or meaningful comparison of patients' outcomes across post-acute care settings.

Response: We appreciate MedPAC's support for the 4 proposed functional outcome measures. These functional status quality measures are calculated using standardized functional assessment (that is, CARE) data, which is the primary data source for not only these 4 functional outcome measures, but also for the standardized cross-setting function process measure. Therefore, we are proposing 5 functional status quality measures that are derived from 1 data source (CARE data) and use the same set of assessment items.

Comment: One commenter supported the concepts of the 4 IRF outcome measures, and was pleased that prior mobility devices were risk adjustors for the outcome measures. This commenter encouraged CMS to continue to examine data for this quality measure and the risk adjustment methodology.

Response: We appreciate the commenter's support for the proposed function quality measure concepts and appreciate the commenter's input on risk adjustment. The risk adjustors selected for these proposed quality measures were selected based on rigorous literature reviews, clinical relevance, TEP input, and empirical findings from the PAC–PRD analyses. We also requested input on suggested risk adjustors as part of the public comment process, and we appreciate this commenter's input during this process. As part of our measure maintenance process, we will continue to examine data and refine measures.

Comment: One commenter encourages CMS to add wheelchair mobility items in the mobility quality measures to reflect that some patients use a wheelchair as a primary method of mobility, and directed CMS's attention to quality measure, CARE: Improvement in Mobility (NQF #2612). The commenter encouraged CMS to examine this measure during the implementation phase (by which we assume they meant the implementation phase of the five IRF function quality measures).

Response: We appreciate the commenter's suggestion to add wheelchair mobility items in the mobility quality measure, and will explore that refinement as we further develop and refine these quality measures. As part of our maintenance process, we will continue to examine data, refine measures, and examine and evaluate the use of other quality measures for considerations of future measure modifications.

Comment: One commenter was pleased to see the 4 IRF function outcome measures proposed as part of the FY 2016 IRF PPS Proposed Rule. The commenter encouraged CMS to propose functional outcome measures for LTCHs, SNFs and HHAs in future rulemaking for quality of care and payment.

Response: We agree that the use of outcome measures is important. We would like to note that we adopted the quality measure Long-Term Care Hospital Functional Outcome Measure: Change in Mobility Among Patients Requiring Ventilator Support (NQF #2632; endorsed on July 23, 2015) in the FY 2015 final rule and data collection for this outcome measure begins in LTCHs on April 1, 2016. We are currently developing functional outcome measures, specifically self-care and mobility quality measures, which may be used for SNFs and HHAs. These functional outcome quality measures are intentionally being designed to use the same standardized functional assessment items that are included in the cross-setting person- and family-centered function process measure in order to capitalize on the data collected using the process measure, which will inform further development, while allowing for the consideration of limited additional burden.

Comment: One commenter questioned whether the 4 proposed functional outcome measures meet the IMPACT Act's requirement of being ''standardized and interoperable'' and noted the 4 measures were not proposed for the SNF QRP and LTCH QRP.

Response: The 4 proposed functional outcome measures were developed for data collection and reporting for the IRF QRP prior to the implementation of the IMPACT Act of 2014. We would like to clarify that the quality measure, the Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), meets the requirements of the IMPACT Act. We note that the 4 proposed IRF QRP functional outcome quality measures contain a common core subset of function items that ultimately will allow tracking of patients' functional status across settings, as these items also appear in the quality measure, the Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed July 23, 2015), that was developed to meet the requirements of the IMPACT Act. For this measure, there are a set of core items that are identical across the settings; that is, the item definitions in each setting are the same. The exchangeability of data rests upon common terminology and standardized data. The core items use such standardized definitions, enabling

interoperability. It should be noted, we are currently developing functional outcome measures that use the same standardized functional assessment items included in the cross-setting function process measure in order to capitalize on the data collected using the currently proposed process measure in SNFs and LTCHs, which allow for the consideration of limited additional burden. We would also like to note that while the IMPACT Act requires that we adopt cross-setting quality measures in specified measures domains, it does not prohibit the development of future setting-specific quality measures.

Comment: One commenter noted that according to the proposed rule, CMS's rationale for proposing the measures was due to differences in IRF patients' functional outcomes have been found by geographic region, insurance type, and race/ethnicity, after adjusting for key patient demographic characteristics and admission clinical status, and questioned how CMS might use the new measure data to address these concerns. The commenter had concerns that the introduction of the new items could affect the validity and reliability of all function data submitted to CMS.

Response: We understand the comment suggests the introduction of the new items could affect the validity and reliability of all function data submitted to CMS. Also, the commenter believes that the use of a new standardized functional assessment items for quality reporting along with the existing functional assessment data used for payment purposes could affect the validity and reliability of all of the data submitted. We disagree with the commenter's suggestion that the utilization of the new functional assessment items for purposes of quality reporting will affect the reliability and validity of either the new or the existing data because IRFs have received training on the current items, which are currently in use, and CMS would provide comprehensive training for the new standardized items. We would like to note that the inclusion of discussion of the variation by geographic region, insurance type, race and ethnicity described by the commenter pertains to one of the concerns underlying the need for standardized data, as well the need for function quality measures in IRFs. The proposed CARE function items, which have acceptable reliability in both the IRF setting and other PAC settings, will be useful for measuring the impact of rehabilitation services across settings and underscore the value of IRF level services for the patients they appropriately treat. The IMPACT Act sets the foundation for future reporting of quality across the PAC settings. However, we will further monitor these key characteristics as we move to future measure development and testing.

Comment: One commenter is concerned that while the proposed functional outcome measures do address functional improvement, they do not measure the ability for a patient to return to the community. The commenter was concerned that some patients—for example, patients with complete cervical spinal cord injury or dense hemiplegia from a stroke—may not make significant functional gains, but do return to the community. This commenter noted the need to consider psychosocial and family financial support in prediction models. This commenter encouraged CMS to develop quality measures that relate to patient and family engagement as PAC reform implementation evolves.

Response: We appreciate the commenter's concern about specific patients who may not show improvement with functional activities that are commonly assessed for most IRF patients. We recognized this issue during the development of the CARE tool, and specifically addressed this topic in the report entitled, ''The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on the Development of the CARE Item Set. Volume 1 of 3,'' which is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/The-Development-and-Testing-of-the-Continuity-Assessment-Record-and-Evaluation-CARE-Item-Set-Final-Report-on-the-Development-of-the-CARE-Item-Set-Volume-1-of-3.pdf*. In section 7 of this report, entitled ''The CARE Tool: Potential Challenges and Future Enhancements,'' we describe the need to have items that focus on special populations, and we address the spinal cord injury and stroke populations that the commenter noted. As noted in the FY 2016 IRF PPS proposed rule (80 FR 23332 at 23399), for the 4 proposed functional outcome measures, we took into consideration literature reviews and discussions with the TEP members convened by our measure development contractor, and we excluded patients with certain conditions due to limited expected improvement or unpredictable course. The exclusion criteria for the proposed functional outcome measures are patients with: Coma or persistent vegetative state on admission; complete tetraplegia; locked-in syndrome; severe anoxic brain damage, cerebral edema, or compression of brain. Excluding these patients from the quality measure calculation means that a facility that admits these patients will not have a lower average functional improvement score attributed to these patients. We believe this is an important issue, because including these patients in the quality measure may create access barriers.

We also appreciate the commenter suggesting that we incorporate patient and family engagement into the development of our quality measures. The proposed function quality measure, the Application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015), is a person- and family-centered process measure that reports standardized functional assessment data at admission and discharge, as well as at least one functional status discharge goal. The function goal is established at admission by the IRF clinicians with input from the patient and family, demonstrating person and family-centered care. As we continue our quality measurement development process, we will take into full consideration the person and family engagement and process of care perspective.

Comment: One commenter expressed concerns regarding the sensitivity to change of the CARE-based functional outcome measures, in terms of their precision and ability to capture functional improvement, and asked CMS to refrain from implementing the CARE-based functional quality measures.

Response: The self-care and mobility items in the CARE-based functional outcome measures were carefully selected to represent a wide range of item difficulty, and cover a wide range of patient functioning, from low to high functioning. The self-care measure includes 7 items, and the mobility measure includes 15 items. Inclusion of this number of items allows the patient the opportunity to demonstrate gains in a variety of functional activities and tasks. Rehabilitation care typically focuses on several aspects of functioning, and patients may be expected to make varying amounts of improvement, from minimal to large improvement, across different functional tasks. In the event that a patient may not demonstrate gains in a specific self-care or mobility item, inclusion of a range of self-care and mobility items in our measures ensures that patients can demonstrate functional gains in other items. In addition to improving their ability to capture change, including items that target a

wide range of patient functioning is a key factor for items to be applicable across the wide range of patients seen in IRFs, LTCHs, SNFs and HHAs.

We examined patient-level sensitivity to change of the CARE-based self-care and mobility outcome measures using data from the PAC–PRD. Table 19 shows the distribution of patient-level unadjusted (observed) change in self-care scores in 4,769 patients, and change in mobility scores in 4,776 patients. Both self-care and mobility change scores demonstrated excellent variability at the patient level, with a wide range and close to normal distribution. The mean patient-level unadjusted self-care change score was 9.92 ± 6.47, while the median self-care change score was 10.00. Patient-level self-care change scores ranged from −25.00 to 33.00, with a range of 58.00 and an interquartile range of 9.00. The mean patient-level unadjusted mobility change score was 21.45 ± 13.69, while the median mobility change score was 20.50. Patient-level mobility change scores ranged from −20.00 to 66.00, with a range of 86.00 and an interquartile range of 20.00.

TABLE 19—DISTRIBUTION OF PATIENT-LEVEL UNADJUSTED (OBSERVED) CHANGE IN SELF-CARE AND MOBILITY SCORES FOR MEDICAL REHABILITATION PATIENTS

Patient-level unadjusted (observed) change score	Number	Mean (SD)	Range (IQR)	Median
Change in Self-Care	4,769	9.92 (6.47)	58 (9)	10.00
Change in Mobility	4,776	21.45 (13.69)	86 (20)	20.50

N = Number of patients; SD = standard deviation; IQR = interquartile range.

In addition to patient-level sensitivity to change, facility-level variability is a key psychometric characteristic desired for quality measures to ensure that the measures can distinguished among facilities with varying performance on the measure. The CARE-based risk-adjusted self-care and mobility outcome measures demonstrate very good variability at the facility-level. The mean risk adjusted facility-level change in self-care scores have a mean of 10.02 ± 1.72, a median of 9.82, a range of 6.53 to 14.78, and an interquartile range of 2.07. The mean risk adjusted facility-level change in mobility scores have a mean of 20.90 ± 4.67, a median of 21.34, range of 9.82 to 31.88, and an interquartile range of 6.03 (Table 20). Therefore, we believe that the items developed, tested, and chosen to develop the proposed functional quality measures are able to assess appropriately functional change, allowing CMS to collect and evaluate functional improvement for patients within and across settings. Thus, testing of these items demonstrated excellent variability at the patient level and very good variability at the facility level, and we are confident that they cover a wide range of item difficulty and a wide range of patient functioning.

TABLE 20—DISTRIBUTION OF FACILITY-LEVEL RISK ADJUSTED CHANGE IN MOBILITY SCORES FOR INPATIENT REHABILITATION FACILITIES

Risk-adjusted facility-level change score	N	Mean (SD)	Median
Change in Self-Care	38	10.02 (1.72)	9.82
Change in Mobility	38	20.90 (4.67)	21.34

N = Number of facilities; SD = standard deviation;

Comment: One commenter raised concerns that level 06 on the CARE function item rating scale groups patients who are independent with use of an assistive device, and those who are independent without a device. The commenters also suggest that a patient, who is independent with use of an assistive device, thus receiving a score of 06, may fail to receive home health services because the clinician sees that the patient has the maximum functional score. The commenter considers the level 06 overly broad. The commenter considered these issues safety concerns and indicated that they pilot tested the CARE function items in the proposed IRF–PAI. The commenter expressed that patients who otherwise demonstrated functional progress on the existing numerical functional measures on the current IRF–PAI, showed no progress in their CARE functional score between admission and discharge.

Response: Rehabilitation care typically focuses on improvement in several aspects of functioning, and patients may be expected to make varying amounts of improvement across different functional activities. In the event that a patient may not demonstrate gains in one self-care or mobility item, an IRF patient will often improve in another activity. The inclusion of a 7 self-care and 15 mobility items in the proposed quality measures ensures that most patients can demonstrate functional gains one or more items.

The proposed quality measure, IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review), includes an 'upper body dressing' item to address self-care. A patient who makes gains in upper body bathing is also very likely to make gains in upper body dressing; thus, this patient would demonstrate improvement in upper body dressing score. We believe that such a patient is also likely to make gains in other self-care items primarily requiring upper extremity use, such as eating, and oral hygiene. In addition, for the proposed quality measure, IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review), we have included items related to ambulation and car transfer. We developed the CARE function items based on the approach of the World Health Organization's (WHO) International Classification of Functioning, Disability, and Health (ICF) that recognizes functional independence and ability regardless of the use of assistive devices.[62] The CARE

[62] World Health Organization. International Classification of Functioning, Disability and Health:

Continued

items measure a person's ability to perform functional activities, with or without assistive devices. Use of assistive devices remains an important part of the patient's functional assessment.

The CARE Tool used during the PAC–PRD included a list of devices used by a patient in order to document the type of device that was used. The decision to include devices on the CARE Tool was based on input from clinicians who wanted to document that a patient's status improved as they transition from one type of device to another. For example, a patient may transition from walking with a walker to walking with the straight cane. This progress is not currently captured on the IRF–PAI, as the FIM® instrument does not include information about the type of device used. Even if the rating scale integrates use of an assistive device, the type of device used by the patient is not apparent.

Patients can use an assistive devices regardless of their level performance, from 01—Dependent through 06—Independent. For example, a patient who uses a wheelchair may be scored level 01—Dependent through 06—Independent. We do not believe it is important to only differentiate between independent function with a device and independent function without a device. Rather, to ensure patient safety, documentation of assistive device use for every level of patient performance is critical. Separate documentation of a patient's functional ability and need for an assistive device, together provide clinicians with the information needed regarding the patient's functional status. In the proposed rule, we proposed including wheelchair as a device as part of the admission and discharge assessment. We are very sensitive to the issue of burden associated with data collection and proposed only the minimal number of items needed to calculate the proposed quality measures. We would like to note that devices used prior to the current illness, injury or exacerbation are included on the proposed IRF–PAI version 1.4, because they are important factors associated with functional outcomes and are risk adjustors for our functional outcome measures.

We would also like to state that individual CARE function items are not intended to be stand-alone indicators of a patient's need for services, such as home health services, after discharge from the IRF. Determination of need for home health services should be based on comprehensive patient assessment; not on a patient's ability to perform a single activity.

Regarding the CARE function item rating scale, our decision to use a 6-level rating scale was based on input from the clinical communities and research examining the relationship between minutes of assistance and functional assessment scores. Hamilton *et al.*[63] found that the relationship between function scores and minutes of assistance per day was curvilinear, and that persons with high function scores frequently did not require any daily assistance. During PAC–PRD on-site training, when we explained differences between the existing and CARE rating scales, we received positive feedback about the CARE rating scale. We also conducted exit interviews with participating sites. The feedback was incorporated into the items that we have proposed for the function measure. Based on our experiences, we believe that the CARE items and associated rating scale represent a simple, but comprehensive method of documenting functional limitations at admission and discharge.

Comment: Several commenters were concerned that the four (4) functional outcome measures are not NQF-endorsed. Some of these commenters suggested that CMS delay implementation of these quality measures until they are NQF-endorsed for all PAC settings.

Response: We appreciate the commenters' feedback, and we agree that the NQF endorsement process is an important part of measure development. As previously noted, two of the proposed functional outcome quality measures are undergoing review by NQF at this time, and two of the measures were endorsed on July 23, 2015. As previously discussed, where such measures do not exist for the IRF setting, we may adopt measures that are not NQF-endorsed under the Secretary's exception authority with respect to the IMPACT Act in section 1899B(e)(2)(B) and with respect to the IRF QRP in section 1886(j)(7)(D)(ii) of the Act. It should be noted that for all quality measures, we provided a through and rigorous process of construct testing and measure selection, guided by the technical expert panels, public comments from stakeholders, and recommendations by the MAP.

Comment: One commenter expressed concern about the reliability and validity of the measures based on their belief that the PAC PRD was a cross-sectional study. They noted that the study data is now more than 5 years old, and that IRFs now admit an increasing population with neurological conditions. The commenter also expressed concern that the demonstration project did not follow patients across venues of care, limiting applicability across care settings.

Response: We would like to clarify that the PAC–PRD was a prospective cohort study that collected data at the time of admission and discharge form the PAC settings. Coupled with PAC settings, the PAC–PRD also collected data in acute care hospitals. The study also linked the PAC assessment data with hospital claims, and thus did follow patients across care settings. The commenter is correct that the data were collected more than 5 years ago. For the data, we would like to note that when we adopt quality measures for its QRPs, we also implement a process to evaluate quality measures each year by examining data submitted for the measure. In addition, there is a process in place for endorsement maintenance that also involves systematic analyses of measure data, literature reviews, and stakeholder input. Finally, the proposed function meaures that use CARE data contain a core set of function items selected for cross-setting use and chosen for their applicability across all post-acute settings, standardized to one another by item and through the use of the standardized 6-level rating scale. Items, while tested within each setting, were also tested among settings to develop a core set of items that could be used and re-used for many purposes across settings. The core set of items were developed with TEP input.

Comment: One commenter asked if CMS intends to ultimately use the CARE data for payment purposes, such as performance-based payment, and expressed concerns about potential effects on beneficiary access to IRF services of doing so.

Response: As we did not propose to use the CARE data items for any payment purposes, this comment is outside the scope of the proposed rule. However, we will note the commenter's concerns and consider them carefully should we ever consider extending use of the CARE data items to payment.

Comment: One commenter encouraged CMS to continue ongoing stakeholder engagement as the function quality measures evolve and as new function measures, such as gait speed, are considered.

ICF. Geneva, Switzerland: World Health Organization; 2001. Retrieved from *http://www.who.int/classifications/icf/icf_more/en/.*

[63] Hamilton BB, Deutsch A, Russell C, Fiedler RC, Granger CV Relation of disability costs to function: spinal cord injury Arch. Phys. Med. Rehabil. 80(4):385–391, Apr. 1999.

Response: We will consider the input for measure concepts as we move through the development of current and future measures for the IRF QRP. TEPs are engaged to provide feedback and input on measure development.

Comment: One commenter supported the IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review), noting that the measure considers essential information such as prior functioning.

Response: CMS appreciate the commenter for their comment and support of the proposed quality measure, Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review). We understand the commenter's comment to refer to the importance of setting function goals and consideration of prior functioning when determining the expected functional improvement. IRF staff can report goals for each self-care and mobility item, although that is not required for this measure. For this measure and all self-care and mobility outcome measures, we do apply a risk adjustment for prior functioning. We appreciate the comment's support of including prior functioning as risk adjustors.

Final Decision: Having carefully considered the comments we received on the IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633, under review), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

4. IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; Under Review)

The fourth quality measure we proposed for the FY 2018 payment determination and subsequent years is an outcome quality measure entitled IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review). This quality measure estimates the risk-adjusted mean change in mobility score between admission and discharge among IRF patients. This measure was proposed under the authority of section 1886(j)(7)(C) of the Act, and is under review at NQF. A summary of this quality measure can be accessed on the NQF Web site at *http://www.qualityforum.org/qps/2634*. More detailed specifications for this quality measure can be accessed at *http://www.qualityforum.org/ProjectTemplateDownload.aspx?SubmissionID=2634*.

This outcome measure requires the collection of admission and discharge functional status data by trained clinicians using standardized clinical assessment items, or data elements that assess specific functional mobility activities (for example, toilet transfer and walking). The mobility function items are coded using a 6-level rating scale that indicates the patient's level of independence with the activity; higher scores indicate more independence. In addition, this measure requires the collection of risk factors data, such as patient functioning prior to the current reason for admission, history of falls, bladder continence, communication ability and cognitive function, at the time of admission.

As noted in the previous section, IRFs provide intensive rehabilitation services to patients with a goal of improving patient functioning.

We released draft specifications for the function quality measures, and requested public comment between February 21 and March 14, 2014. We received 40 comments from stakeholders and have updated the measures specifications based on these comments and suggestions. The quality measure was developed by us and was submitted for endorsement review to NQF in November 2014. A summary of the quality measure can be accessed on the NQF Web site at *http://www.qualityforum.org/qps/2634*. More detailed specifications for this quality measure can be accessed at *http://www.qualityforum.org/ProjectTemplateDownload.aspx?SubmissionID=2634*.

Based on the evidence previously discussed, we proposed to adopt for the IRF QRP for the FY 2018 payment determination and subsequent years the quality measure entitled IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review). As described in more detail in section IX.I.2. of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016), and the subsequent data collection periods are 12-months in length and follow the calendar year (that is, January 1 to December 31).

The list of measures under consideration for the IRF QRP, including this quality measure, was released to the public on December 1, 2014, and early comments were submitted between December 1 and December 5, 2014. The MAP met on December 9 2014, sought public comment on this measure from December 23, 2014 to January 13, 2015, and met on January 26, 2015. They provided input to us as required under section 1890A(a)(3) of the Act in the final report, MAP 2015 Considerations for Selection of Measures for Federal Programs: Post-Acute/Long-Term Care, which is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx*. The MAP conditionally supported this measure. Refer to section IX.B. of this final rule for more information on the MAP.

We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed quality measures focused on assessment of functional status for patients in the IRF setting. There are related measures—for example, Improvement in ambulation/locomotion (NQF #0167), Improvement in bed transferring (NQF #0175), Functional status change for patients with Knee impairments (NQF #0422), Functional status change for patients with Hip impairments (NQF #0423)—but they are not endorsed for IRFs, and several focus on 1 condition (for example, knee or hip impairment). We are not aware of any other quality measures for functional assessment that have been endorsed or adopted by another consensus organization for the IRF setting. Therefore, we proposed to adopt this measure, IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review), for use in the IRF QRP for the FY 2018 payment determination and subsequent years under the Secretary's authority to select non-NQF-endorsed measures.

The specifications and data elements for the quality measure are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html*.

We proposed that data for the quality measure be collected using the IRF–PAI, with submission through the QIES ASAP system. For more information on IRF QRP reporting through the QIES ASAP system, refer to the CMS Web site at *http://cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html* and *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

We sought public comments on our proposal to adopt the quality measure entitled IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review) for the IRF QRP, with data collection starting on October 1, 2016, for the FY 2018 payment determination and subsequent years. Refer to section IX.I.2. of this final rule for more information on the data

collection and submission timeline for this quality measure. The responses to public comments on this measure are discussed in this section of the final rule. We note that we received many comments about the standardized (that is, CARE) items that pertain to several of the 5 proposed function quality measures. These comments are provided in section IX.G.2 of this final rule as part of review of comments about the measure, an Application Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015). We also received many comments pertaining to several of the 4 function outcomes measures, and we provide these comments in section IX.G.3 of this final rule as part of our review of comments about the measure, IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review). Comments that uniquely apply to the measure, IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review), are provided below.

Comment: One commenter supported the concept of change in mobility and noted that measuring mobility is important in determining the patient's ability to be independent, and that access to occupational and physical therapy services is necessary to improve patient functioning.

Response: We appreciate the commenter's support of this quality measure and agree that access to occupational and physical therapy services to assist patients to improve functioning is important. In addition, we note that it is important for the IRF clinician teams to work collaboratively to help support established therapy goals (for example, by mobilizing patients when occupational and physical therapy services are not available).

Final Decision: Having carefully considered the comments we received on the IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

5. IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; Endorsed on July 23, 2015)

The fifth quality measure we proposed for the FY 2018 payment determination and subsequent years is an outcome quality measure entitled: IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015). This quality measure estimates the percentage of IRF patients who meet or exceed an expected discharge self-care score. This measure was proposed under the authority of section 1886(j)(7)(C) of the Act and was endorsed by NQF on July 23, 2015.

This outcome measure requires the collection of admission and discharge functional status data by trained clinicians using standardized clinical assessment items, or data elements that assess specific functional mobility activities (for example, eating, oral hygiene, and dressing). The self-care function items are coded using a 6-level rating scale that indicates the patient's level of independence with the activity; higher scores indicate more independence. In addition, this measure requires the collection of risk factors data, such as patient functioning prior to the current reason for admission, bladder continence, communication ability and cognitive function, at the time of admission. The data collection required for this measure is the same as the data required for the measure: IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review).

As noted in the previous section, IRFs provide intensive rehabilitation services to patients with a goal of improving patient functioning.

We released draft specifications for the function quality measures, and requested public comment between February 21 and March 14, 2014. We received 40 comments from stakeholders and have updated all 4 IRF quality measures specifications based on these comments and suggestions. A summary of this quality measure can be accessed on the NQF Web site at *http://www.qualityforum.org/qps/2634.* More detailed specifications for this quality measure can be accessed at *http://www.qualityforum.org/ProjectTemplateDownload.aspx?SubmissionID=2634.*

Based on the evidence previously discussed, we proposed to adopt for the IRF QRP for the FY 2018 payment determination and subsequent years the quality measure entitled IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015).

The list of measures under consideration for the IRF QRP, including this quality measure, was released to the public on December 1, 2014, and early comments were submitted between December 1 and December 5, 2014. The MAP met on December 9, 2014, sought public comment on this measure from December 23, 2014 to January 13, 2015, and met on January 26, 2015. They provided input to us as required under section 1890A(a)(3) of the Act in the final report, MAP 2015 Considerations for Selection of Measures for Federal Programs: Post-Acute/Long-Term Care, which is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx.* The MAP conditionally supported this measure. Refer to section IX.B. of this final rule for more information on the MAP.

We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed quality measures focused on assessment of functional status for patients in the IRF setting. There are related measures, but they are not endorsed for IRFs and several focus on one condition (for example, knee or shoulder impairment). We are not aware of any other quality measures for functional outcomes that have been endorsed or adopted by another consensus organization for the IRF setting. Therefore, we proposed to adopt this measure, IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015), for use in the IRF QRP for the FY 2018 payment determination and subsequent years under the Secretary's authority to select non-NQF-endorsed measures. As described in more detail in section IX.I.2 of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016), and the subsequent data collection periods are 12-months in length and follow the calendar year (that is, January 1 to December 31).

The specifications and data elements for the quality measure are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

We proposed that data for the quality measure be collected using the IRF–PAI, with submission through the QIES ASAP system. For more information on IRF QRP reporting through the QIES ASAP system, refer to the CMS Web site at *http://cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html* and *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*

We sought public comments on our proposal to adopt the quality measure entitled IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015) for the IRF QRP, with data collection starting on October 1, 2016, for the FY 2018 payment determination and subsequent years. For more information on the proposed data collection and submission timeline for this proposed quality measure, refer to section IX.I.2, of this final rule. The responses to public comments on this measure are discussed below in this section of the final rule. We note that we received many comments about the standardized (that is, CARE) items that pertain to several of the 5 proposed function quality measures. These comments are provided in section IX.G.2 of this final rule as part of review of comments about the measure, an Application Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015). We also received many comments pertaining to several of the 4 function outcomes measures, and we provide these comments in section IX.G.3 of this final rule as part of our review of comments about the measure, IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review). Comments that specifically apply to the measure, IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015), are provided below.

Comment: One commenter noted that this measure is important for discharge planning that will enable the ability to achieve the best outcomes and avoid readmissions.

Response: We appreciate the commenter's support of this quality measure. We believe that examining patient functioning at discharge will help IRFs focus on optimizing patients' functioning and discharge planning and supporting patients' transition from the IRF to home or another setting.

Final Decision: Having carefully considered the comments that we received on the IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

6. IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; Endorsed on July 23, 2015)

The sixth quality measure we proposed for the FY 2016 implementation and the FY 2018 payment determination and subsequent years is an outcome quality measure entitled: IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). This quality measure estimates the percentage of IRF patients who meet or exceed an expected discharge mobility score. This measure was proposed under the authority of section 1886(j)(7)(C) of the Act, was endorsed by NQF on July 23, 2015. A summary of this quality measure can be accessed on the NQF Web site at *http://www.qualityforum.org/qps/2636.* More detailed specifications for this quality measure can be accessed at *http://www.qualityforum.org/ProjectTemplateDownload.aspx?SubmissionID=2636.*

This outcome measure requires the collection of admission and discharge functional status data by trained clinicians using standardized clinical assessment items, or data elements that assess specific functional mobility activities (for example, bed mobility and walking). The mobility function items are coded using a 6-level rating scale that indicates the patient's level of independence with the activity; higher scores indicate more independence. In addition, this measure requires the collection of risk factors data, such as patient functioning prior to the current reason for admission, history of falls, bladder continence, communication ability and cognitive function, at the time of admission. Note that the data collection required for this measure is the same as the data required for the measure: IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2634; endorsed on July 23, 2015).

As noted in the previous section, IRFs provide intensive rehabilitation services to patients with a goal of improving patient functioning.

We released draft specifications for the function quality measures, and requested public comment between February 21 and March 14, 2014. We received 40 comments from stakeholders and have updated all 4 IRF outcome quality measures specifications based on these comments and suggestions.

Based on the evidence discussed earlier, we proposed to adopt for the IRF QRP for the FY 2018 payment determination and subsequent years the quality measure entitled IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). As described in more detail in section IX.I.2. of this final rule, the first data collection period is 3 months (October 1, 2016 to December 31, 2016), and the subsequent data collection periods are 12-months in length and follow the calendar year (that is, January 1 to December 31).

The list of measures under consideration for the IRF QRP, including this quality measure, was released to the public on December 1, 2014, and early comments were submitted between December 1 and December 5, 2014. The MAP met on December 9, 2014, sought public comment on this measure from December 23, 2014 to January 13, 2015, and met on January 26, 2015. They provided input to us as required under section 1890A(a)(3) of the Act in the final report, MAP 2015 Considerations for Selection of Measures for Federal Programs: Post-Acute/Long-Term Care, which is available at *http://www.qualityforum.org/Setting_Priorities/Partnership/MAP_Final_Reports.aspx.* The MAP conditionally supported this measure. Refer to section IX.B. of this final rule for more information on the MAP.

We reviewed the NQF's consensus endorsed measures and were unable to identify any NQF-endorsed quality measures focused on assessment of functional status for patients in the IRF setting. There are related measures, but they are not endorsed for IRFs and several focus on one condition (for example, knee or shoulder impairment). We are not aware of any other quality measures for functional outcomes that have been endorsed or adopted by another consensus organization for the IRF setting. Therefore, we proposed to adopt this measure, IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015), for use in the IRF QRP for the FY 2018 payment determination and subsequent years.

We proposed that data for this quality measure be collected using the IRF–PAI, with submission through the QIES ASAP system. For more information on IRF QRP reporting through the QIES ASAP system, refer to the CMS Web site at *http://cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html* and *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-*

Payment/InpatientRehabFacPPS/IRFPAI.html.

We sought public comments on the quality measure entitled IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015) for the IRF QRP, with data collection starting on October 1, 2016, for the FY 2018 payment determination and subsequent years. Refer to section IX.I. of this final rule for more information on the proposed data collection and submission timeline for this quality measure. The responses to public comments on this measure are discussed below in this section of the final rule. We note that we received many comments about the standardized (that is, CARE) items that pertain to several of the 5 proposed function quality measures. These comments are provided in section IX.G.2 of this final rule as part of review of comments about the measure, an Application Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015). We also received many comments pertaining to several of the 4 function outcomes measures, and we provide these comments in section IX G.3 of this final rule as part of our review of comments about the measure, IRF Functional Outcome Measure: Change in Self-care Score for Medical Rehabilitation Patients (NQF #2633; under review). Comments that specifically apply to the measure, IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015).

Comment: One commenter noted that the measure IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015) is important for discharge planning so that an individual is able to achieve the best outcomes.

Response: We appreciate the commenter's support of this quality measure. We agree that patient functioning is critical information to consider as part of discharge planning. Examining patient functioning at discharge will help IRFs focus on optimizing patients' functioning and supporting patients' transition from the IRF to home or another setting.

Final Decision: Having carefully considered the comments regarding the CARE items in Section IX.G.2. of this final rule and the comments about the IRF functional outcome measures in section IX.G.3. of this final rule and the comment that we received about the measure, IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015), we are finalizing the adoption of this measure for use in the IRF QRP as proposed.

TABLE 21—SUMMARY OF IRF QRP MEASURES AFFECTING THE FY 2017 AND FY 2018 ADJUSTMENTS TO THE IRF PPS ANNUAL INCREASE FACTOR AND SUBSEQUENT YEAR INCREASE FACTORS

Continued IRF QRP Measures Affecting the FY 2017 Adjustments to the IRF PPS Annual Increase Factor and Subsequent Year Increase Factors:

- NQF #0138: National Health Safety Network (NHSN) Catheter-Associated Urinary Tract Infection (CAUTI) Outcome Measure.[1]
- NQF #0431: Influenza Vaccination Coverage among Healthcare Personnel.[1]
- NQF #0680: Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay).
- NQF #1716: National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset Methicillin-Resistant *Staphylococcus aureus* (MRSA) Bacteremia Outcome Measure.[1]
- NQF #1717: National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset *Clostridium difficile* Infection (CDI) Outcome Measure.[1]
- NQF #2502: All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs.[4 2]
- NQF #0678: Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay).[4]

Newly adopted IRF QRP Measures Affecting FY 2018 Adjustments to the IRF PPS Annual Increase Factor and Subsequent Year Increase Factors:

- NQF #2502: All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs.[4 2]
- NQF #0678: Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay).[4 3]
- NQF #0674: An application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay).[5 3]
- NQF #2631; endorsed on July 23, 2015: An application of Percent of LTCH Patients with a an Admission and Discharge Functional Assessment and a Care Plan that Addresses Function.[5 3]
- NQF #2633; under review: IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients.[6 3]
- NQF #2634; under review: IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients.[6 3]
- NQF #2635; endorsed on July 23, 2015 IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients.[3]
- NQF #2636; endorsed on July 23, 2015: IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients.[3]

1. Using CDC/NHSN.
2. Medicare Fee-for-Service claims data.
3. New or modified IRF–PAI items.
4. Previously adopted quality measure that was re-adopted for FY2018 and subsequent years.
5. Not NQF-endorsed for the IRF setting.
6. Not NQF-endorsed, CMS submitted the measure for NQF review in November 2014.

H. IRF QRP Quality Measures and Measure Concepts Under Consideration for Future Years

We sought public comments on relevance and applicability of each of the quality measures and quality measure concepts listed in Table 22 for future years in the IRF QRP. Specifically, we sought public comments regarding the clinical importance, the feasibility of data collection and implementation to inform and improve quality of care delivered to IRF patients. The responses to public comments on future measures are discussed below in this section of the final rule.

TABLE 22—FUTURE MEASURES AND MEASURE CONCEPTS UNDER CONSIDERATION FOR THE IRF QUALITY REPORTING PROGRAM

National Quality Strategy Priority: Patient Safety:
Venous Thromboembolism Prophylaxis.
Medication Reconciliation.*
National Quality Strategy Priority: Effective Communication and Coordination of Care:
Transfer of health information and care preferences when an individual transitions.*
All-Condition Risk-Adjusted Potentially Preventable Hospital Readmission Rates.*
National Quality Strategy Priority: Patient- and Caregiver-Centered Care:
Discharge to Community.*
Patient Experience of Care.
Percent of Patients with Moderate to Severe Pain.
National Quality Strategy Priority: Affordable Care:
Medicare Spending per Beneficiary.*

* Indicates that this is a cross-setting measure domain listed in the IMPACT Act of 2014.

Comment: We received several comments about the relevance and applicability of each of the quality measures and quality measure concepts listed for future years in the IRF QRP. For example, several supported measures related to skin integrity, medication reconciliation, major falls, transfer of health information, functional improvement and discharge to home, noting that these are already areas of ongoing focus in the IRF industry. Some commenters noted that while they support measures related to functional improvement and discharge to home, they believed they were already reporting these outcomes using the FIM® instrument on the IRF–PAI.

Response: We will take these comments into consideration to inform our ongoing measure development efforts for this measure and our ongoing consideration of the potential to adopt these measures in the IRF QRP through future rulemaking. We are aware of the perception of duplicative reporting with regard to the data items that inform the functional status measures that we are finalizing in this final rule and the current and continued use of the FIM® instrument, which is used for payment purposes. For an expanded discussion on this topic, we refer you to the comments and responses under section IX.G.2 of this final rule.

Comment: One commenter recommends that CMS adopt a more direct approach for engaging patients to ensure the transfer of health information and care preferences of a patient is accurately communicated.

Response: We thank the commenter for their comment. We are dedicated to the consideration and inclusion of patient preferences as they relate to the care that patients receive. It is our contractor's policy to include patients as part of the TEPs that it convenes throughout all stages of measure development.

Comment: Some commenters noted suggestions related to specific quality measures included in our list of potential future measures. One commenter noted that Discharge to Community should be amended to include Long-Term Care/Intermediate Care Facilities as a community discharge if this is the level of modified independence the patient chooses as a best option for themselves. One commenter noted that Patient Experience of Care should be measured utilizing a tool that evaluated the patient's experience as an interdisciplinary event, but cautioned CMS against survey fatigue. One commenter recommended that SNFs and LTCHs also be required to report the same FIM® change, length of stay efficiency, and successful discharge to community, noting that this would give CMS beneficiaries a better picture of the quality of different post-acute care settings. Another commenter stated Medication Reconciliation depends heavily on the information provided by the transferring facility and that approximately 95 percent of all patients admitted to an IRF come directly from an acute care hospital, noting that IRFs are typically the recipient of information and have far less control of the accuracy and completeness of the data received.

Response: We will take these recommendations into account throughout the measure development process.

Comment: One commenter stated that they did not support the addition of further process measures to the IRF QRP, and noted that outcome measures are more meaningful to patients and healthcare providers. A few commenters recommended that CMS postpone any additional measures outside the requirements of the IMPACT Act, due to the increased burden on providers.

Response: While we agree that outcome measures are important and meaningful, and we intend to implement outcomes based measures throughout the life of the IRF QRP, we also believe that process measures are important. We believe that by monitoring facility and provider activities by using process measures initially will allow for the development of more robust outcome-based quality measures. While some commenters feel that we should suspend quality measures not related to the IMPACT Act, we would also like to note that while the IMPACT Act does require that we adopt specific cross-setting quality measures, it does not prohibit the development of future setting-specific quality measures. We also believe that while cross-setting metrics are important for comparison purposes, setting-specific measures are equally important, as the patient populations for each PAC setting are unique, and thus have unique considerations for patient care and quality.

I. Form, Manner, and Timing of Quality Data Submission for the FY 2018 Payment Determination and Subsequent Years

1. Background

Section 1886(j)(7)(C) of the Act requires that, for the FY 2014 payment determination and subsequent years, each IRF submit to the Secretary data on quality measures specified by the Secretary. In addition, section 1886(j)(7)(F) of the Act, as added by the IMPACT Act, requires that, for the FY beginning on the specified application date, as defined in section 1899B(a)(2)(E) of the Act, and each subsequent year, each IRF submit to the Secretary data on measures specified by the Secretary under section 1899B of the Act. The data required under section 1886(j)(7)(C) and (F) must be submitted in a form and manner, and at a time, specified by the Secretary. As required by section 1886(j)(7)(A)(i) of the Act, for any IRF that does not submit data in

accordance with section 1886(j)(7)(C) and (F) of the Act with respect to a given fiscal year, the annual increase factor for payments for discharges occurring during the fiscal year must be reduced by 2 percentage points.

2. Timeline for Data Submission Under the IRF QRP for the FY 2018 and FY 2019 Payment Determinations

We proposed the following data submission timeline for the quality measures for the FY 2018 adjustments to the IRF PPS annual increase factor. We proposed that IRFs would be required to submit IRF–PAI data on discharges occurring between October 1, 2016 and December 31, 2016 (first quarter), for the FY 2018 adjustments to the IRF PPS annual increase factor. For FY 2019, we proposed that IRFs would be required to submit data on discharges occurring between January 1, 2017 and December 31, 2017 (1 year). We proposed this time frame because we believe this will provide sufficient time for IRFs, and we can put processes and procedures in place to meet the additional quality reporting requirements. Given that these measures are collected via the IRF–PAI, and IRFs are already familiar with the QIES ASAP system, we believe this proposed timeframe would allow IRFs ample opportunity to begin reporting the newly proposed measures, should they be finalized. We also proposed that the quarterly data submission deadlines (for submitting IRF–PAI corrections) for the FY 2018 and FY 2019 adjustments to the IRF PPS annual increase factor would occur approximately 135 days after the end of the quarter, as outlined in the Table 23 (FY 2018) and Table 24 (FY 2019). Each quarterly deadline would be the date by which all data collected during the preceding quarter would be required to be submitted to us for measures using the IRF–PAI.

We sought public comment on these proposed timelines for data submission for the proposed IRF QRP quality measures for the FY 2018 and FY 2019 adjustments to the IRF PPS annual increase factor. The responses to public comments on timelines for data submission are discussed in this section of the final rule.

Comment: Several commenters suggested using the patient's admission date instead of their discharge date for the effective date for the IRF–PAI Version 1.4, citing EMR burden and uncertainty about which IRF–PAI items would be required for which patients at the time of their admission.

Response: Because the IRF–PAI is submitted to CMS for payment purposes, as well as quality purposes, and both the admission data and discharge data are only submitted upon discharge of the patient, we believe requiring any discharge that occurs on or after the date of implementation of a new version of the IRF–PAI allows for the reporting of the most accurate and current data. We historically released, and will continue to release, training manuals that accompany new iterations of our data collection instruments. Additionally, we plan on providing national-level training for IRFs related to the release of the IRF–PAI version 1.4. Please continue to check the IRF Quality Reporting Training Web page for information on such trainings. The IRF Quality Reporting Training Web page is accessible at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Training.html.*

Final Decision: After consideration of public comments on the timeline for data submission under the IRF QRP for the FY 2018 and FY 2019 payment determinations, we are finalizing this policy, as proposed.

TABLE 23—DATA COLLECTION TIME FRAME AND SUBMISSION DEADLINES FOR IRF QRP QUALITY DATA FOR MEASURES * USING IRF–PAI AS DATA COLLECTION MECHANISM, FY 2018 ADJUSTMENTS TO THE ANNUAL INCREASE FACTOR

Quarter (calendar year)	Data collection time frame	Deadline submission of IRF–PAI corrections	Annual increase factor affected
Quarter 4 (CY 2016)	October 1, 2016–December 31, 2016	May 15, 2017	FY 2018.

* Includes data required for the 3 cross-setting IMPACT Act measures.

TABLE 24—DATA COLLECTION TIME FRAME AND SUBMISSION DEADLINES FOR IRF QRP QUALITY DATA FOR MEASURES USING IRF–PAI AS DATA COLLECTION MECHANISM, FY 2019 ADJUSTMENTS TO THE ANNUAL INCREASE FACTOR

Quarter (calendar year)	Data collection time frame	Deadline submission of IRF–PAI corrections	Annual increase factor affected
Quarter 1 (CY 2017)	January 1, 2017–March 31, 2017	August 15, 2017	FY 2019.
Quarter 2 (CY 2017)	April 1, 2017–June 30, 2017	November 15, 2017	FY 2019.
Quarter 3 (CY 2017)	July 1, 2017–September 30, 2017	February 15, 2018	FY 2019.
Quarter 4 (CY 2017)	October 1, 2017–December 31, 2017	May 15, 2018	FY 2019.

3. Revision to the Previously Adopted Data Collection Timelines and Submission Deadlines

We proposed that the quality measures in the IRF QRP have a data collection time frame based on the calendar year, unless there is a clinical reason for an alternative data collection time frame. For example, for Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) and Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680), the data collection period is tied to the influenza vaccination season. At this time, three of the quality measures submitted via CDC's NHSN (that is, the CAUTI measure [NQF #0138], the MRSA measure [NQF #1716], and the CDI measure [NQF #1717]) use a quarterly data collection time frame based on the calendar year. The pressure ulcer measure [NQF #0678], which is submitted using the IRF–PAI, follows a fiscal year data collection time frame due to the current fiscal-year-based release schedule of the IRF–PAI. The 2 influenza vaccination quality measures (Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine [NQF #0680], Influenza Vaccination Coverage among Healthcare Personnel [NQF #0431]) use a data collection time frame that is consistent with the influenza vaccination season (that is, October 1 [or when the vaccine becomes available] to March 31).

We proposed to revise the data collection time frame to follow the

calendar year, unless there is a clinical reason for an alternative data collection time frame. We posited this change would simplify the data collection and submission time frame under the IRF QRP for IRF providers. It would also eliminate the situation in which data collection during a quarter in the same calendar year can affect 2 different years of annual payment update determination (that is, October 1 to December 31 is first quarter of data collection for quality measures with fiscal year data collection time frame and the last quarter of data collection for quality measures with calendar data collection time frame). If this proposal was implemented, when additional quality measures that use IRF–PAI as the data collection mechanism are adopted for future use in the IRF QRP, the first data collection time frame for those newly-adopted measures will be 3 months (October to December) and subsequent data collection time frame would follow a calendar year data collection time frame.

We sought public comments on our proposal to adopt calendar year data collection time frames, unless there is a clinical reason for an alternative data collection time frame. The responses to public comments on revisions to data submission timelines are discussed in this section of the final rule.

Comment: Several commenters supported the proposal to modify data collection timelines from fiscal year to calendar year for all measures, unless there is a clinical reason for an alternative timeline.

Response: We thank the commenters for their feedback and support to revise the data collection period to calendar year for quality measures, unless there is a clinical reason for an alternate data collection period. We agree that this would simplify the data collection and reporting process.

Final Decision: After consideration of public comments, we are finalizing this policy as proposed.

4. Data Submission Mechanisms for the FY 2018 and Subsequent Years Payment Determination for Additional IRF QRP Quality Measures and for Revisions to Previously Adopted Quality Measures

We proposed that all IRFs would be required to collect data using a revised IRF–PAI Version 1.4 (IRF–PAI 1.4) for the pressure ulcer measure and the additional 6 quality measures: (1) Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678); (2) an application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674); (3) an application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015); (4) IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review); (5) IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review); (6) IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; endorsed on July 23, 2015); and (7) IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). IRF–PAI Version 1.4 would have modified pressure ulcer items collected at admission and discharge, new fall items collected at discharge, new self-care and mobility functional status items collected at admission and discharge, and new risk factor items for the self-care and mobility measures collected at admission. The proposed IRF–PAI Version 1.4 is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

The QIES ASAP system would remain the data submission mechanism for the IRF–PAI. We will release the technical data submission specifications and update the IRF–PAI Training Manual to include items related to the new and updated quality measures in CY 2015. Further information on data submission of the IRF–PAI for the IRF QRP using the QIES ASAP system is available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html.* We sought public comments on these data submission requirements. The responses to public comments on data submission requirements are discussed in this section of the final rule.

Comment: Some commenters noted the need for CMS to issue direction with regard to which IRF–PAI version 1.4 data items are voluntary versus mandatory. Others noted that the IRF community needs clear training manuals and specifications.

Response: We have historically released, and are planning to release, the IRF–PAI Training Manual, as well as data submission specifications, both of which will guide providers with respect to mandatory items. Additionally, we are planning a national IRF Train the Trainer conference, during which we will also present such information. We invite providers to visit our IRF Quality Reporting Training Web page for further information on upcoming manual releases and training events. The IRF Quality Reporting Training Web page can be found at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Training.html.*

Final Decision: After consideration of public comments, we are finalizing this policy, as proposed.

J. Timing for New IRFs To Begin Submitting Quality Data Under the IRF QRP for the FY 2018 Payment Determination and Subsequent Years

In the FY 2015 IRF PPS (79 FR 45918), we finalized that beginning with the FY 2017 payment determination and that of subsequent fiscal years, new IRFs are required to begin reporting data under the IRF QRP requirements no later than the first day of the calendar quarter subsequent to the quarter in which it was designated as operating in the Certification and Survey Provider Enhanced Reports (CASPER) system.

To ensure that all IRFs have a minimum amount of time to prepare to submit quality data to CMS under the requirements of the IRF QRP, we proposed that a new IRF would be required to begin reporting quality data under the IRF QRP by no later than the first day of the calendar quarter subsequent to 30 days after the date on its CMS Certification Number (CCN) notification letter. For example, if an IRF's CCN notification letter is dated March 15th, then the IRF would be required to begin reporting quality data to CMS beginning on July 1st (March 15 + 30 days = April 14 (quarter 2). The IRF would be required to begin collecting quality data on the first day of the quarter subsequent to quarter 2, which is quarter 3, or July 1st). The collection of quality data would begin on the first day of the calendar year quarter identified as the start date, and would include all IRF admissions and subsequent discharges beginning on, and subsequent to, that day; however, the actual submission of quality data would be required by previously finalized quarterly deadlines, which fall approximately 135 days post the end of each CY quarter. To determine which quality measure data an IRF would need to begin submitting, we refer you to section IX.E of this final rule, as it will vary depending upon the timing of the CY quarter identified as a start date.

In the FY 2016 IRF PPS proposed rule, we indicated that the proposed requirements would apply beginning with the FY 2017 payment determination. We note that the

inclusion of ''FY 2018'' in this section heading in the FY 2016 IRF PPS proposed rule was a technical error, and that the reference to FY 2017 in proposed policy was correct, and is feasible for us to implement. However, it remains feasible for us to implement these requirements for FY 2018 payment determination and subsequent years, as we proposed. Therefore, we are not finalizing this proposal for the FY 2018 payment determination, but we are finalizing this proposal for FY 2017 payment determination and subsequent years.

We proposed to add the IRF QRP participation requirements at § 412.634 and sought public comments on our proposal to the participation requirements for new IRFs. The responses to public comments on the IRF QRP participation requirements are discussed in this section of the final rule.

Comment: We received several supportive comments regarding the change to our policy that directs when new IRFs are required to begin reporting data, some stating that the expanded timeframe will be beneficial to new providers.

Response: We agree that the expanded timeframe surrounding when new IRF providers need to begin submitting quality data to CMS is beneficial in that it allows each provider ample time to begin reporting, whether their certification falls at the beginning or end of a calendar year quarter, and has removed any advantage for providers certified at the beginning of a calendar year quarter.

Final Decision: After consideration of public comments, and as previously discussed, we are finalizing this policy for the FY 2017, payment determination and subsequent years.

K. IRF QRP Data Completion Thresholds for the FY 2016 Payment Determination and Subsequent Years

In the FY 2015 IRF PPS final rule (79 FR 45921 through 45923), we finalized IRF QRP thresholds for completeness of IRF data submissions. To ensure that IRFs are meeting an acceptable standard for completeness of submitted data, we finalized the policy that, beginning with the FY 2016 payment determination and for each subsequent year, IRFs must meet or exceed two separate data completeness thresholds: one threshold set at 95 percent for completion of quality measures data collected using the IRF–PAI submitted through the QIES and a second threshold set at 100 percent for quality measures data collected and submitted using the CDC NHSN.

Additionally, we stated that we will apply the same thresholds to all measures adopted as the IRF QRP expands and IRFs begin reporting data on previously finalized measure sets. That is, as we finalize new measures through the regulatory process, IRFs will be held accountable for meeting the previously finalized data completion threshold requirements for each measure until such time that updated threshold requirements are proposed and finalized through a subsequent regulatory cycle.

Further, we finalized the requirement that an IRF must meet or exceed both thresholds to avoid receiving a 2 percentage point reduction to their annual payment update for a given fiscal year, beginning with FY 2016 and for all subsequent payment updates. We did not propose any changes to these policies. Refer to the FY 2015 IRF PPS final rule (79 FR 45921 through 45923) for a detailed discussion of the finalized IRF QRP data completion requirements.

While we did not seek comment on previously finalized IRF QRP thresholds for completeness of IRF data submissions, we received several comments.

Comment: One commenter expressed concerns about the data completion thresholds, citing that they are too high given CMS' acknowledgment that achieving 100 percent data completion would be difficult at best. The commenter was also concerned that the threshold would be applied to data collected in FY 2014, despite being proposed after FY 2014 had already begun, and noted that CMS should avoid policies that have a retroactive impact on payment. The commenter suggested CMS to suspend the data completion threshold and work with stakeholders to develop a new policy.

Response: To clarify, the IRF QRP has two data completion thresholds: a threshold of 95 percent regarding quality data submitted via the IRF–PAI Quality Indicator section; and a threshold of 100 percent regarding the quality data submitted via the CDC's NHSN. We have continually maintained that providers should be submitting complete and accurate data, and the adoption of the data completion thresholds in the FY 2015 IRF PPS final rule did not change this policy. We believe that both data completion thresholds are achievable, as evidenced by the 91 percent of IRFs that were able to achieve these thresholds for purposes of the FY 2015 payment determination. We have also taken strides to increase compliance, including regular notification of upcoming deadlines, updated guidance documents, increased alarms for incomplete data submissions, and the development of several reports which will help providers better determine where they stand with respect to compliance throughout the year.

L. Proposed Suspension of the IRF QRP Data Validation Process for the FY 2016 Payment Determination and Subsequent Years

Validation is intended to provide added assurance of the accuracy of the data that will be reported to the public as required by sections 1886(j)(7)(E) and 1899B(g) of the Act. In the FY 2015 IRF PPS rule (79 FR 45923), we finalized, for the FY 2016 adjustments to the IRF PPS annual increase factor and subsequent years, a process to validate the data submitted for quality purposes. In the FY 2016 IRF PPS proposed rule (80 FR 23386), we proposed to temporarily suspend the implementation of this policy. We proposed that, through the suspension of this previously finalized policy, data accuracy validation will have no bearing on the applicable FY annual increase factor reduction for FY 2016 and subsequent years unless and until we propose to either reenact this policy, or propose to adopt a new validation policy through future rulemaking. At this time, we are working to develop a more comprehensive data validation policy that is aligned across the PAC quality reporting programs, and believe that we can implement a policy that increases the efficiency with which data validation is performed. We are also considering ways to reduce the labor and cost burden on IRFs through the development of a new data accuracy validation policy.

We sought comment on our proposal.

Comment: Several commenters supported CMS' proposal to temporarily suspend the data validation policy.

Response: We appreciate the commenters for their support.

Final Decision: After careful consideration of public comments, we are finalizing our decision to temporarily suspend the IRF data accuracy validation policy, as proposed.

M. Previously Adopted and Proposed IRF QRP Submission Exception and Extension Requirements for the FY 2017 Payment Determination and Subsequent Years

In the FY 2014 IRF PPS final rule (78 FR 47920), we finalized a process for IRF providers to request and for us to grant exceptions or extensions for the reporting requirements of the IRF QRP for one or more quarters, beginning with the FY 2015 payment determination and

for subsequent years when there are extraordinary circumstances beyond the control of the provider. We also finalized a policy that allows us to grant exemptions or extensions to IRFs that did not request them when it is determined that an extraordinary circumstance affects an entire region or locale.

In the FY 2015 IRF PPS final rule (79 FR 45920 through 45921), we adopted the policies and procedures previously finalized in the FY 2014 IRF PPS final rule for the FY 2017 payment determination and that of subsequent years. We also finalized the policy that grants an exception or extension to IRFs if we determine that a systemic problem with 1 of our data collection systems directly affected the ability of an IRF to submit data.

We did not propose any changes to the previously finalized policies and procedures for the FY 2018 payment determination and beyond.

In the FY 2014 IRF PPS final rule and the FY 2015 IRF PPS final rule, we stated that IRFs must request an exception or extension by submitting a written request along with all supporting documentation to CMS via email to the IRF QRP mailbox at *IRFQRPReconsiderations@cms.hhs.gov.* We further stated that exception or extension requests sent to us through any other channel would not be considered as a valid request for an exception or extension from the IRF QRP's reporting requirements for any payment determination. To be considered, a request for an exception or extension must contain all of the requirements as outlined on CMS Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Reconsideration-and-Exception-and-Extension.html.*

We proposed to add the IRF QRP Submission Exception and Extension Requirements at § 412.634. Refer to the FY 2014 IRF PPS final rule (78 FR 47920) and the FY 2015 IRF PPS final rule (79 FR 45920 through 45921) for detailed discussions of the IRF QRP Submission Exception and Extension Requirements.

Final Decision: We did not receive any public comments on this previously finalized policy, and, as such, are not making any changes to the policy. We are finalizing our proposal to codify our Data Submission Exception and Extension Requirements at § 412.634.

N. Previously Adopted and Proposed IRF QRP Reconsideration and Appeals Procedures for the FY 2017 Payment Determination and Subsequent Years

At the conclusion of each FY reporting cycle, we review the data received from each IRF to determine if the IRF met the reporting requirements set forth for that reporting cycle. IRFs that are found to be non-compliant will receive a reduction in the amount of 2 percentage points to their annual payment update for the applicable fiscal year. In the FY 2015 IRF PPS final rule (79 FR 45919 through 45920), we described and adopted an updated process that enables an IRF to request a reconsideration of our initial noncompliance decision in the event that an IRF believes that it was incorrectly identified as being subject to the 2-percentage point reduction to its IRF PPS annual increase factor due to noncompliance with the IRF QRP reporting requirements for a given reporting period.

Any IRF that wishes to submit a reconsideration request must do so by submitting an email to CMS containing all of the requirements listed on the IRF program Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Reconsideration-and-Exception-and-Extension.html.* Email sent to *IRFQRPReconsiderations@cms.hhs.gov* is the only form of submission that will be accepted by us. Any reconsideration requests received through another channel, including U.S. postal service or phone, will not be considered as a valid reconsideration request.

We proposed to continue using the IRF QRP Reconsideration and Appeals Procedures that were adopted in the FY 2015 IRF PPS final rule (79 FR 45919 through 45920) for the FY 2017 payment determination and subsequent years with an exception regarding the way in which non-compliant IRFs are notified of this determination.

Currently IRFs found to be non-compliant with the reporting requirements set forth for a given payment determination received a notification of this finding along with instructions for requesting reconsideration in the form of a certified United States Postal Service (USPS) letter. In an effort to communicate as quickly, efficiently, and broadly as possible with IRFs regarding annual compliance, we proposed changes to our communications method regarding annual notification of reporting compliance in the IRF QRP. In addition to sending letters via regular USPS mail, beginning with the FY 2016 payment determination and for subsequent fiscal years, we proposed to use the QIES as a mechanism to communicate to IRFs regarding their compliance with the reporting requirements for the given reporting cycle.

We proposed that all Medicare-certified IRF compliance letters be uploaded into the QIES system for each IRF to access. Instructions to download files from QIES may be found at *https://www.qtso.com/irfpai.html.* We proposed to disseminate communications regarding the availability of compliance reports in IRFs' QIES files through routine channels to IRFs and vendors, including, but not limited to, issuing memos, emails, Medicare Learning Network (MLN) announcements, and notices on *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Reconsideration-and-Disaster-Waiver-Requests.html.*

The purpose of the compliance letter is to notify an IRF that it has been identified as either being compliant or non-compliant with the IRF QRP reporting requirements for the given reporting cycle. If the IRF is determined to be non-compliant, then the notification would indicate that the IRF is scheduled to receive a 2 percentage point reduction to its upcoming annual payment update and that it may file a reconsideration request if it disagrees with this finding. IRFs may request a reconsideration of a non-compliance determination through the CMS reconsideration request process. We also proposed that the notifications of our decision regarding all received reconsideration requests will be made available through the QIES system. We did not propose to change the process or requirements for requesting reconsideration. Refer to the FY 2015 IRF PPS final rule (79 FR 45919 through 45920) for a detailed discussion of the IRF QRP Reconsideration and Appeals Procedures.

Below, we discuss a proposal to publish a list of IRFs who successfully meet the reporting requirements for the applicable payment determination on the IRF QRP Web site *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/.* As proposed, we also update the list of IRFs who successfully meet the reporting requirements after all reconsideration requests have been processed on an annual basis.

We proposed to add the IRF QRP Reconsideration and Appeal Procedures at § 412.634.

We sought comment on the proposals to change the communication mechanism to the QIES system for the dissemination of compliance notifications and reconsideration decisions and to add these processes at § 412.634.

Comment: Several commenters supported CMS' proposal to notify non-compliant IRFs using QIES, as well as via USPS.

Response: We appreciated the commenters for their support.

Comment: One commenter appreciated CMS' attempts to improve communication but suggested CMS to consider transferring the IRF QRP reporting to QualityNet, which is the current clearinghouse for all other Medicare quality reporting programs. This commenter suggested that doing so would reduce provider confusion, promote program alignment, and enhance compliance rates.

Response: We thank the commenter for their feedback about communication and will take their suggestion into consideration for future rulemaking.

Final Decision: After careful consideration of public comments, we are finalizing these policies, as proposed.

O. Proposed Public Display of Quality Measure Data for the IRF QRP

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF QRP data available to the public. In so doing, the Secretary must ensure that IRFs have the opportunity to review any such data with respect to the IRF prior to its release to the public. Section 1899B(g) of the Act requires the Secretary to establish procedures for making available to the public information regarding the performance of individual PAC providers with respect to the measures required under section 1899B of the Act beginning not later than 2 years after the applicable specified application date. The procedures must ensure, including through a process consistent with the process applied under section 1886(b)(3)(B)(viii)(VII) for similar purposes, that each PAC provider has the opportunity to review and submit corrections to the data and information that are to be made public with respect to the PAC provider prior to such data being made public. We proposed a policy to display performance information regarding the quality measures, as applicable, required by the IRF QRP by fall 2016 on a CMS Web site, such as the Hospital Compare Web site at *http://www.hospitalcompare.hhs.gov*, after a 30-day preview period. Additional information about preview report content and delivery will be announced on the IRF QRP Web site.

The Hospital Compare Web site is an interactive web tool that assists beneficiaries by providing information on hospital quality of care to those who need to select a hospital. It further serves to encourage beneficiaries to work with their providers to discuss the quality of care provided to patients, by providing an additional incentive to providers to improve the quality of care that they furnish. As we have done on other CMS compare Web sites, we will, at some point in the future, report public data using a quality rating system that gives each IRF a rating between 1 and 5 stars. Initially, however, we will not use the 5-star methodology, until such time that we are publicly reporting a sufficient number of quality metrics to allow for variation and the differentiation between IRFs using this methodology. Decisions regarding how the rating system will determine a provider's star rating and methods used for calculations, as well as a proposed timeline for implementation, will be announced via regular IRF QRP communication channels, including listening sessions, memos, email notification, provider association calls, Open Door Forums, and Web postings. Providers would be notified via CMS listservs, CMS mass emails, and memorandums, IRF QRP Web site announcements and MLN announcements regarding the release of IRF Provider Preview Reports followed by the posting of data.

The initial display of information would contain IRF provider performance on the following 3 quality measures:

- Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened(Short-Stay) (NQF #0678).
- NHSN CAUTI Outcome Measure (NQF #0138).
- All-Cause Unplanned Readmission Measure for 30 Days Post Discharge From IRFs (NQF #2502).

For the first 2 listed measures, Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) and NHSN CAUTI Outcome Measure (NQF #0138), we proposed publicly reporting data beginning with data collected on these measures for discharges beginning January 1, 2015. Rates would be displayed based on 4 rolling quarters of data and would initially be reported using discharges from January 1, 2015 through December 31, 2015, for calculation. As each quarter advances, we would add the subsequent calendar year quarter and remove the earliest calendar year quarter. For example, initially we would use data from discharges occurring from January 1, 2015 through December 31, 2015. The next quarter, we would display performance data using discharges that occurred between the dates of April 1, 2015 through March 31, 2016, etc.

For the measure All-Cause Unplanned Readmission Measure for 30 Days Post Discharge From IRFs (NQF #2502), we proposed to publicly report data beginning with data collected for discharges beginning January 1, 2013. Rates would be displayed based on 2 consecutive years of data and would initially be reported using discharges from January 1, 2013 through December 31, 2014. As each calendar year advances, we would add the subsequent calendar year quarter and remove the earliest calendar year.

Calculations for the CAUTI measure adjust for differences in the characteristics of hospitals and patients using a Standardized Infection Ratio (SIR). The SIR is a summary measure that takes into account differences in the types of patients a hospital treats. The SIR may take into account the type of patient care location, laboratory testing methods, hospital affiliation with a medical school, bed size of the hospital, and bed size of specific patient care locations. It compares the actual number of Healthcare Associated Infections (HAIs) in a facility or state to a national benchmark based on previous years of reported data and adjusts the data based on several risk factors. A confidence interval with a lower and upper limit is displayed around each SIR to indicate that there is a high degree of confidence that the true value of the SIR lies within that interval. An SIR with a lower limit that is greater than 1.0 means that there were more HAIs in a facility or state than were predicted, and the facility is classified as ''Worse than the U.S. National Benchmark''. If the SIR has an upper limit that is less than 1, then the facility had fewer HAIs than were predicted and is classified as ''Better than the U.S. National Benchmark''. If the confidence interval includes the value of 1, then there is no statistical difference between the actual number of HAIs and the number predicted, and the facility is classified as ''No Different than U.S. National Benchmark''. If the number of predicted infections is a specific value less than 1, the SIR and confidence interval cannot be calculated.

Calculations for the Percent of Residents or Patients with Pressure

Ulcers That Are New or Worsened measure application (NQF #0678) will be risk-adjusted. Resident- or patient-level covariate risk adjustment is performed. Resident- or patient-level covariates are used in a logistic regression model to calculate a resident- or patient-level expected quality measure (QM) score (the probability that the resident or patient will evidence the outcome, given the presence or absence of patient characteristics measured by the covariates). Then, an average of all resident- or patient-level expected QM scores for the facility is calculated to create a facility-level expected QM score. The final facility-level adjusted QM score is based on a calculation which combines the facility-level expected score and the facility level observed score. Additional information about the covariates can be found at *www.qualityforum.org/QPS/0678.*

Finally, calculation for performance on the measure All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502) will also be risk-adjusted. The risk adjustment methodology is available, along with the specifications for this measure, on our IRF Quality Reporting Measures Information Web page at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

We are currently developing reports that will allow providers to view the data that is submitted to CMS via the QIES ASAP system and the CDC's NHSN (Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678) and NHSN CAUTI Outcome Measure (NQF #0138), respectively). Although initial reports will not allow providers to view this data, subsequent iterations of these reports will also include provider performance on any currently reported quality measure that is calculated based on CMS claims data that we plan on publicly reporting (All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502)). Although real time results will not be available, the report will refresh all of the data submitted at least once a month. We proposed a process to give providers an opportunity to review and correct data submitted to the QIES ASAP system or to the CDC's NHSN system by utilizing that report. Under this process, providers would to have the opportunity to review and correct data they submit on all assessment-based measures. Providers can begin submitting data on the first discharge day of any reporting quarter. Providers are encouraged to submit data early in the submission schedule so that they can identify errors and resubmit data before the quarterly submission deadline. The data would be populated into reports that are updated at least once a month with all data that have been submitted. That report would contain the provider's performance on each measure calculated based on assessment submissions to the QIES ASAP or CDC NHSN system. We believe that the submission deadline timeframe, which is 4.5 months beyond the end of each calendar year quarter, is sufficient time for providers to be able to submit, review data, make corrections to the data, and view their data. We note that the quarterly data submission deadline/timeframe only applies to the quality indicator section of the IRF–PAI, and has no bearing on the current deadline of 27 days that is imposed for payment items. We proposed that once the provider has an opportunity to review and correct quarterly data related to measures submitted via the QIES ASAP or CDC NHSN system, we would consider the provider to have been given the opportunity to review and correct this data. We would not allow patient-level data correction after the submission deadline or for previous years. This is because we must set a deadline to ensure timely computation of measure rates and payment adjustment factors. Before we display this information, providers will be permitted 30 days to review their information as recorded in the QIES ASAP or CDC NHSN system.

In addition to our proposal, we proposed to publish a list of IRFs who successfully meet the reporting requirements for the applicable payment determination on the IRF QRP Web site *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/.* We proposed updating the list after reconsideration requests are processed on an annual basis.

We sought public comment on the listed proposals.

Comment: One commenter supported the public display of the NHSN CAUTI Outcome Measure (NQF #0138). This commenter also mentioned displaying the SIR information for this measure.

Response: We would like to clarify that while the SIR calculation will be communicated to each IRF provider in their Preview Report that will be issued during the 30-day preview period prior to public reporting, the IRF public reporting Web site will not display this information, but rather will display ratings based on whether or not an IRF is the same, higher than, or lower than the national average with respect to their performance on the CAUTI measure.

Comment: Several commenters supported public display of IRF QRP data, but requested an opportunity to submit corrections during the preview period.

Response: We would like to clarify that once we issue the Preview Report to IRF providers, they will have 30 days during which to contest the measure calculations contained within that report. We will not allow providers to correct patient level data during the preview period, as this would have the effect of negating our data submission deadlines. We maintain that IRFs have 135 days beyond the end of each calendar year quarter during which to review and correct patient-level data, and believe that this is a sufficient amount of time. While providers may use this time as an extended data submission deadline, the original intent of this grace period was to allow for provider review and correction of their patient-level data. Our public reporting preview period policy aligns with that of the HIQR and other CMS QRPs. We suggested to providers to submit data as soon as possible, in order to ensure enough time for review and correction of that data.

Final Decision: After careful consideration of public comments, we are finalizing our policy related to the public display of quality measure data for the IRF QRP, as proposed.

P. Method for Applying the Reduction to the FY 2016 IRF Increase Factor for IRFs That Fail To Meet the Quality Reporting Requirements

As previously noted, section 1886(j)(7)(A)(i) of the Act requires the application of a 2-percentage point reduction of the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. In compliance with 1886(j)(7)(A)(i) of the Act, we will apply a 2-percentage point reduction to the applicable FY 2016 market basket increase factor (1.7 percent) in calculating an adjusted FY 2016 standard payment conversion factor to apply to payments for only those IRFs that failed to comply with the data submission requirements. As previously noted, application of the 2-percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Also, reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY

involved. Table 25 shows the calculation of the adjusted FY 2016 standard payment conversion factor that will be used to compute IRF PPS payment rates for any IRF that failed to meet the quality reporting requirements for the period from January 1, 2014, through December 31, 2014.

TABLE 25—CALCULATIONS TO DETERMINE THE ADJUSTED FY 2016 STANDARD PAYMENT CONVERSION FACTOR FOR IRFS THAT FAILED TO MEET THE QUALITY REPORTING REQUIREMENT

Explanation for adjustment	Calculations
Standard Payment Conversion Factor for FY 2015	$15,198
Market Basket Increase Factor for FY 2016 (2.4 percent), reduced by 0.5 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, reduced by 0.2 percentage point in accordance with sections 1886(j)(3)(C) and (D) of the Act and further reduced by 2 percentage points for IRFs that failed to meet the quality reporting requirement	× 0.9970
Budget Neutrality Factor for the Wage Index and Labor-Related Share	× 1.0033
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	× 0.9981
Final Adjusted FY 2016 Standard Payment Conversion Factor	= $15,174

We received no comments on the proposed method for applying the reduction to the FY 2016 IRF increase factor for IRFs that fail to meet the quality reporting requirements.

Final Decision: As we did not receive any comments on the proposed method for applying the reduction to the FY 2016 IRF increase factor for IRFs that fail to meet the quality reporting requirements, we are finalizing the proposed methodology.

X. Miscellaneous Comments

Comment: Although one commenter expressed support for the changes to the 60 percent rule compliance methodology that we finalized in the FY 2014 and FY 2015 IRF PPS final rules, several other commenters expressed concerns about the impact of these changes on beneficiary access to IRF services and suggested that we revisit them. In addition, several commenters suggested that we add specific ICD–10–CM codes to the list of codes that would meet the 60 percent rule under the presumptive methodology, including specific diagnosis codes related to cognition, swallowing, and communication. Further, one commenter requested that additional clarity and rationale be added to the 60 percent rule compliance data files that we posted on the CMS Web site in conjunction with the FY 2014 and FY 2015 IRF PPS final rules.

Response: As we did not propose any changes to the methodology for determining IRFs' compliance with the 60 percent rule, these comments are outside the scope of the proposed rule. We appreciate the commenter's suggestions, and will continue to monitor and assess the implications of the changes to the presumptive methodology that we finalized in the FY 2014 and FY 2015 IRF PPS final rules to determine if any further refinements to the methodology are needed.

Comment: Several commenters suggested that we use the most recent 3 years of data to re-examine the conditions that are included on the list of tier comorbidities, and that we revise this list for FY 2016. One commenter provided a list of specific diagnosis codes to add to the list.

Response: As we did not propose any changes to the list of tier comorbidities, these comments are outside the scope of the proposed rule. We appreciate the commenters' suggestions, and will consider these suggestions for future analyses.

Comment: One commenter suggested that CMS should be more transparent about the criteria the agency is using to determine when changes to the facility-level adjustments occur. Another commenter encouraged CMS to continue to analyze changes to the facility-level adjustments and adjust all three factors at a minimum of every three years.

Response: As we did not propose any changes to the facility-level adjustments, these comments are outside the scope of the proposed rule. The FY 2016 IRF PPS proposed rule (80 FR 23332 at 23341) included a reminder that, in the FY 2015 IRF PPS final rule (79 FR 45872 at 45882), we froze the facility-level adjustments at FY 2014 levels for FY 2015 and all subsequent years (unless and until we propose to update them again through future notice-and-comment rulemaking).

Comment: Several commenters suggested that we consider imposing a cap, possibly adjusted by a geographic index, on the amount of outlier payments an individual IRF can receive under the IRF PPS.

Response: Comments regarding the amount of outlier payments an individual IRF can receive are outside the scope of this rule. However, any future consideration given to imposing a limit on outlier payments would have to carefully analyze and take into consideration the effect on access to IRF care for certain high-cost populations.

Comment: One commenter requested clarification of several IRF PPS policies, including the therapy data collection that was finalized in the FY 2015 IRF PPS final rule (79 FR 45900 through 45903), the weighted motor score that is used to classify beneficiaries into CMGs, and the definition of a Medicare ''discharge'' under the IRF PPS.

Response: Comments regarding the therapy data collection that was finalized in the FY 2015 IRF PPS final rule are outside the scope of this rule. However, additional information on the therapy data collection that begins October 1, 2015 is available for download from the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html.* Comments regarding the weighted motor score are also outside the scope of this rule. However, we refer the commenter to the detailed discussion of the weighted motor score in the FY 2006 IRF PPS final rule (70 FR 47880 at 47896 through 47900). Finally, the definition of an IRF discharge is located at § 412.602.

Comment: Several commenters noted the need for consistency in payment policies and regulations across Medicare post-acute care settings, and suggested that CMS should reduce or eliminate any unnecessary or burdensome IRF regulations and documentation requirements, including those associated with the IRF coverage requirements or the IRF 60 percent rule. One commenter also discussed the Medicare Payment Advisory Commission's site-neutral payment policy recommendation for post-acute care.

Response: Comments regarding the any site-neutral payment policies or changes to IRF regulations or documentation requirements are outside the scope of this rule.

Comment: Several commenters requested that we review the ICD–10–CM codes that we finalized in the FY 2015 IRF PPS final rule (79 FR 45905 through 45908) and add specific ICD–10–CM codes to the diagnosis code lists used in the 60 percent rule presumptive methodology and in assigning tier comorbidities. In addition, one commenter suggested that we perform additional ''end-to-end'' testing of the ICD–10–CM coding to ensure that IRFs are able to submit their claims and IRF–PAI forms using ICD–10–CM codes in a timely manner and that contractors are able to reimburse providers based on ICD–10–CM coding in a timely manner.

Response: Comments regarding any changes to the ICD–10–CM codes for the IRF PPS are outside the scope of the proposed rule. However, we are undergoing extensive testing of ICD–10–CM coding of claims and IRF–PAIs, and will closely monitor the effects of the ICD–10–CM implementation on IRFs to ensure that IRF claims are paid appropriately and expeditiously. Once we have enough ICD–10–CM data to analyze, we also plan to assess the lists of ICD–10–CM codes for the IRF PPS to determine whether any revisions to the code lists for the 60 percent rule or the tier comorbidities might be needed.

XI. Provisions of the Final Regulations

In this final rule, we are adopting the provisions set forth in the FY 2016 IRF proposed rule (80 FR 23332), except as noted elsewhere in the preamble. Specifically:

- We will update the FY 2016 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section IV of this final rule.
- We include a reminder that, in the FY 2015 IRF PPS final rule (79 FR 45872 at 45882), we froze the facility-level adjustments at FY 2014 levels for FY 2015 and all subsequent years (unless and until we propose to update them again through future notice-and-comment rulemaking), as discussed in section V of this final rule.
- We will adopt the IRF-specific market basket, as discussed in section VI of this final rule.
- We will update the FY 2016 IRF PPS payment rates by the market basket increase factor, based upon the most current data available, with a 0.2 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act and the productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section VI of this final rule.
- We will update the FY 2016 IRF PPS payment rates by the FY 2016 wage index and the labor-related share in a budget-neutral manner and the wage adjustment transition as discussed in section VI of this final rule.
- We will calculate the final IRF standard payment conversion factor for FY 2016, as discussed in section VI of this final rule.
- We will update the outlier threshold amount for FY 2016, as discussed in section VII of this final rule.
- We will update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2016, as discussed in section VII of this final rule.
- We include a reminder of the October 1, 2015 implementation of the International Classification of Diseases, 10th Revision, Clinical Modification (ICD–10–CM) for the IRF PPS, as discussed in section VIII of this final rule.
- We will adopt revisions and updates to quality measures and reporting requirements under the quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act, as discussed in section IX of this final rule.

XII. Collection of Information Requirements

A. Statutory Requirement for Solicitation of Comments

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This final rule makes reference to associated information collections that are not discussed in the regulation text contained in this document.

B. Collection of Information Requirements for Updates Related to the IRF QRP

Failure to submit data required under section 1886(j)(7)(C) and (F) of the Act will result in the reduction of the annual update to the standard federal rate for discharges occurring during such fiscal year by 2 percentage points for any IRF that does not comply with the requirements established by the Secretary. At the time that this analysis was prepared, 91, or approximately 8 percent, of the 1166 active Medicare-certified IRFs did not receive the full annual percentage increase for the FY 2015 annual payment update determination. Information is not available to determine the precise number of IRFs that will not meet the requirements to receive the full annual percentage increase for the FY 2016 payment determination.

We believe that the burden associated with the IRF QRP is the time and effort associated with data collection and reporting. As of April 1, 2015, there are approximately 1132 IRFs currently reporting quality data to CMS. In this final rule, we are finalizing 2 quality measures that have already been adopted for the IRF QRP: (1) All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502), to establish the newly NQF-endorsed status of this measure; and (2) Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), to establish its use as a cross-setting measure that addresses the domain of skin integrity, as required by the IMPACT Act of 2014. The All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502) is a Medicare claims-based measure; because claims-based measures can be calculated based on data that are already reported to the Medicare program for payment purposes, we believe there will be no additional impact. We also believe that there will be no additional burden associated with our re-proposal of the measure Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), as IRFs are already submitting quality data related to this measure.

We also proposed adoption of 6 additional quality measures. These 6 new quality measures are: (1) An application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674); (2) an application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a

Care Plan that Addresses Function (NQF #2631; endorsed on July 23, 2015); (3) IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review); (4) IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review); (5) IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; under review); and (6) IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). Additionally we proposed that data for these 6 new measures will be collected and reported using the IRF–PAI (version 1.4).

Our burden calculations take into account all ''new'' items required on the IRF–PAI (version 1.4) to support data collection and reporting for these 6 proposed measures. New items will be included on the following assessment: IRF–PAI version 1.4 Admission and Discharge assessment. The addition of the new items required to collect the 6 newly adopted measures is for the purpose of achieving standardization of data elements.

We estimate the additional elements for the 6 newly adopted measures will take 25.5 minutes of nursing/clinical staff time to report data on admission and 16.0 minutes of nursing/clinical staff time to report data on discharge, for a total of 41.5 minutes. We believe that the additional IRF–PAI items we proposed will be completed by Registered Nurses (RN), Occupational Therapists (OT), Speech Language Pathologists (SLP) and/or Physical Therapists (PT), depending on the item. We identified the staff type per item based on past LTCH and IRF burden calculations in conjunction with expert opinion. Our assumptions for staff type were based on the categories generally necessary to perform assessment: RN, OT, SLP, and PT. Individual providers determine the staffing resources necessary; therefore, we averaged the national average for these labor types and established a composite cost estimate. This composite estimate was calculated by weighting each salary based on the following breakdown regarding provider types most likely to collect this data: RN 59 percent; OT 11 percent; PT 20 percent; SLP 1 percent. In accordance with OMB control number 0938–0842, we estimate 390,748 discharges from all IRFs annually, with an additional burden of 41.5 minutes. This would equate to 270,267.37 total hours or 238.75 hours per IRF. We believe this work will be completed by RN, OT, PT, and SLP staff, depending on the item. We obtained mean hourly wages for these staff from the U.S. Bureau of Labor Statistics' May 2013 National Occupational Employment and Wage Estimates (*http://www.bls.gov/oes/current/oes_nat.htm*), and to account for overhead and fringe benefits, we have doubled the mean hourly wage. Per the U.S. Bureau of Labor and Statistics, the mean hourly wage for a RN is $33.13. However, to account for overhead and fringe benefits, we have doubled the mean hourly wage, making it $66.26 for an RN. The mean hourly wage for an OT is $37.45, doubled to $74.90 to account for overhead and fringe benefits. The mean hourly wage for a PT is $39.51, doubled to $79.02 to account for overhead and fringe benefits. The mean hourly wage for a SLP is $35.56, doubled to $71.12 to account for overhead and fringe benefits. Given these wages and time estimates, the total cost related to the six newly proposed measures is estimated at $21,239.33 per IRF annually, or $22,529,560.74–$24,042,291.01 for all IRFs annually.

For discussion purposes, we provided a detailed description of the burden associated with the requirements in section IX of this final rule. However, the burden associated with the aforementioned requirements is exempt from the PRA under the IMPACT Act of 2014. Section 1899B(m) and the sections referenced in section 1899B(a)(2)(B) of the Act exempt modifications that are intended to achieve the standardization of patient assessment data. The requirement and burden will, however, be submitted to OMB for review and approval when the quality measures and the PAC assessment instruments are no longer used to achieve the standardization of patient assessment data.

In section IX.F. of this final rule, we are finalizing 2 quality measures that have already been adopted for the IRF QRP: (1) All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502), to establish the newly NQF-endorsed status of this measures; and (2) Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), to establish its use as a cross-setting measure that addresses the domain of skin integrity, as required by the IMPACT Act of 2014. The All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502) is a Medicare claims-based measure; because claims-based measures can be calculated based on data that are already reported to the Medicare program for payment purposes, we believe there will be no additional impact as a result of this measure. We also believe that there will be no additional burden associated with our proposal of the measure Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), as IRFs are already submitting quality data related to this measure.

In section IX.G. of this final rule, we are also finalizing adoption of six new quality measures. These 6 proposed quality measures are: (1) An application of Percent of Residents Experiencing One or More Falls with Major Injury (Long-Stay) (NQF #0674); (2) an application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015); (3) IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review); (4) IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review); (5) IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; under review); and (6) IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). Additionally, we are finalizing that data for the 6 measures will be collected and reported using the IRF–PAI (version 1.4). While the reporting of data on quality measures is an information collection, we believe that the burden associated with modifications to the IRF–PAI discussed in this final rule fall under the PRA exceptions provided in 1899B(m) of the Act because they are required to achieve the standardization of patient assessment data. Section 1899B(m) of the Act provides that the PRA does not apply to section 1899B and the sections referenced in section 1899B(a)(2)(B) of the Act that require modification to achieve the standardization of patient assessment data. The requirement and burden will, however, be submitted to OMB for review and approval when the modifications to the IRF–PAI or other applicable PAC assessment instrument are not used to achieve the standardization of patient assessment data. Additionally, while the IMPACT Act does not specifically require the IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review), IRF Functional Outcome Measure: Change in Mobility Score for

Medical Rehabilitation Patients (NQF #2634; under review), IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; recommended for endorsement), and IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015), the data elements used to inform those measures are part of larger set of functional status data items that have been added to the IRF–PAI version 1.4, for the purpose of providing standardized data elements under the domain of functional status, which is required by the IMPACT Act. These same data elements are used to inform different quality measures that we are finalizing, each with a different outcome.

For quality reporting during extraordinary circumstances, as discussed in section IX.M. of this final rule, we proposed to codify at § 412.634 a process previously finalized for the FY 2017 payment determination and subsequent years for IRF providers to request exceptions or extensions for the IRF QRP reporting requirements when there are extraordinary circumstances beyond the control of the provider. The request must be submitted by email within 90 days from the date that the extraordinary circumstances occurred.

While the preparation and submission of the request is an information collection, unlike the aforementioned temporary exemption of the data collection requirements for the 6 new quality measures, and the 2 re-proposed quality measures, the request is not expected to be submitted to OMB for formal review and approval since we estimate less than 2 requests (total) per year. Since we estimate fewer than 10 respondents annually, the information collection requirement and associated burden is not subject as stated in the implementing regulations of the PRA (5 CFR 1320.3(c)).

As discussed in section IX.N. of this final rule, we proposed to codify at § 412.634 a previously finalized process that enables an IRF to request reconsiderations of our initial non-compliance decision in the event that it believes that it was incorrectly identified as being subject to the 2-percentage point reduction to its annual increase factor due to non-compliance with the IRF QRP reporting requirements. We believe the reconsideration and appeals requirements and the associated burden would be incurred subsequent to an administrative action. In accordance with the implementing regulations for the PRA (5 CFR 1320.4(a)(2) and (c)), the burden associated with any information collected subsequent to the administrative action is exempt from the requirements of the PRA.

Comments: Several commenters noted that there was undue burden associated with the collection of the 5 functional status measures we proposed and are finalizing, as they perceive the data items that inform these measures to be duplicative of existing items contained within the IRF–PAI.

Response: We have addressed these concerns under the comment and response section of the functional status measure proposals in sections IX.G.1. through IX.G.5. of this final rule.

Comment: Several commenters were concerned with the time and cost of updating electronic medical records systems in order to capture the new data items related to functional status. Some commenters noted that CMS only accounted for the time for the IRF–PAI and not the time for documentation in a patient's EMR to support the IRF–PAI information.

Response: While we applaud the use of EMRs to support the capture of IRF–PAI data, we do not require them. We issue free software which allows providers to capture and submit the required IRF–PAI data to us. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product are available on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html*. We additionally provide data submission specifications which allow providers to integrate our requirements into their existing electronic systems; however, this is solely a business decision on the part of the provider. For the burden of EMR documentation, we do not account for the burden of documenting data that is considered a routine part of clinical practice.

XIII. Regulatory Impact Analysis

A. Statement of Need

This final rule updates the IRF prospective payment rates for FY 2016 as required under section 1886(j)(3)(C) of the Act. It responds to section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

This final rule also implements sections 1886(j)(3)(C) and (D) of the Act. Section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 through 2019.

Furthermore, this final rule also adopts policy changes under the statutory discretion afforded to the Secretary under section 1886(j) of the Act. Specifically, we adopt an IRF-specific market basket, provide for a 1-year phase-in for the revised wage index changes for all IRFs, provide a 3-year phase-out of the rural adjustment for certain IRFs, and revise and update the quality measures and reporting requirements under the IRF quality reporting program.

B. Overall Impacts

We have examined the impacts of this final rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354) (RFA), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for a major final rule with economically significant effects ($100 million or more in any 1 year). We estimate the total impact of the policy updates described in this final rule by comparing the estimated payments in FY 2016 with those in FY 2015. This analysis results in an estimated $135 million increase for FY 2016 IRF PPS payments. As a result, this final rule is designated as economically ''significant'' under section 3(f)(1) of Executive Order 12866, and hence a major rule under the Congressional

Review Act. Also, the rule has been reviewed by OMB.

The Regulatory Flexibility Act (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 IRFs and most other providers and suppliers are small entities, either by having revenues of $7.5 million to $38.5 million or less in any 1 year depending on industry classification, or by being nonprofit organizations that are not dominant in their markets. (For details, see the Small Business Administration's final rule that set forth size standards for health care industries, at 65 FR 69432 at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*, effective March 26, 2012 and updated on July 14, 2014.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an approximate total of 1,100 IRFs, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The Department of Health and Human Services generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 26, we estimate that the net revenue impact of this final rule on all IRFs is to increase estimated payments by approximately 1.8 percent. However, we find that certain individual IRF providers would be expected to experience revenue impacts greater than 3 percent. We estimate that approximately 3 IRFs that would transition from urban to rural status as a result of the changes to the delineation of CBSAs issued in OMB Bulletin No. 13–01 will gain the 14.9 percent rural adjustment, and will therefore experience net increases in IRF PPS payments of 16.4 percent. As a result, we anticipate this final rule will have a net positive impact on small entities. Medicare Administrative Contractors are not considered to be small entities. Individuals and states are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 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. As discussed in detail below, the rates and policies set forth in this final rule will not have a significant impact (not greater than 3 percent) on a substantial number of rural hospitals based on the data of the 145 rural units and 12 rural hospitals in our database of 1,135 IRFs for which data were available.

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, enacted on March 22, 1995) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2015, that threshold level is approximately $144 million. This final rule will not mandate spending costs on state, local, or tribal governments, in the aggregate, or by the private sector, of greater than $144 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. As stated, this final rule will not have a substantial effect on state and local governments, preempt state law, or otherwise have a federalism implication.

C. Detailed Economic Analysis

1. Basis and Methodology of Estimates

This final rule sets forth policy changes and updates to the IRF PPS rates contained in the FY 2015 IRF PPS final rule (79 FR 45872). Specifically, this final rule introduces an IRF-specific market basket. This final rule also updates the CMG relative weights and average length of stay values, the wage index, and the outlier threshold for high-cost cases. This final rule applies a MFP adjustment to the FY 2016 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.2 percentage point reduction to the FY 2016 IRF market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and –(D)(iv) of the Act. Further, this final rule contains revisions to the IRF quality reporting requirements that are expected to result in some additional financial effects on IRFs. In addition, section IX of this final rule discusses the implementation of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements, in accordance with section 1886(j)(7) of the Act.

We estimate that the impact of the changes and updates described in this final rule will be a net estimated increase of $135 million in payments to IRF providers. This estimate does not include the implementation of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements (as discussed in section XIII.C.9. of this final rule). The impact analysis in Table 26 of this final rule represents the projected effects of the updates to IRF PPS payments for FY 2016 compared with the estimated IRF PPS payments in FY 2015. We determine the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2016, we are adopting standard annual revisions described in this final rule (for example, the update to the wage and market basket indexes used to adjust the federal rates). We are also implementing a productivity adjustment to the FY 2016 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.2 percentage point reduction to the FY 2016 IRF market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and –(D)(iv) of the Act. We estimate the total increase in payments to IRFs in FY 2016, relative to FY 2015, will be approximately $135 million.

This estimate is derived from the application of the FY 2016 IRF market basket increase factor, as reduced by a

productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.2 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and –(D)(iv) of the Act, which yields an estimated increase in aggregate payments to IRFs of $130 million. Furthermore, there is an additional estimated $5 million increase in aggregate payments to IRFs due to the update to the outlier threshold amount. Outlier payments are estimated to increase from approximately 2.9 percent in FY 2015 to 3.0 percent in FY 2016. Therefore, summed together, we estimate that these updates will result in a net increase in estimated payments of $135 million from FY 2015 to FY 2016.

The effects of the updates that impact IRF PPS payment rates are shown in Table 26. The following updates that affect the IRF PPS payment rates are discussed separately below:

- The effects of the update to the outlier threshold amount, from approximately 2.9 percent to 3.0 percent of total estimated payments for FY 2016, consistent with section 1886(j)(4) of the Act.
- The effects of the annual market basket update (using the IRF market basket) to IRF PPS payment rates, as required by section 1886(j)(3)(A)(i) and sections 1886(j)(3)(C) and –(D) of the Act, including a productivity adjustment in accordance with section 1886(j)(3)(C)(i)(I) of the Act, and a 0.2 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and –(D)(iv) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the budget-neutral changes to the CMG relative weights and average length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The total change in estimated payments based on the FY 2016 payment changes relative to the estimated FY 2015 payments.

2. Description of Table 26

Table 26 categorizes IRFs by geographic location, including urban or rural location, and location for CMS's 9 Census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), by teaching status, and by disproportionate share patient percentage (DSH PP). The top row of Table 26 shows the overall impact on the 1,135 IRFs included in the analysis.

The next 12 rows of Table 26 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 978 IRFs located in urban areas included in our analysis. Among these, there are 739 IRF units of hospitals located in urban areas and 239 freestanding IRF hospitals located in urban areas. There are 157 IRFs located in rural areas included in our analysis. Among these, there are 145 IRF units of hospitals located in rural areas and 12 freestanding IRF hospitals located in rural areas. There are 401 for-profit IRFs. Among these, there are 347 IRFs in urban areas and 54 IRFs in rural areas. There are 661 non-profit IRFs. Among these, there are 568 urban IRFs and 93 rural IRFs. There are 73 government-owned IRFs. Among these, there are 63 urban IRFs and 10 rural IRFs.

The remaining four parts of Table 26 show IRFs grouped by their geographic location within a region, by teaching status, and by DSH PP. First, IRFs located in urban areas are categorized for their location within a particular one of the nine Census geographic regions. Second, IRFs located in rural areas are categorized for their location within a particular one of the nine Census geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. IRFs are then grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to average daily census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent. Finally, IRFs are grouped by DSH PP, including IRFs with zero DSH PP, IRFs with a DSH PP less than 5 percent, IRFs with a DSH PP between 5 and less than 10 percent, IRFs with a DSH PP between 10 and 20 percent, and IRFs with a DSH PP greater than 20 percent.

The estimated impacts of each policy described in this final rule to the facility categories listed are shown in the columns of Table 26. The description of each column is as follows:

- Column (1) shows the facility classification categories.
- Column (2) shows the number of IRFs in each category in our FY 2014 analysis file.
- Column (3) shows the number of cases in each category in our FY 2014 analysis file.
- Column (4) shows the estimated effect of the adjustment to the outlier threshold amount.
- Column (5) shows the estimated effect of the update to the IRF PPS payment rates, which includes a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.2 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and –(D)(iv) of the Act.
- Column (6) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget-neutral manner. This represents the effect of using the most recent wage data available, without taking into account the revised OMB delineations. That is, the impact represented in this column is solely that of updating from the FY 2015 wage index to the FY 2016 wage index without any changes to the OMB delineations.
- Column (7) shows the estimated effect of adopting the updated OMB delineations for wage index purposes for FY 2016 with the blended FY 2016 wage index.
- Column (8) shows the estimated effect of applying the adjustment factor to payments to IRFs in rural areas. It includes the proposed 3 year budget-neutral phase-out of the rural adjustment for rural IRFs that are becoming urban IRFs due to the revised OMB delineations.
- Column (9) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget-neutral manner.
- Column (10) compares our estimates of the payments per discharge, incorporating all of the policies reflected in this final rule for FY 2016 to our estimates of payments per discharge in FY 2015.

The average estimated increase for all IRFs is approximately 1.8 percent. This estimated net increase includes the effects of the IRF market basket increase factor for FY 2016 of 2.4 percent, reduced by a productivity adjustment of 0.5 percentage point in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and further reduced by 0.2 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iv) of the Act.

It also includes the approximate 0.1 percent overall increase in estimated IRF outlier payments from the update to the outlier threshold amount. Since we are making the updates to the IRF wage index and the CMG relative weights in a budget-neutral manner, they will not be expected to affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they will be expected to affect the estimated distribution of payments among providers.

TABLE 26—IRF IMPACT TABLE FOR FY 2016

[Columns 4 through 10 in percentage]

Facility classification	Number of IRFs	Number of cases	Outlier	IRF Market basket [1]	Wage index	CBSA	Change in rural adjustment [2]	CMG Weights	Total percent change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Total	1,135	393,178	0.1	1.7	0.0	0.0	0.0	0.0	1.8
Urban unit	739	181,087	0.2	1.7	0.1	0.0	0.0	0.0	1.9
Rural unit	145	22,904	0.1	1.7	0.1	−0.2	0.3	0.0	2.0
Urban hospital	239	185,036	0.0	1.7	−0.1	0.1	0.0	0.0	1.7
Rural hospital	12	4,151	0.0	1.7	0.0	−0.7	0.0	−0.1	0.9
Urban For-Profit	347	172,770	0.1	1.7	0.0	0.0	0.0	0.0	1.7
Rural For-Profit	54	9,677	0.1	1.7	−0.1	−0.4	0.2	−0.1	1.4
Urban Non-Profit	568	174,551	0.1	1.7	0.0	0.1	0.0	0.0	2.0
Rural Non-Profit	93	15,778	0.1	1.7	0.2	−0.3	0.3	0.0	2.1
Urban Government	63	18,802	0.1	1.7	−0.4	0.0	−0.1	0.0	1.4
Rural Government	10	1,600	0.1	1.7	0.0	−0.4	0.0	0.0	1.5
Urban	978	366,123	0.1	1.7	0.0	0.0	0.0	0.0	1.8
Rural	157	27,055	0.1	1.7	0.1	−0.3	0.3	0.0	1.8
CBSA Change:									
Urban to Urban	959	362,019	0.1	1.7	0.0	0.0	0.0	0.0	1.8
Rural to Rural	154	26,467	0.1	1.7	0.1	−0.3	0.0	0.0	1.6
Urban to Rural	3	588	0.2	1.7	0.7	0.8	12.4	0.2	16.4
Rural to Urban	19	4,104	0.1	1.7	0.5	1.4	−3.7	0.0	−0.1
Urban by region:									
Urban New England	31	16,864	0.1	1.7	0.9	−0.2	0.0	0.1	2.6
Urban Middle Atlantic	143	58,190	0.1	1.7	0.2	0.4	0.0	0.0	2.4
Urban South Atlantic	146	69,975	0.1	1.7	−0.4	−0.1	−0.1	0.0	1.2
Urban East North Central	173	51,912	0.1	1.7	0.2	−0.1	0.0	0.0	2.0
Urban East South Central	54	25,119	0.1	1.7	−0.5	−0.1	0.0	0.0	1.1
Urban West North Central	73	19,092	0.1	1.7	0.0	0.0	0.0	0.1	1.9
Urban West South Central	179	73,556	0.1	1.7	−0.8	0.0	0.0	0.0	0.9
Urban Mountain	77	25,788	0.1	1.7	0.8	−0.1	0.0	0.0	2.5
Urban Pacific	102	25,627	0.2	1.7	1.1	−0.1	0.0	0.0	2.9
Rural by region:									
Rural New England	5	1,278	0.2	1.7	0.8	−0.1	0.0	0.0	2.6
Rural Middle Atlantic	12	1,809	0.1	1.7	1.9	−2.1	0.0	0.1	1.7
Rural South Atlantic	17	4,282	0.1	1.7	−0.1	−0.3	0.4	−0.1	1.7
Rural East North Central	31	5,170	0.1	1.7	−0.3	0.1	1.0	0.0	2.8
Rural East South Central	18	3,255	0.1	1.7	−0.3	−0.2	0.0	0.0	1.4
Rural West North Central	23	2,881	0.2	1.7	0.2	−0.1	0.0	0.1	2.0
Rural West South Central	42	7,462	0.1	1.7	0.0	−0.5	0.0	0.0	1.2
Rural Mountain	7	736	0.3	1.7	−0.4	−0.1	0.0	0.0	1.6
Rural Pacific	2	182	0.6	1.7	0.8	0.0	0.0	−0.1	3.0
Teaching status:									
Non-teaching	1,032	351,348	0.1	1.7	0.0	0.0	0.0	0.0	1.7
Resident to ADC less than 10%	61	28,997	0.1	1.7	0.3	−0.2	0.0	0.1	2.0
Resident to ADC 10%–19%	32	11,253	0.2	1.7	0.5	0.3	0.0	0.0	2.8
Resident to ADC greater than 19%	10	1,580	0.1	1.7	0.1	−0.3	0.0	−0.1	1.5

TABLE 26—IRF IMPACT TABLE FOR FY 2016—Continued

[Columns 4 through 10 in percentage]

Facility classification	Number of IRFs	Number of cases	Outlier	IRF Market basket [1]	Wage index	CBSA	Change in rural adjustment [2]	CMG Weights	Total percent change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Disproportionate share patient percentage (DSH PP):									
DSH PP = 0% ...	34	4,850	0.2	1.7	−0.2	−0.1	0.0	0.1	1.7
DSH PP <5%	172	62,562	0.1	1.7	−0.2	0.3	0.0	0.0	1.9
DSH PP 5%–10%	326	133,750	0.1	1.7	−0.1	0.0	0.1	0.0	1.7
DSH PP 10%–20%	376	133,463	0.1	1.7	0.1	−0.1	−0.1	0.0	1.8
DSH PP greater than 20%	227	58,553	0.1	1.7	0.2	−0.1	0.0	0.0	1.9

[1] This column reflects the impact of the IRF market basket increase factor for FY 2016 (2.4 percent), reduced by 0.5 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and reduced by 0.2 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iv) of the Act.

[2] Providers changing from urban to rural status will receive a 14.9 percent rural adjustment, and providers changing from rural to urban status will receive ⅔ of the 14.9 percent rural adjustment in FY 2016. For those changing from urban to rural, the total impact shown is affected by the outlier threshold increasing, which results in smaller outlier payments as part of the total payments. For those changing from rural to urban status, the outlier threshold is being lowered by ⅔ of 14.9 percent, which results in more providers being eligible for outlier payments, increasing the outlier portion of their total payments.

3. Impact of the Update to the Outlier Threshold Amount

The estimated effects of the update to the outlier threshold adjustment are presented in column 4 of Table 26. In the FY 2015 IRF PPS final rule (79 FR 45872), we used FY 2013 IRF claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2015 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2015.

For the FY 2016 IRF PPS proposed rule, we used preliminary FY 2014 IRF claims data, and, based on that preliminary analysis, we estimated that IRF outlier payments as a percentage of total estimated IRF payments would be 3.2 percent in FY 2015 (80 FR 23367). As we typically do between the proposed and final rules each year, we updated our FY 2014 IRF claims data to ensure that we are using the most recent available data in setting IRF payments. Therefore, based on updated analysis of the most recent IRF claims data for this final rule, we now estimate that IRF outlier payments as a percentage of total estimated IRF payments are 2.9 percent in FY 2015. Thus, we are adjusting the outlier threshold amount in this final rule to set total estimated outlier payments equal to 3 percent of total estimated payments in FY 2016. The estimated change in total IRF payments for FY 2016, therefore, includes an approximate 0.1 percent increase in payments because the estimated outlier portion of total payments is estimated to increase from approximately 2.9 percent to 3 percent.

The impact of this outlier adjustment update (as shown in column 4 of Table 26) is to increase estimated overall payments to IRFs by about 0.1 percent. We estimate the largest increase in payments from the update to the outlier threshold amount to be 0.6 percent for rural IRFs in the Pacific region.

4. Impact of the Market Basket Update to the IRF PPS Payment Rates

The estimated effects of the market basket update to the IRF PPS payment rates are presented in column 5 of Table 26. In the aggregate the update would result in a net 1.7 percent increase in overall estimated payments to IRFs. This net increase reflects the estimated IRF market basket increase factor for FY 2016 of 2.4 percent, reduced by a 0.5 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and further reduced by the 0.2 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act.

5. Impact of the CBSA Wage Index and Labor-Related Share

In column 6 of Table 26, we present the effects of the budget-neutral update of the wage index and labor-related share without taking into account the revised OMB delineations or the effects of the 1-year phase-in of the wage index changes due to the revised OMB delineations, which are presented separately in the next column. The changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the changes in the two have a combined effect on payments to providers. As discussed in section VI.E. of this final rule, we will increase the labor-related share from 69.294 percent in FY 2015 to 71.0 percent in FY 2016.

6. Impact of the Updated OMB Delineations

In column 7 of Table 26, we present the effects of the revised OMB delineations, and the transition to the new delineations using the blended wage index.

In the aggregate, since these updates to the wage index and the labor-related share are applied in a budget-neutral manner as required under section 1886(j)(6) of the Act, we do not estimate that these updates will affect overall estimated payments to IRFs. However, we estimate that these updates will have small distributional effects. For example, we estimate the largest increase in payments from the update to the CBSA wage index and labor-related share of 0.4 percent for urban IRFs in the Middle Atlantic region. We estimate the largest decrease in payments from the update to the CBSA wage index and labor-related share to be a 2.1 percent decrease for rural IRFs in the Middle Atlantic region.

7. Impact of the Phase-Out of the Rural Adjustment for IRFs Transitioning From Rural to Urban Designations

In column 8 of Table 26, we present the effects 3-year phase-out of the rural adjustment for IRFs transitioning from rural to urban status under the new CBSA delineations. Under the IRF PPS, IRFs located in rural areas receive a 14.9 percent adjustment to their payment rates to account for the higher costs incurred in treating beneficiaries in rural areas. Under the new CBSA delineations, we estimate that 19 IRFs will transition from rural to urban status for purposes of the IRF PPS wage index adjustment in FY 2016. Without the phase-out of the rural adjustment, these 19 IRFs would experience an automatic 14.9 percent decrease in payments as a result of this change from rural to urban status in FY 2016. To mitigate the effects of this relatively large decrease in payments, we will phase-out the rural adjustment for these providers over a 3-year period, as discussed in more detail in section VI. of this final rule. Thus, these IRF would receive two thirds of the rural adjustment in FY 2016, one third of the rural adjustment in FY 2017, and none of the rural adjustment in FY 2018, thus giving these IRFs time to adjust to the reduced payments.

Column 8 shows the effect on providers of this budget-neutral phase-out of the rural adjustment for IRFs transitioning from rural to urban status in FY 2016. Under this policy, these providers would only experience a reduction in payments of one third of the 14.9 percent rural adjustment in FY 2016. As we propose to implement this phase-out in a budget-neutral manner, it does not affect aggregate payments to IRFs, but we estimate that this policy would have small effects on the distribution of payments to IRFs. The largest increase in payments to IRFs as a result of the interaction of the rural adjustment with the changes to the CBSA delineations is a 12.4 percent increase to 3 IRFs that transition from urban to rural status under the new CBSA delineations. These 3 IRFs will receive the full 14.9 percent rural adjustment for FY 2016. The largest decrease in payments to IRFs as a result of this policy change is a 3.7 percent decrease in payments to IRFs that transition from rural to urban status under the new CBSA delineations. This is a result of these providers only receiving two thirds of the 14.9 percent rural adjustment for FY 2016. We note that the decrease in payments to these providers is substantially lessened from what it otherwise would have been as a result of the phase-out of the rural adjustment for these IRFs.

8. Impact of the Update to the CMG Relative Weights and Average Length of Stay Values

In column 9 of Table 26, we present the effects of the budget-neutral update of the CMG relative weights and average length of stay values. In the aggregate, we do not estimate that these updates will affect overall estimated payments of IRFs. However, we do expect these updates to have small distributional effects. The largest estimated increase in payments is a 0.1 percent increase for rural IRFs in the Middle Atlantic and West North Central regions, and urban IRFs in the New England and West North Central regions. Rural IRFs in the South Atlantic and Pacific regions are estimated to experience a 0.1 percent decrease in payments due to the CMG relative weights change.

9. Effects of Requirements for the IRF QRP for FY 2018

In accordance with section 1886(j)(7) of the Act, we will implement a 2 percentage point reduction in the FY 2016 increase factor for IRFs that have failed to report the required quality reporting data to us during the most recent IRF quality reporting period. In section IX.P. of this final rule, we discuss the finalized method for applying the 2 percentage point reduction to IRFs that fail to meet the IRF QRP requirements. At the time that this analysis was prepared, 91, or approximately 8 percent, of the 1166 active Medicare-certified IRFs did not receive the full annual percentage increase for the FY 2015 annual payment update determination. Information is not available to determine the precise number of IRFs that will not meet the requirements to receive the full annual percentage increase for the FY 2016 payment determination.

In section IX.L. of this final rule, we discuss our finalized policy to suspend the previously finalized data accuracy validation policy for IRFs. While we cannot estimate the increase in the number of IRFs that will meet IRF QRP compliance standards at this time, we believe that this number will increase due to the temporary suspension of this policy. Thus, we estimate that the suspension of this policy will decrease impact on overall IRF payments, by increasing the rate of compliance, in addition to decreasing the cost of the IRF QRP to each IRF provider by approximately $47,320 per IRF, which was the estimated cost to each IRF provider to the implement the previously finalized policy.

In section IX.F. of this final rule, we are finalizing two quality measures that have already been adopted for the IRF QRP: (1) All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from IRFs (NQF #2502), to establish the newly NQF-endorsed status of this measures; and (2) Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), to establish its use as a cross-setting measure that addresses the domain of skin integrity, as required by the IMPACT Act of 2014. The All-Cause Unplanned Readmission Measure for 30 Days Post-Discharge from IRFs (NQF #2502) is a Medicare claims-based measure; because claims-based measures can be calculated based on data that are already reported to the Medicare program for payment purposes, we believe there will be no additional impact as a result of this measure. We also believe that there will be no additional burden associated with our proposal of the measure Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678), which was finalized to establish its use as a cross-setting measure that meets the IMPACT Act requirement of adding a quality measure that stratifies the domain of skin integrity, as IRFs are already submitting quality data related to this measure.

In section VIII.G. of this final rule, we are also finalizing the adoption of 6 new quality measures. The 6 finalized quality measures are: (1) An application of Percent of Residents Experiencing One or More Falls with Major Injury (Long Stay) (NQF #0674); (2) an application of Percent of LTCH Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631; endorsed on July 23, 2015); (3) IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633; under review); (4) IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634; under review); (5) IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635; under review); and (6) IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636; endorsed on July 23, 2015). Additionally, we have finalized that data for these six measures will be collected and reported using the IRF–PAI (version 1.4). The total cost related to the six finalized

measures is estimated at $21,239.33 per IRF annually, or $24,042,291.01 for all IRFs annually. This is an average increase of 124 percent to all IRF providers over the burden discussed in the FY 2015 IRF PPS final rule (79 FR 45935), which included all quality measures that IRFs are required to report under the QRP with the exception of six new quality measures finalized in this final rule.

We intend to continue to closely monitor the effects of this new quality reporting program on IRF providers and help perpetuate successful reporting outcomes through ongoing stakeholder education, national trainings, IRF provider announcements, Web site postings, CMS Open Door Forums, and general and technical help desks.

We did not receive any comment on the regulatory analysis, and are finalizing the analysis, as is.

D. Alternatives Considered

The following is a discussion of the alternatives considered for the IRF PPS updates contained in this final rule.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. In recent years, IRF PPS payment rates have been updated by the RPL market basket. Thus, we did consider updating payments using the RPL market basket increase factor for FY 2016. However, as stated in section VI. of this final rule, we believe the use of an IRF market basket that reflects the cost structure of the universe of IRF providers is a technical improvement over the use of the RPL market basket. The RPL market basket reflects the input costs of two additional provider types: Inpatient Psychiatric Facilities and Long-term Care Hospitals; and also only includes data from freestanding providers. On the other hand, the IRF market basket reflects the input costs of only IRF providers. We also received support from several commenters on our proposal to replace the RPL market basket with an IRF market basket. Additionally, some commenters expressed concerns regarding our proposed methodology for deriving compensation related costs for hospital-based providers from the cost report. In response to the technical comments received, we have adjusted the methodology for deriving the wages and salaries and employee benefits for hospital-based IRFs. Based on these reasons, we are updating payments for FY 2016 using the market basket increase factor based on the IRF market basket, with slight methodological changes to the cost weights from the proposed rule. In addition, as noted previously in this final rule, section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a productivity adjustment to the market basket increase factor for FY 2016, and sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iv) of the Act require the Secretary to apply a 0.2 percentage point reduction to the market basket increase factor for FY 2016. Thus, in accordance with section 1886(j)(3)(C) of the Act, we are updating the IRF federal prospective payments in this final rule by 1.7 percent (which equals the 2.4 percent estimated IRF market basket increase factor for FY 2016 reduced by a 0.5 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act and further reduced by 0.2 percentage point). If we had instead continued to use the RPL market basket, the final update for the FY 2016 IRF federal prospective payments would have also been 1.7 percent (which equals the 2.4 percent estimated RPL market basket increase factor for FY 2016 reduced by a 0.5 percentage point productivity adjustment and further reduced by 0.2 percentage point).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2016. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case mix, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We considered updating facility-level adjustment factors for FY 2016. However, as discussed in more detail in the FY 2015 final rule (79 FR 45872), we believe that freezing the facility-level adjustments at FY 2014 levels for FY 2015 and all subsequent years (unless and until the data indicate that they need to be further updated) will allow us an opportunity to monitor the effects of the substantial changes to the adjustment factors for FY 2014, and will allow IRFs time to adjust to the previous changes.

We considered maintaining the existing outlier threshold amount for FY 2016. However, analysis of updated FY 2014 data indicates that estimated outlier payments would be lower than 3 percent of total estimated payments for FY 2016, by approximately 0.1 percent, unless we updated the outlier threshold amount. Consequently, we are adjusting the outlier threshold amount in this final rule to reflect a 0.1 percent increase thereby setting the total outlier payments equal to 3 percent, instead of 2.9 percent, of aggregate estimated payments in FY 2016.

We considered a number of options for implementing the new CBSA designations. Overall, we believe implementing the new OMB delineations would result in wage index values being more representative of the actual costs of labor in a given area. Further, we recognize that some providers (10 percent) would have a higher wage index due to our proposed implementation of the new labor market area delineations. However, we also recognize that more providers (16 percent) would experience decreases in wage index values as a result of our proposed implementation of the new labor market area delineations. In prior years, we have provided for transition periods when adopting changes that have significant payment implications, particularly large negative impacts. As discussed in the FY 2006 IRF PPS final rule (70 FR 47921 through 47926), we evaluated several options to ease the transition to the new CBSA system.

In implementing the new CBSA delineations for FY 2016, we continue to have similar concerns as those expressed in the FY 2006 IRF PPS final rule. While we believe that implementing the latest OMB labor market area delineations would create a more accurate wage index system, we recognize that IRFs may experience decreases in their wage index as a result of the labor market area changes. Our analysis for the FY 2016 IRF PPS final rule indicated that a majority of IRFs either expect no change in the wage index or an increase in the wage index based on the new CBSA delineations. However, we found that 188 facilities will experience a decline in their wage index with 29 facilities experiencing a decline of 5 percent or more based on the CBSA changes. Therefore, we believe it would be appropriate to consider, as we did in FY 2006, whether or not a transition period should be used to implement these changes to the wage index.

We considered having no transition period and fully implementing the new OMB delineations beginning in FY 2016. This would mean that we would adopt the revised OMB delineations for all IRF providers on October 1, 2015. However, this would not provide any time for IRF providers to adapt to the new OMB delineations. As previously discussed, more IRFs would experience a decrease in wage index due to

implementation of the new OMB delineations than would experience an increase. Thus, we believe that it would be appropriate to provide for a transition period to mitigate the resulting short-term instability and negative impacts on these IRF providers, and to provide time for these IRFs to adjust to their new labor market area delineations.

Furthermore, in light of the comments received during the FY 2006 IRF PPS proposed rule (70 FR 30238 through 30240) to adopt the new CBSA definitions without a transition period, we continue to believe that a transition period is appropriate. Therefore, we will use a similar transition methodology to that used in FY 2006. Specifically, for the FY 2016 IRF PPS, we are adopting a budget-neutral 1-year transition policy. All IRF providers will receive a 1-year blended wage index using 50 percent of their FY 2016 wage index based on the new OMB delineations and 50 percent of their FY 2016 wage index based on the OMB delineations used in FY 2015. We will apply this 1-year blended wage index in FY 2016 for all geographic areas to assist providers in adapting to these changes. We believe a 1-year, 50/50 blend will mitigate the short-term instability and negative payment impacts due to the implementation of the new OMB delineations. This transition policy will be for a 1-year period, going into effect October 1, 2016, and continuing through September 30, 2017.

For the reasons previously discussed and based on similar concerns to those we expressed during the FY 2006 rulemaking cycle to the adoption of the new CBSA definitions, we are adopting a 3-year budget-neutral phase-out of the rural adjustment for the group of IRFs that during FY 2015 were designated as rural and for FY 2016 are designated as urban under the new CBSA system. This is in addition to implementing a 1-year blended wage index for all IRFs. We considered having no transition, but found that a multi-year transition policy would best provide a sufficient buffer for rural IRFs that may experience a reduction in payments due to being designated as urban. We believe that the incremental reduction of the FY 2015 rural adjustment is appropriate to mitigate a significant reduction in per case payment. Based on similar concerns to those we expressed during the FY 2006 rulemaking cycle to the proposed adoption of the new CBSA definitions, we considered different multi-year transition policies to provide a sufficient buffer for rural IRFs that may experience a reduction in payments due to being designated as urban. However, fewer IRFs (19) will be impacted by the transition from rural to urban status than were affected in FY 2006 (34). Additionally, the FY 2016 rural adjustment of 14.9 percent is less than the FY 2006 rural adjustment of 21.3 percent. Therefore, we do not believe a transition period longer than three years would be appropriate. We believe a 3-year budget-neutral phase-out of the rural adjustment will appropriately mitigate the adverse payment impacts for these IRFs while also ensuring that payment rates for these providers are set accurately and appropriately.

E. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in Table 27, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table 27 provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the updates presented in this final rule based on the data for 1,135 IRFs in our database. In addition, Table 27 presents the costs associated with the new IRF quality reporting program for FY 2016.

TABLE 27—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

Change in estimated transfers from FY 2015 IRF PPS to FY 2016 IRF PPS:	
Category	Transfers
Annualized Monetized Transfers	$135 million.
From Whom to Whom?	Federal Government to IRF Medicare Providers.
FY 2016 Cost to Updating the Quality Reporting Program:	
Category	Costs
Cost for IRFs to Submit Data for the Quality Reporting Program	$24,042,291.01.

F. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2016 are projected to increase by 1.8 percent, compared with the estimated payments in FY 2015, as reflected in column 10 of Table 26. IRF payments per discharge are estimated to increase by 1.8 percent in both urban and rural areas, compared with estimated FY 2015 payments. Payments per discharge to rehabilitation units are estimated to increase 1.9 percent in urban areas and 2.0 in rural areas. Payments per discharge to freestanding rehabilitation hospitals are estimated to increase 1.7 percent in urban areas and 0.9 percent in rural areas.

Overall, IRFs are estimated to experience a net increase in payments as a result of the policies in this final rule. The largest payment increase is estimated to be a 3.0 percent increase for rural IRFs located in the Pacific region.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh), sec. 124 of Pub. L. 106–113 (113 Stat. 1501A–332), sec. 1206 of Pub. L. 113–67, and sec. 112 of Pub. L. 113–93.

■ 2. Section 412.634 is added to read as follows:

§ 412.634 Requirements under the Inpatient Rehabilitation Facility (IRF) Quality Reporting Program (QRP).

(a) *Participation.* (1) For the FY 2018 payment determination and subsequent years, an IRF must begin reporting data under the IRF QRP requirements no later than the first day of the calendar quarter subsequent to 30 days after the date on its CMS Certification Number (CCN) notification letter, which designates the IRF as operating in the Certification and Survey Provider Enhanced Reports (CASPER) system.

(2) [Reserved]

(b) *Submission Requirements and Payment Impact.* (1) IRFs must submit to CMS data on measures specified under section 1886(j)(7)(D), 1899B(c)(1), and 1899B(d)(1) of the Act, as applicable. Sections 1886(j)(7)(C) and (j)(7)(F)(iii) of the Act require each IRF to submit data on the specified measures in the form and manner, and at a time, specified by the Secretary.

(2) As required by section 1886(j)(7)(A)(i) of the Act, any IRF that does not submit data in accordance with section 1886(j)(7)(C) and (F) of the Act for a given fiscal year will have its annual update to the standard Federal rate for discharges for the IRF during the fiscal year reduced by two percentage points.

(c) *Exception and Extension Requirements.* (1) An IRF may request and CMS may grant exceptions or extensions to the quality data reporting requirements, for one or more quarters, when there are certain extraordinary circumstances beyond the control of the IRF.

(2) An IRF must request an exception or extension within 30 days of the date that the extraordinary circumstances occurred.

(3) Exception and extension requests must be submitted to CMS from the IRF by sending an email to *IRFQRPReconsiderations@cms.hhs.gov* containing all of the following information:

(i) IRF CMS Certification Number (CCN).

(ii) IRF Business Name.

(iii) IRF Business Address.

(iv) CEO or CEO-designated personnel contact information including name, telephone number, title, email address, and mailing address. (The address must be a physical address, not a post office box.)

(v) IRF's reason for requesting the exception or extension.

(vi) Evidence of the impact of extraordinary circumstances, including, but not limited to, photographs, newspaper, and other media articles.

(vii) Date when the IRF believes it will be able to again submit IRF QRP data and a justification for the proposed date.

(4) CMS may grant exceptions or extensions to IRFs without a request if it is determined that one or more of the following has occurred:

(i) An extraordinary circumstance affects an entire region or locale.

(ii) A systemic problem with one of CMS's data collection systems directly affected the ability of an IRF to submit data.

(5) Email is the only form of submission that will be accepted. Any reconsideration requests received through another channel will not be considered as a valid exception or extension request.

(d) *Reconsideration.* (1) IRFs found to be non-compliant with the quality reporting requirements for a particular fiscal year will receive a letter of non-compliance through the Quality Improvement and Evaluation System Assessment Submission and Processing (QIES–ASAP) system, as well as through the United States Postal Service. IRFs must submit reconsideration requests no later than 30 calendar days after the date identified on the letter of non-compliance.

(2) Reconsideration requests must be submitted to CMS by sending an email to *IRFQRPReconsiderations@cms.hhs.gov* containing all of the following information:

(i) IRF CCN.

(ii) IRF Business Name.

(iii) IRF Business Address.

(iv) CEO or CEO-designated personnel contact information including name, telephone number, title, email address, and mailing address. (The address must be a physical address, not a post office box.)

(v) CMS identified reason(s) for non-compliance from the non-compliance letter.

(vi) Reason(s) for requesting reconsideration.

(3) The request for reconsideration must be accompanied by supporting documentation demonstrating compliance. This documentation must be submitted electronically as an attachment to the reconsideration request email. Any request for reconsideration that does not contain sufficient evidence of compliance with the IRF QRP requirements will be denied.

(4) Email is the only form of submission that will be accepted. Any reconsideration requests received through another channel will not be considered as a valid exception or extension request.

(5) The QIES–ASAP system and the United States Postal Service will be the two mechanisms used to distribute each IRF's compliance letter, as well as our final decision regarding any reconsideration request received from the IRF.

(e) *Appeals.* (1) An IRF may appeal the decision made by CMS on its reconsideration request by filing with the Provider Reimbursement Review Board (PRRB) under 42 CFR part 405, subpart R.

(2) [Reserved]

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: July 29, 2015.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2015–18973 Filed 7–31–15; 4:15 pm]

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 418

Medicare Program; FY 2016 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

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Medicare Program; FY 2016 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule will update the hospice payment rates and the wage index for fiscal year (FY) 2016 (October 1, 2015 through September 30, 2016), including implementing the last year of the phase-out of the wage index budget neutrality adjustment factor (BNAF). Effective on January 1, 2016, this rule also finalizes our proposals to differentiate payments for routine home care (RHC) based on the beneficiary's length of stay and implement a service intensity add-on (SIA) payment for services provided in the last 7 days of a beneficiary's life, if certain criteria are met. In addition, this rule will implement changes to the aggregate cap calculation mandated by the Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act), align the cap accounting year for both the inpatient cap and the hospice aggregate cap with the federal fiscal year starting in FY 2017, make changes to the hospice quality reporting program, clarify a requirement for diagnosis reporting on the hospice claim, and discuss recent hospice payment reform research and analyses.

DATES: *Effective Date:* These regulations are effective on October 1, 2015 and the implementation date for the RHC rates and the SIA payment rates will be January 1, 2016.

FOR FURTHER INFORMATION CONTACT: Debra Dean-Whittaker, (410) 786–0848 for questions regarding the CAHPS® Hospice Survey. Michelle Brazil, (410) 786–1648 for questions regarding the hospice quality reporting program. For general questions about hospice payment policy please send your inquiry via email to: *hospicepolicy@cms.hhs.gov*.

SUPPLEMENTARY INFORMATION: Wage index addenda will be available only through the internet on the CMS Web site at: (*http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/index.html*).

Table of Contents

I. Executive Summary
A. Purpose
B. Summary of the Major Provisions
C. Summary of Costs, Benefits, and Transfers
II. Background
A. Hospice Care
B. History of the Medicare Hospice Benefit
C. Services Covered by the Medicare Hospice Benefit
D. Medicare Payment for Hospice Care
1. Omnibus Budget Reconciliation Act of 1989
2. Balanced Budget Act of 1997
3. FY 1998 Hospice Wage Index Final Rule
4. FY 2010 Hospice Wage Index Final Rule
5. The Affordable Care Act
6. FY 2012 Hospice Wage Index Final Rule
7. FY 2015 Hospice Rate Update Final Rule
8. Impact Act of 2014
E. Trends in Medicare Hospice Utilization
III. Provisions of the Proposed Rule and Responses to Comments
A. Hospice Payment Reform: Research and Analyses
1. Pre-Hospice Spending
2. Non-Hospice Spending for Hospice Beneficiaries During an Election
3. Live Discharge Rates
B. Routine Home Care Rates and Service Intensity Add-On (SIA) Payment
1. Background and Statutory Authority
a. U-Shaped Payment Model
b. Tiered Payment Model
c. Visits During the Beginning and End of a Hospice Election
2. Routine Home Care Rates
3. Service Intensity Add-On Payment
C. FY 2016 Hospice Wage Index and Rates Update
1. FY 2016 Hospice Wage Index
a. Background
b. Elimination of the Wage Index Budget Neutrality Factor (BNAF)
c. Implementation of New Labor Market Delineations
2. Hospice Payment Update Percentage
3. FY 2016 Hospice Payment Rates
4. Hospice Aggregate Cap and the IMPACT Act of 2014
D. Alignment of the Inpatient and Aggregate Cap Accounting Year With the Federal Fiscal Year
1. Streamlined Method and Patient-by-Patient Proportional Method for Counting Beneficiaries To Determine Each Hospice's Aggregate Cap Amount
2. Inpatient and Aggregate Cap Accounting Year Timeframe
E. Updates to the Hospice Quality Reporting Program
1. Background and Statutory Authority
2. General Considerations Used for Selection of Quality Measures for the HQRP
3. Policy for Retention on HQRP Measures Adopted for Previous Payment Determination
4. Previously Adopted Measures for FY 2016 and FY 2017 Payment Determination
5. HQRP Quality Measures and Concepts Under Consideration for Future Years
6. Form, Manner, and Timing of Quality Data Submission
a. Background
b. Policy for New Facilities To Begin Submitting Quality Data
c. Previously Finalized Data Submission Mechanism, Collection Timelines, and Submission Deadlines for the FY 2017 Payment Determination
d. Data Submission Timelines and Requirements for FY 2018 Payment Determination and Subsequent Years
e. HQRP Data Submission and Compliance Thresholds for the FY 2018 Payment Determination and Subsequent Years
7. HQRP Submission Exception and Extension Requirements for the FY 2017 Payment Determination and Subsequent Years
8. Adoption of the CAHPS Hospice Survey for the FY 2017 Payment Determination
a. Background Description of the Survey
b. Participation Requirements To Meet Quality Reporting Requirements for the FY 2017 APU
c. Participation Requirements To Meet Quality Reporting Requirements for the FY 2018 APU
d. Vendor Participation Requirements for the FY 2017 APU
9. Previously Finalized HQRP Reconsideration and Appeals Procedures for the FY 2016 Payment Determination and Subsequent Years
10. Public Display of Quality Measures Data for HQRP
11. Public Display of Other Hospice Information
F. Clarification Regarding Diagnosis Reporting on Hospice Claims
1. Background
2. Current Discussions About Hospice Vulnerabilities
3. Medicare Hospice Eligibility Requirements
4. Assessment of Conditions and Comorbidities Required by Regulation
5. Clarification Regarding Diagnosis Reporting on Hospice Claims
IV. Collection of Information Requirements
V. Regulatory Impact Analysis
A. Statement of Need
B. Introduction
C. Overall Impact
1. Detailed Economic Analysis
a. Effects on Hospices
b. Hospice Size
c. Geographic Location
d. Type of Ownership
e. Hospice Base
f. Effects on Other Providers
g. Effects on the Medicare and Medicaid Programs
h. Alternatives Considered
i. Accounting Statement
j. Conclusion
2. Regulatory Flexibility Act Analysis
3. Unfunded Mandates Reform Act Analysis
VI. Federalism Analysis and Regulations Text

Acronyms

Because of the many terms to which we refer by acronym in this final rule,

we are listing the acronyms used and their corresponding meanings in alphabetical order below:

APU Annual Payment Update
ASPE Assistant Secretary of Planning and Evaluation
AHIMA American Health Information Management Association
BBA Balanced Budget Act of 1997
BETOS Berenson-Eggers Types of Service
BIPA Benefits Improvement and Protection Act of 2000
BNAF Budget Neutrality Adjustment Factor
BLS Bureau of Labor Statistics
CAHPS® Consumer Assessment of Healthcare Providers and Systems
CBSA Core-Based Statistical Area
CCN CMS Certification Number
CCW Chronic Conditions Data Warehouse
CFR Code of Federal Regulations
CHC Continuous Home Care
CHF Congestive Heart Failure
CMS Centers for Medicare & Medicaid Services
COPD Chronic Obstructive Pulmonary Disease
CoPs Conditions of Participation
CPI Center for Program Integrity
CPI–U Consumer Price Index-Urban Consumers
CR Change Request
CVA Cerebral Vascular Accident
CWF Common Working File
CY Calendar Year
DME Durable Medical Equipment
DRG Diagnostic Related Group
ER Emergency Room
FEHC Family Evaluation of Hospice Care
FR Federal Register
FY Fiscal Year
GAO Government Accountability Office
GIP General Inpatient Care
HCFA Healthcare Financing Administration
HHS Health and Human Services
HIPPA Health Insurance Portability and Accountability Act
HIS Hospice Item Set
HQRP Hospice Quality Reporting Program
IACS Individuals Authorized Access to CMS Computer Services
ICD–9–CM International Classification of Diseases, Ninth Revision, Clinical Modification
ICD–10–CM International Classification of Diseases, Tenth Revision, Clinical Modification
ICR Information Collection Requirement
IDG Interdisciplinary Group
IMPACT Act Improving Medicare Post-Acute Care Transformation Act of 2014
IOM Institute of Medicine
IPPS Inpatient Prospective Payment System
IRC Inpatient Respite Care
LCD Local Coverage Determination
LPN Licensed Practical Nurse
MAC Medicare Administrative Contractor
MAP Measure Applications Partnership
MedPAC Medicare Payment Advisory Commission
MFP Multifactor Productivity
MSA Metropolitan Statistical Area
MSS Medical Social Services
NHPCO National Hospice and Palliative Care Organization
NF Long Term Care Nursing Facility
NOE Notice of Election
NOTR Notice of Termination/Revocation
NP Nurse Practitioner
NPI National Provider Identifier
NQF National Quality Forum
OIG Office of the Inspector General
OACT Office of the Actuary
OMB Office of Management and Budget
PRRB Provider Reimbursement Review Board
PS&R Provider Statistical and Reimbursement Report
Pub. L Public Law
QAPI Quality Assessment and Performance Improvement
RHC Routine Home Care
RN Registered Nurse
SBA Small Business Administration
SEC Securities and Exchange Commission
SIA Service Intensity Add-on
SNF Skilled Nursing Facility
TEFRA Tax Equity and Fiscal Responsibility Act of 1982
TEP Technical Expert Panel
UHDDS Uniform Hospital Discharge Data Set
U.S.C. United States Code

I. Executive Summary

A. Purpose

This final rule updates the payment rates for hospices for fiscal year (FY) 2016, as required under section 1814(i) of the Social Security Act (the Act) and reflects the final year of the 7-year Budget Neutrality Adjustment Factor (BNAF) phase-out finalized in the FY 2010 Hospice Wage Index final rule (74 FR 39407). Our updates to payment rates for hospices also include changes to the hospice wage index by incorporating the new Office of Management and Budget (OMB) core-based statistical area (CBSA) definitions, changes to the aggregate cap calculation required by section 1814(i)(2)(B)(ii) of the Act, and includes aligning the cap accounting year for both the inpatient cap and the hospice aggregate cap with the federal fiscal year starting in FY 2017. In addition, pursuant to the discretion granted the Secretary under section 1814(i)(6)(D)(i) of the Act and effective on January 1, 2016; this rule will create two different payment rates for routine home care (RHC) that will result in a higher base payment rate for the first 60 days of hospice care and a reduced base payment rate for days 61 and over of hospice care; and a service intensity add-on (SIA) payment that will result in an add-on payment equal to the Continuous Home Care (CHC) hourly payment rate multiplied by the amount of direct patient care provided by a registered nurse (RN) or social worker provided during the last 7 days of a beneficiary's life, if certain criteria are met. In addition, section 3004(c) of the Affordable Care Act established a quality reporting program for hospices. In accordance with section 1814(i)(5)(A) of the Act, starting in FY 2014, hospices that have failed to meet quality reporting requirements receive a 2 percentage point reduction to their payment update percentage. Although this rule does not implement new quality measures, it provides updates on the hospice quality reporting program. Finally, this rule includes a clarification regarding diagnosis reporting on the hospice claim form.

B. Summary of the Major Provisions

Section III.A of this rule provides an update on hospice payment reform research and analysis. As a result of the hospice payment reform research and analysis conducted over the past several years, some of which is described in section III.A of this rule and in various technical reports available on the CMS Hospice Center Web page (*http://www.cms.gov/Center/Provider-Type/Hospice-Center.html*) we proposed several provisions to address issues identified and strengthen the Medicare hospice benefit. Section III.B implements the creation of two different payment rates for RHC that will result in a higher base payment rate for the first 60 days of hospice care and a reduced base payment rate for days 61 and over of hospice care. Section III.B also implements SIA payment, in addition to the per diem rate for the RHC level of care, that will result in an add-on payment equal to the CHC hourly payment rate multiplied by the amount of direct patient care provided by an RN or social worker that occurs during the last 7 days of a beneficiary's life, if certain criteria are met.

In section III.C.1 of this rule, we update the hospice wage index using a 50/50 blend of the existing CBSA designations and the new CBSA designations outlined in a February 28, 2013, OMB bulletin. Section III.C.2 of this rule implements year 7 of the 7-year BNAF phase-out finalized in the FY 2010 Hospice Wage Index final rule (74 FR 39407). In section III.C.3, we update the hospice payment rates for FY 2016 by 1.6 percent. Section III.C.4 implements changes mandated by the Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act), in which the aggregate cap for accounting years that end after September 30, 2016 and before October 1, 2025, will be updated by the hospice payment update percentage rather than using the consumer price index for urban consumers (CPI–U). Specifically, the 2016 cap year, starting on November 1, 2015 and ending on October 31, 2016, will be updated by the FY 2016 hospice update percentage for hospice care. In

addition, in section III.D, we are aligning the cap accounting year for both the inpatient cap and the hospice aggregate cap with the fiscal year for FY 2017 and later. We believe that this will allow for the timely implementation of the IMPACT Act changes while better aligning the cap accounting year with the timeframe described in the IMPACT Act.

In section III.E of this rule, we discuss updates to the hospice quality reporting program, including participation requirements for current year (CY) 2015 regarding the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Hospice Survey, and remind the hospice industry that last year we set the July 1, 2014 implementation date for the Hospice Item Set (HIS) and the January 1, 2015 implementation date for the CAHPS® Hospice Survey. More than seven new quality measures will be derived from these tools; therefore, no new measures were implemented this year. Also, Section III.E of this rule will make changes related to the reconsideration process, extraordinary circumstance extensions or exemptions, hospice quality reporting program (HQRP) eligibility requirements for newly certified hospices and new data submission timeliness requirements and compliance thresholds. Finally, in Section III.F, we clarify that hospices must report all diagnoses of the beneficiary on the hospice claim as a part of the ongoing data collection efforts for possible future hospice refinements. We believe that reporting of all diagnoses on the hospice claim aligns with current coding guidelines as well as admission requirements for hospice certifications.

C. Summary of Impacts

TABLE 1—IMPACT SUMMARY TABLE

Provision description	Transfers
FY 2016 Hospice Wage Index and Payment Rate Update.	The overall economic impact of this final rule is estimated to be $160 million in increased payments to hospices during FY 2016.

II. Background

A. Hospice Care

Hospice care is an approach to treatment that recognizes that the impending death of an individual warrants a change in the focus from curative care to palliative care for relief of pain and for symptom management. The goal of hospice care is to help terminally ill individuals continue life with minimal disruption to normal activities while remaining primarily in the home environment. A hospice uses an interdisciplinary approach to deliver medical, nursing, social, psychological, emotional, and spiritual services through use of a broad spectrum of professionals and other caregivers, with the goal of making the individual as physically and emotionally comfortable as possible. Hospice is compassionate patient and family-centered care for those who are terminally ill. It is a comprehensive, holistic approach to treatment that recognizes that the impending death of an individual necessitates a change from curative to palliative care.

Medicare regulations define ''palliative care'' as ''patient and family-centered care that optimizes quality of life by anticipating, preventing, and treating suffering. Palliative care throughout the continuum of illness involves addressing physical, intellectual, emotional, social, and spiritual needs and to facilitate patient autonomy, access to information, and choice.'' (42 CFR 418.3) Palliative care is at the core of hospice philosophy and care practices, and is a critical component of the Medicare hospice benefit. *See also* Hospice Conditions of Participation final rule (73 FR 32088) (2008). The goal of palliative care in hospice is to improve the quality of life of individuals, and their families, facing the issues associated with a life-threatening illness through the prevention and relief of suffering by means of early identification, assessment and treatment of pain and other issues. This is achieved by the hospice interdisciplinary team working with the patient and family to develop a comprehensive care plan focused on coordinating care services, reducing unnecessary diagnostics or ineffective therapies, and offering ongoing conversations with individuals and their families about changes in their condition. It is expected that this comprehensive care plan will shift over time to meet the changing needs of the patient and family as the individual approaches the end of life.

Medicare hospice care is palliative care for individuals with a prognosis of living 6 months or less if the terminal illness runs its normal course. When an individual is terminally ill, many health problems are brought on by underlying condition(s), as bodily systems are interdependent. In the June 5, 2008 Hospice Conditions of Participation final rule (73 FR 32088), we stated that ''the medical director must consider the primary terminal condition, related diagnoses, current subjective and objective medical findings, current medication and treatment orders, and information about unrelated conditions when considering the initial certification of the terminal illness.'' As referenced in our regulations at § 418.22(b)(1), to be eligible for Medicare hospice services, the patient's attending physician (if any) and the hospice medical director must certify that the individual is ''terminally ill,'' as defined in section 1861(dd)(3)(A) of the Act and our regulations at § 418.3 that is, the individual's prognosis is for a life expectancy of 6 months or less if the terminal illness runs its normal course. The certification of terminal illness must include a brief narrative explanation of the clinical findings that supports a life expectancy of 6 months or less as part of the certification and recertification forms, as set out at § 418.22(b)(3).

The goal of hospice care is to make the hospice patient as physically and emotionally comfortable as possible, with minimal disruption to normal activities, while remaining primarily in the home environment. Hospice care uses an interdisciplinary approach to deliver medical, nursing, social, psychological, emotional, and spiritual services through the use of a broad spectrum of professional and other caregivers and volunteers. While the goal of hospice care is to allow for the individual to remain in his or her home environment, circumstances during the end-of-life may necessitate short-term inpatient admission to a hospital, skilled nursing facility (SNF), or hospice facility for procedures necessary for pain control or acute or chronic symptom management that cannot be managed in any other setting. These acute hospice care services are to ensure that any new or worsening symptoms are intensively addressed so that the individual can return to his or her home environment at a home level of care. Short-term, intermittent, inpatient respite services are also available to the

family of the hospice patient when needed to relieve the family or other caregivers. Additionally, an individual can receive continuous home care during a period of crisis in which an individual requires primarily continuous nursing care to achieve palliation or management of acute medical symptoms so that the individual can remain at home. Continuous home care may be covered on a continuous basis for as much as 24 hours a day, and these periods must be predominantly nursing care in accordance with our regulations at § 418.204. A minimum of 8 hours of nursing, or nursing and aide, care must be furnished on a particular day to qualify for the continuous home care rate (§ 418.302(e)(4)).

Hospices are expected to comply with all civil rights laws, including the provision of auxiliary aids and services to ensure effective communication with patients or patient care representatives with disabilities consistent with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, and to provide language access for such persons who are limited in English proficiency, consistent with Title VI of the Civil Rights Act of 1964. Further information about these requirements may be found at *http://www.hhs.gov/ocr/civilrights*.

B. History of the Medicare Hospice Benefit

Before the creation of the Medicare hospice benefit, hospice programs were originally operated by volunteers who cared for the dying. During the early development stages of the Medicare hospice benefit, hospice advocates were clear that they wanted a Medicare benefit that provided all-inclusive care for terminally-ill individuals, provided pain relief and symptom management, and offered the opportunity to die with dignity in the comfort of one's home rather than in an institutional setting.[1] As stated in the August 22, 1983 proposed rule entitled ''Medicare Program; Hospice Care'' (48 FR 38146), ''the hospice experience in the United States has placed emphasis on home care. It offers physician services, specialized nursing services, and other forms of care in the home to enable the terminally ill individual to remain at home in the company of family and friends as long as possible.'' The concept of a patient ''electing'' the hospice benefit and being certified as terminally ill were two key components of the legislation responsible for the creation of the Medicare Hospice Benefit (section 122 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), (Pub. L. 97–248)). Section 122 of TEFRA created the Medicare Hospice benefit, which was implemented on November 1, 1983. Under sections 1812(d) and 1861(dd) of the Act, codified at 42 U.S.C. 1395d(d) and 1395x(dd), we provide coverage of hospice care for terminally ill Medicare beneficiaries who elect to receive care from a Medicare-certified hospice. Our regulations at § 418.54(c) stipulate that the comprehensive hospice assessment must identify the patient's physical, psychosocial, emotional, and spiritual needs related to the terminal illness and related conditions, and address those needs in order to promote the hospice patient's well-being, comfort, and dignity throughout the dying process. The comprehensive assessment must take into consideration the following factors: the nature and condition causing admission (including the presence or lack of objective data and subjective complaints); complications and risk factors that affect care planning; functional status; imminence of death; and severity of symptoms (§ 418.54(c)). The Medicare hospice benefit requires the hospice to cover all reasonable and necessary palliative care related to the terminal prognosis, as described in the patient's plan of care. The December 16, 1983 Hospice final rule (48 FR 56008) requires hospices to cover care for interventions to manage pain and symptoms. Additionally, the hospice Conditions of Participation (CoPs) at § 418.56(c) require that the hospice must provide all reasonable and necessary services for the palliation and management of the terminal illness, related conditions and interventions to manage pain and symptoms. Therapy and interventions must be assessed and managed in terms of providing palliation and comfort without undue symptom burden for the hospice patient or family.[2] In the December 16, 1983 Hospice final rule (48 FR 56010 through 56011), regarding what is related versus unrelated to the terminal illness, we stated: ''. . . we believe that the unique physical condition of each terminally ill individual makes it necessary for these decisions to be made on a case-by-case basis. It is our general view that hospices are required to provide virtually all the care that is needed by terminally ill patients.'' Therefore, unless there is clear evidence that a condition is unrelated to the terminal prognosis; all conditions are considered to be related to the terminal prognosis. It is also the responsibility of the hospice physician to document why a patient's medical needs will be unrelated to the terminal prognosis.

As stated in the December 16, 1983 Hospice final rule, the fundamental premise upon which the hospice benefit was designed was the ''revocation'' of traditional curative care and the ''election'' of hospice care for end-of-life symptom management and maximization of quality of life (48 FR 56008). After electing hospice care, the patient typically returns to the home from an institutionalized setting or remains in the home, to be surrounded by family and friends, and to prepare emotionally and spiritually for death while receiving expert symptom management and other supportive services. Election of hospice care also includes waiving the right to Medicare payment for curative treatment for the terminal prognosis, and instead receiving palliative care to manage pain or symptoms.

The benefit was originally designed to cover hospice care for a finite period of time that roughly corresponded to a life expectancy of 6 months or less. Initially, beneficiaries could receive three election periods: two 90-day periods and one 30-day period. Currently, Medicare beneficiaries can elect hospice care for two 90-day periods and an unlimited number of subsequent 60-day periods; however, the expectation remains that beneficiaries have a life expectancy of 6 months or less if the terminal illness runs its normal course.

C. Services Covered by the Medicare Hospice Benefit

One requirement for coverage under the Medicare Hospice benefit is that hospice services must be reasonable and necessary for the palliation and management of the terminal illness and related conditions. Section 1861(dd)(1) of the Act establishes the services that are to be rendered by a Medicare certified hospice program. These covered services include: Nursing care; physical therapy; occupational therapy; speech-language pathology therapy; medical social services; home health aide services (now called hospice aide services); physician services; homemaker services; medical supplies (including drugs and biologics); medical appliances; counseling services (including dietary counseling); short-term inpatient care (including both respite care and care necessary for pain control and acute or chronic symptom management) in a hospital, nursing

[1] Connor, Stephen. (2007). Development of Hospice and Palliative Care in the United States. OMEGA. 56(1), p89–99.

[2] Paolini, DO, Charlotte. (2001). Symptoms Management at End of Life. JAOA. 101(10). p609–615.

facility, or hospice inpatient facility; continuous home care during periods of crisis and only as necessary to maintain the terminally ill individual at home; and any other item or service which is specified in the plan of care and for which payment may otherwise be made under Medicare, in accordance with Title XVIII of the Act.

Section 1814(a)(7)(B) of the Act requires that a written plan for providing hospice care to a beneficiary who is a hospice patient be established before care is provided by, or under arrangements made by, that hospice program and that the written plan be periodically reviewed by the beneficiary's attending physician (if any), the hospice medical director, and an interdisciplinary group (described in section 1861(dd)(2)(B) of the Act). The services offered under the Medicare hospice benefit must be available, as needed, to beneficiaries 24 hours a day, 7 days a week (section 1861(dd)(2)(A)(i) of the Act). Upon the implementation of the hospice benefit, the Congress expected hospices to continue to use volunteer services, though these services are not reimbursed by Medicare (see Section 1861(dd)(2)(E) of the Act and (48 FR 38149)). As stated in the August 22, 1983 Hospice proposed rule, the hospice interdisciplinary group should be comprised of paid hospice employees as well as hospice volunteers (48 FR 38149). This expectation supports the hospice philosophy of holistic, comprehensive, compassionate, end-of-life care.

Before the Medicare hospice benefit was established, the Congress requested a demonstration project to test the feasibility of covering hospice care under Medicare. The National Hospice Study was initiated in 1980 through a grant sponsored by the Robert Wood Johnson and John A. Hartford Foundations and CMS (then, the Health Care Financing Administration (HCFA)). The demonstration project was conducted between October 1980 and March 1983. The project summarized the hospice care philosophy and principles as the following:

- Patient and family know of the terminal condition.
- Further medical treatment and intervention are indicated only on a supportive basis.
- Pain control should be available to patients as needed to prevent rather than to just ameliorate pain.
- Interdisciplinary teamwork is essential in caring for patient and family.
- Family members and friends should be active in providing support during the death and bereavement process.
- Trained volunteers should provide additional support as needed.

The cost data and the findings on what services hospices provided in the demonstration project were used to design the Medicare hospice benefit. The identified hospice services were incorporated into the service requirements under the Medicare hospice benefit. Importantly, in the August 22, 1983 Hospice proposed rule, we stated ''the hospice benefit and the resulting Medicare reimbursement is not intended to diminish the voluntary spirit of hospices'' (48 FR 38149).

D. Medicare Payment for Hospice Care

Sections 1812(d), 1813(a)(4), 1814(a)(7), 1814(i), and 1861(dd) of the Act, and our regulations in part 418, establish eligibility requirements, payment standards and procedures, define covered services, and delineate the conditions a hospice must meet to be approved for participation in the Medicare program. Part 418, subpart G, provides for a per diem payment in one of four prospectively-determined rate categories of hospice care (RHC, CHC, inpatient respite care, and general inpatient care), based on each day a qualified Medicare beneficiary is under hospice care (once the individual has elected). This per diem payment is to include all of the hospice services set out at section 1861(dd)(1) of the Act that are needed to manage the beneficiary's care. There has been little change in the hospice payment structure since the benefit's inception. The per diem rate based on level of care was established in 1983, and this payment structure remains today with some adjustments, as noted below.

1. Omnibus Budget Reconciliation Act of 1989

Section 6005(a) of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239) amended section 1814(i)(1)(C) of the Act and provided for the following two changes in the methodology concerning updating the daily payment rates: (1) Effective January 1, 1990, the daily payment rates for RHC and other services included in hospice care were increased to equal 120 percent of the rates in effect on September 30, 1989; and (2) the daily payment rate for RHC and other services included in hospice care for fiscal years (FYs) beginning on or after October 1, 1990, were the payment rates in effect during the previous Federal fiscal year increased by the hospital market basket percentage increase.

2. Balanced Budget Act of 1997

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) amended section 1814(i)(1)(C)(ii)(VI) of the Act to establish updates to hospice rates for FYs 1998 through 2002. Hospice rates were updated by a factor equal to the hospital market basket percentage increase, minus 1 percentage point. Payment rates for FYs from 2002 have been updated according to section 1814(i)(1)(C)(ii)(VII) of the Act, which states that the update to the payment rates for subsequent FYs will be the hospital market basket percentage increase for the FY. The Act requires us to use the inpatient hospital market basket to determine hospice payment rates.

3. FY 1998 Hospice Wage Index Final Rule

In the August 8, 1997 FY 1998 Hospice Wage Index final rule (62 FR 42860), we implemented a new methodology for calculating the hospice wage index based on the recommendations of a negotiated rulemaking committee. The original hospice wage index was based on 1981 Bureau of Labor Statistics hospital data and had not been updated since 1983. In 1994, because of disparity in wages from one geographical location to another, the Hospice Wage Index Negotiated Rulemaking Committee was formed to negotiate a new wage index methodology that could be accepted by the industry and the government. This Committee was comprised of representatives from national hospice associations; rural, urban, large and small hospices, and multi-site hospices; consumer groups; and a government representative. The Committee decided that in updating the hospice wage index, aggregate Medicare payments to hospices would remain budget neutral to payments calculated using the 1983 wage index, to cushion the impact of using a new wage index methodology. To implement this policy, a BNAF will be computed and applied annually to the pre-floor, pre-reclassified hospital wage index when deriving the hospice wage index, subject to a wage index floor.

4. FY 2010 Hospice Wage Index Final Rule

Inpatient hospital pre-floor and pre-reclassified wage index values, as described in the August 8, 1997 Hospice Wage Index final rule, are subject to either a budget neutrality adjustment or application of the wage index floor. Wage index values of 0.8 or greater are adjusted by the BNAF. Starting in FY

2010, a 7-year phase-out of the BNAF began (August 6, 2009 FY 2010 Hospice Wage Index final rule, (74 FR 39384)), with a 10 percent reduction in FY 2010, an additional 15 percent reduction for a total of 25 percent in FY 2011, an additional 15 percent reduction for a total 40 percent reduction in FY 2012, an additional 15 percent reduction for a total of 55 percent in FY 2013, and an additional 15 percent reduction for a total 70 percent reduction in FY 2014. The phase-out will continue with an additional 15 percent reduction for a total reduction of 85 percent in FY 2015, and an additional 15 percent reduction for complete elimination in FY 2016. We note that the BNAF is an adjustment which increases the hospice wage index value. Therefore, the BNAF reduction is a reduction in the amount of the BNAF increase applied to the hospice wage index value. It is not a reduction in the hospice wage index value or in the hospice payment rates.

5. The Affordable Care Act

Starting with FY 2013 (and in subsequent FYs), the market basket percentage update under the hospice payment system referenced in sections 1814(i)(1)(C)(ii)(VII) and 1814(i)(1)(C)(iii) of the Act will be annually reduced by changes in economy-wide productivity, as specified in section 1886(b)(3)(B)(xi)(II) of the Act, as amended by section 3132(a) of the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by the Health Care and Education Reconciliation Act (Pub. L. 111–152) (collectively referred to as the Affordable Care Act)). In FY 2013 through FY 2019, the market basket percentage update under the hospice payment system will be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions as specified in section 1814(i)(1)(C)(v) of the Act).

In addition, sections 1814(i)(5)(A) through (C) of the Act, as amended by section 3132(a) of the Affordable Care Act, require hospices to begin submitting quality data, based on measures to be specified by the Secretary of the Department of Health and Human Services (the Secretary), for FY 2014 and subsequent FYs. Beginning in FY 2014, hospices that fail to report quality data will have their market basket update reduced by 2 percentage points.

Section 1814(a)(7)(D)(i) of the Act was amended by section 3132(b)(2)(D)(i) of the Affordable Care Act, and requires effective January 1, 2011, that a hospice physician or nurse practitioner have a face-to-face encounter with the beneficiary to determine continued eligibility of the beneficiary's hospice care prior to the 180th-day recertification and each subsequent recertification, and to attest that such visit took place. When implementing this provision, we finalized in the CY 2011 Home Health Prospective Payment System final rule (75 FR 70435) that the 180th-day recertification and subsequent recertifications corresponded to the beneficiary's third or subsequent benefit periods. Further, section 1814(i)(6) of the Act, as amended by section 3132(a)(1)(B) of the Affordable Care Act, authorizes the Secretary to collect additional data and information determined appropriate to revise payments for hospice care and other purposes. The types of data and information suggested in the Affordable Care Act would capture accurate resource utilization, which could be collected on claims, cost reports, and possibly other mechanisms, as the Secretary determines to be appropriate. The data collected may be used to revise the methodology for determining the payment rates for RHC and other services included in hospice care, no earlier than October 1, 2013, as described in section 1814(i)(6)(D) of the Act. In addition, we are required to consult with hospice programs and the Medicare Payment Advisory Commission (MedPAC) regarding additional data collection and payment revision options.

6. FY 2012 Hospice Wage Index Final Rule

When the Medicare Hospice benefit was implemented, the Congress included an aggregate cap on hospice payments, which limits the total aggregate payments any individual hospice can receive in a year. The Congress stipulated that a ''cap amount'' be computed each year. The cap amount was set at $6,500 per beneficiary when first enacted in 1983 and is adjusted annually by the change in the medical care expenditure category of the consumer price index for urban consumers from March 1984 to March of the cap year (section 1814(i)(2)(B) of the Act). The cap year is defined as the period from November 1st to October 31st. As we stated in the August 4, 2011 FY 2012 Hospice Wage Index final rule (76 FR 47308 through 47314) for the 2012 cap year and subsequent cap years, the hospice aggregate cap will be calculated using the patient-by-patient proportional methodology, within certain limits. We will allow existing hospices the option of having their cap calculated via the original streamlined methodology, also within certain limits. New hospices will have their cap determinations calculated using the patient-by-patient proportional methodology. The patient-by-patient proportional methodology and the streamlined methodology are two different methodologies for counting beneficiaries when calculating the hospice aggregate cap. A detailed explanation of these methods is found in the August 4, 2011 FY 2012 Hospice Wage Index final rule (76 FR 47308 through 47314). If a hospice's total Medicare reimbursement for the cap year exceeded the hospice aggregate cap, then the hospice must repay the excess back to Medicare.

7. FY 2015 Hospice Rate Update Final Rule

When electing hospice, a beneficiary waives Medicare coverage for any care for the terminal illness and related conditions except for services provided by the designated hospice and attending physician. A hospice is to file a Notice of Election (NOE) as soon as possible to establish the hospice election within the claims processing system. Late filing of the NOE can result in inaccurate benefit period data and leaves Medicare vulnerable to paying non-hospice claims related to the terminal illness and related conditions and beneficiaries possibly liable for any cost-sharing associated costs. The FY 2015 Hospice Rate Update final rule (79 FR 50452) finalized a requirement that requires the NOE be filed within 5 calendar days after the effective date of hospice election. If the NOE is filed beyond this 5 day period, hospice providers are liable for the services furnished during the days from the effective date of hospice election to the date of NOE filing (79 FR 50454, 50474). Similar to the NOE, the claims processing system must be notified of a beneficiary's discharge from hospice or hospice benefit revocation. This update to the beneficiary's status allows claims from non-hospice providers to process and be paid. Upon live discharge or revocation, the beneficiary immediately resumes the Medicare coverage that had been waived when he or she elected hospice. The FY 2015 Hospice Rate Update final rule also finalized a requirement that requires hospices to file a notice of termination/revocation within 5 calendar days of a beneficiary's live discharge or revocation, unless the hospices have already filed a final claim. This requirement helps to protect beneficiaries from delays in accessing needed care (79 FR 50509).

A hospice ''attending physician'' is described by the statutory and regulatory definitions as a medical doctor, osteopath, or nurse practitioner whom the patient identifies, at the time of hospice election, as having the most significant role in the determination and delivery of his or her medical care. We received reports of problems with the identification of the patient's designated attending physician and a third of hospice patients had multiple providers submit Part B claims as the ''attending physician'' using a modifier. The FY 2015 Hospice Rate Update final rule finalized a requirement that the election form must include the beneficiary's choice of attending physician and that the beneficiary provide the hospice with a signed document when he or she chooses to change attending physicians (79 FR 50479).

Hospice providers are required to begin using a Hospice Experience of Care Survey for informal caregivers of hospice patients surveyed in 2015. The FY 2015 Hospice Rate Update final rule provided background and a description of the development of the Hospice Experience of Care Survey, including the model of survey implementation, the survey respondents, eligibility criteria for the sample, and the languages in which the survey is offered. The FY 2015 Hospice Rate Update final rule also outlined participation requirements for CY 2015 and discussed vendor oversight activities and the reconsideration and appeals process (79 FR 50496).

Finally, the FY 2015 Hospice Rate Update final rule requires providers to complete their aggregate cap determination within 5 months after the cap year, but not sooner than 3 months after the end of the cap year, and remit any overpayments. Those hospices that do not submit their aggregate cap determinations will have their payments suspended until the determination is completed and received by the Medicare Administrative Contractor (MAC) (79 FR 50503).

8. IMPACT Act of 2014

The Improving Medicare Post-Acute Care Transformation Act (IMPACT Act) of 2014 became law on October 6, 2014 (Pub. L. 113–185). Section 3(a) of the IMPACT Act mandates that all Medicare certified hospices be surveyed every 3 years beginning April 6, 2015 and ending September 30, 2025, as it was found that surveys of hospices were being performed on an infrequent basis. In addition, the IMPACT Act also implements a provision set forth in the Affordable Care Act that requires medical review of hospice cases involving patients receiving more than 180 days care in select hospices that show a preponderance of such patients, and the IMPACT Act contains a new provision mandating that the aggregate cap amount for accounting years that end after September 30, 2016, and before October 1, 2025 be updated by the hospice payment update rather than using the CPI–U for medical care expenditures. Specifically, the 2016 cap year, which starts on November 1, 2015 and ends on October 31, 2016, will be updated by the FY 2016 payment update percentage for hospice care. In accordance with the statute, we will continue to do this through any cap year ending before October 1, 2025 (that is, through cap year 2025).

E. Trends in Medicare Hospice Utilization

Since the implementation of the hospice benefit in 1983, and especially within the last decade, there has been substantial growth in hospice utilization. The number of Medicare beneficiaries receiving hospice services has grown from 513,000 in FY 2000 to over 1.3 million in FY 2013. Similarly, Medicare hospice expenditures have risen from $2.8 billion in FY 2000 to an estimated $15.3 billion in FY 2013. Our Office of the Actuary (OACT) projects that hospice expenditures are expected to continue to increase, by approximately 8 percent annually, reflecting an increase in the number of Medicare beneficiaries, more beneficiary awareness of the Medicare Hospice Benefit for end-of-life care, and a growing preference for care provided in home and community-based settings. However, this increased spending is partly due to an increased average lifetime length of stay for beneficiaries, from 54 days in 2000 to 98.5 days in FY 2013, an increase of 82 percent.

There have also been changes in the diagnosis patterns among Medicare hospice enrollees. Specifically, there were notable increases between 2002 and 2007 in neurologically-based diagnoses, including various dementia diagnoses. Additionally, there have been significant increases in the use of non-specific, symptom-classified diagnoses, such as ''debility'' and ''adult failure to thrive.'' In FY 2013, ''debility'' and ''adult failure to thrive'' were the first and sixth most common hospice diagnoses, respectively, accounting for approximately 14 percent of all diagnoses. Effective October 1, 2014, hospice claims were returned to the provider if ''debility'' and ''adult failure to thrive'' were coded as the principal hospice diagnosis as well as other ICD–9–CM codes that are not permissible as principal diagnosis codes per ICD–9–CM coding guidelines. We reminded the hospice industry that this policy would go into effect and claims would start to be returned October 1, 2014 in the FY 2015 hospice rate update final rule. As a result of this, there has been a shift in coding patterns on hospice claims. For FY 2014, the most common hospice principal diagnoses were Alzheimer's disease, Congestive Heart Failure, Lung Cancer, Chronic Airway Obstruction and Senile Dementia which constituted approximately 32 percent of all claims-reported principal diagnosis codes reported in FY 2014 (see Table 2 below).

TABLE 2—THE TOP TWENTY PRINCIPAL HOSPICE DIAGNOSES, FY 2002, FY 2007, FY 2013, FY 2014

Rank	ICD–9/Reported principal diagnosis	Count	Percentage
	Year: FY 2002		
1	162.9 Lung Cancer	73,769	11
2	428.0 Congestive Heart Failure	45,951	7
3	799.3 Debility Unspecified	36,999	6
4	496 COPD	35,197	5
5	331.0 Alzheimer's Disease	28,787	4
6	436 CVA/Stroke	26,897	4
7	185 Prostate Cancer	20,262	3
8	783.7 Adult Failure To Thrive	18,304	3
9	174.9 Breast Cancer	17,812	3
10	290.0 Senile Dementia, Uncomp.	16,999	3
11	153.0 Colon Cancer	16,379	2
12	157.9 Pancreatic Cancer	15,427	2

TABLE 2—THE TOP TWENTY PRINCIPAL HOSPICE DIAGNOSES, FY 2002, FY 2007, FY 2013, FY 2014—Continued

Rank	ICD–9/Reported principal diagnosis	Count	Percentage
13	294.8 Organic Brain Synd Nec	10,394	2
14	429.9 Heart Disease Unspecified	10,332	2
15	154.0 Rectosigmoid Colon Cancer	8,956	1
16	332.0 Parkinson's Disease	8,865	1
17	586 Renal Failure Unspecified	8,764	1
18	585 Chronic Renal Failure (End 2005)	8,599	1
19	183.0 Ovarian Cancer	7,432	1
20	188.9 Bladder Cancer	6,916	1
Year: FY 2007			
1	799.3 Debility Unspecified	90,150	9
2	162.9 Lung Cancer	86,954	8
3	428.0 Congestive Heart Failure	77,836	7
4	496 COPD	60,815	6
5	783.7 Adult Failure To Thrive	58,303	6
6	331.0 Alzheimer's Disease	58,200	6
7	290.0 Senile Dementia Uncomp.	37,667	4
8	436 CVA/Stroke	31,800	3
9	429.9 Heart Disease Unspecified	22,170	2
10	185 Prostate Cancer	22,086	2
11	174.9 Breast Cancer	20,378	2
12	157.9 Pancreas Unspecified	19,082	2
13	153.9 Colon Cancer	19,080	2
14	294.8 Organic Brain Syndrome NEC	17,697	2
15	332.0 Parkinson's Disease	16,524	2
16	294.10 Dementia In Other Diseases w/o Behav. Dist.	15,777	2
17	586 Renal Failure Unspecified	12,188	1
18	585.6 End Stage Renal Disease	11,196	1
19	188.9 Bladder Cancer	8,806	1
20	183.0 Ovarian Cancer	8,434	1
Year: FY 2013			
1	799.3 Debility Unspecified	127,415	9
2	428.0 Congestive Heart Failure	96,171	7
3	162.9 Lung Cancer	91,598	6
4	496 COPD	82,184	6
5	331.0 Alzheimer's Disease	79,626	6
6	783.7 Adult Failure to Thrive	71,122	5
7	290.0 Senile Dementia, Uncomp.	60,579	4
8	429.9 Heart Disease Unspecified	36,914	3
9	436 CVA/Stroke	34,459	2
10	294.10 Dementia In Other Diseases w/o Behavioral Dist.	30,963	2
11	332.0 Parkinson's Disease	25,396	2
12	153.9 Colon Cancer	23,228	2
13	294.20 Dementia Unspecified w/o Behavioral Dist.	23,224	2
14	174.9 Breast Cancer	23,059	2
15	157.9 Pancreatic Cancer	22,341	2
16	185 Prostate Cancer	21,769	2
17	585.6 End-Stage Renal Disease	19,309	1
18	518.81 Acute Respiratory Failure	15,965	1
19	294.8 Other Persistent Mental Dis.-classified elsewhere	14,372	1
20	294.11 Dementia In Other Diseases w/Behavioral Dist.	13,687	1
Year: FY 2014			
1	331.0 Alzheimer's disease	128,844	9
2	428.0 Congestive heart failure, unspecified	107,540	8
3	162.9 Lung Cancer	90,689	6
4	496 COPD	79,249	6
5	290.0 Senile dementia, uncomplicated	40,269	3
6	429.9 Heart disease, unspecified	37,129	3
7	436 CVA/Stroke	33,759	2
8	294.20 Dementia, unspecified, without behavioral disturbance	33,329	2
9	332.0 Parkinson's Disease	30,292	2
10	153.9 Colon Cancer	23,634	2
11	174.9 Breast Cancer	23,569	2
12	157.9 Pancreatic Cancer	22,789	2
13	185 Prostate Cancer	22,374	2
14	585.6 End stage renal disease	21,713	2
15	294.10 Dementia in conditions classified elsewhere w/o behav disturbance	19,660	1

TABLE 2—THE TOP TWENTY PRINCIPAL HOSPICE DIAGNOSES, FY 2002, FY 2007, FY 2013, FY 2014—Continued

Rank	ICD–9/Reported principal diagnosis	Count	Percentage
16	331.2 Senile degeneration of brain	18,847	1
17	518.81 Acute respiratory failure	17,624	1
18	290.40 Vascular dementia, uncomplicated	17,318	1
19	491.21 Obstructive chronic bronchitis with (acute) exacerbation	16,168	1
20	429.2 Cardiovascular disease, unspecified	14,305	1

Note(s): The frequencies shown represent beneficiaries that had a least one claim with the specific ICD–9–CM code reported as the principal diagnosis. Beneficiaries could be represented multiple times in the results if they have multiple claims during that time period with different principal diagnoses.

Source: FY 2002 and 2007 hospice claims data from the Chronic Conditions Data Warehouse (CCW), accessed on February 14 and February 20, 2013. FY 2013 hospice claims data from the CCW, accessed on June 26, 2014 and FY 2014 hospice claims data from the CCW, accessed on July 6, 2015.

A. Hospice Payment Reform Research and Analyses

In 2010, the Congress amended section 1814(i)(6) of the Act with section 3132(a) of the Affordable Care Act. The amendment authorizes the Secretary to collect additional data and information determined appropriate to revise payments for hospice care and for other purposes. The data collected may be used to revise the methodology for RHC and other hospice services (in a budget-neutral manner in the first year), no earlier than October 1, 2013, as described in section 1814(i)(6)(D) of the Act. The Secretary is required to consult with hospice programs and the Medicare Payment Advisory Commission (MedPAC) regarding additional data collection and payment reform options.

Since 2010, we have undertaken efforts to collect the data needed to establish what revisions to the methodology for determining the hospice payment rates may be necessary. Effective April 1, 2014, we began requiring additional information on hospice claims regarding drugs and certain durable medical equipment and effective October 1, 2014, we finalized changes to the hospice cost report to improve data collection on the costs of providing hospice care.[3] In addition, our research contractor, Abt Associates, conducted a hospice literature review; held stakeholder meetings; and developed and maintained an analytic plan, which supports effort towards implementing hospice payment reform. During the stakeholder meetings, attendees articulated concerns of sweeping payment reform changes and encouraged us to consider incremental steps or to use existing regulatory authority to refine the hospice program. We also held five industry technical expert panels (TEPs) via webinar and in-person meetings; consulted with federal hospice experts; provided annual updates on findings from our research and analyses and reform options in the FY 2014 and FY 2015 Hospice Wage Index and Payment Rate Update proposed and final rules (78 FR 48234 and 79 FR 50452); and updated the hospice industry on reform work through Open Door Forums, industry conferences and academic conferences.[4] We have taken into consideration the recommendations from MedPAC on reforming hospice payment, as articulated in the MedPAC Reports to Congress since 2009. The MedPAC recommendations and research provided a foundation for our development of an analytic plan and additional payment reform concepts. Furthermore, MedPAC participated in post-TEP meetings with other federal hospice experts. These meetings provided valuable feedback regarding the TEP's comments and discussed potential research and analyses to consider for hospice payment reform.

The FY 2012 Hospice Wage Index final rule (76 FR 47324) noted our collaboration with the Assistant Secretary of Planning and Evaluation (ASPE) to develop analyses that were used to inform our research efforts. The results from such analyses were used by Abt Associates to facilitate discussion, in 2012, of potential payment reform options and to guide the identification of topics for further analysis. In early 2014, we began working with Acumen, LLC, using real-time claims data, to monitor the vulnerabilities identified in the 2013 and 2014 Abt Associates' Hospice Payment Reform Technical Reports. On September 18, 2014, the IMPACT Act, mandated that the Centers for Medicare & Medicaid (CMS) undertake additional hospice monitoring and oversight activities. As noted previously, the IMPACT Act requires CMS to survey hospices at least as frequently as every 3 years for the next 10 years and review medical records of hospice beneficiaries on the hospice benefit for 180 days or greater as specified by the Secretary. CMS is actively engaged in cross-agency collaboration to meet the intent of the IMPACT Act to increase monitoring and oversight of hospice providers.

The majority of the research and analyses conducted by CMS and summarized in this rule were based on analyses of FY 2013 Medicare claims and cost report data conducted by our research contractor, Abt Associates, unless otherwise specified. In addition, we cite research and analyses, conducted by Acumen, LLC that are based on real-time claims data from the Integrated Data Repository (IDR). In the sections below, analysis conducted on pre-hospice spending, non-hospice spending for hospice beneficiaries during a hospice election, and live discharge rates highlight potential vulnerabilities of the Medicare hospice benefit.

1. Pre-Hospice Spending

In 1982, the Congress introduced hospice into the Medicare program as an alternative to aggressive treatment at the end of life. During the development of the benefit, multiple testimonies from industry leaders and hospice families were heard and it was reported that hospices provided high-quality, compassionate and humane care while also offering a reduction in Medicare costs.[5] Additionally, a Congressional Budget Office (CBO) study asserted that hospice care would result in sizable savings over conventional hospital care.[6] Those savings estimates were based on a comparison of spending in

[3] CMS Transmittal 2864, ''Additional Data Reporting Requirements for Hospice claim''. Available at *http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R2864P.pdf.*

[4] *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/Downloads/Hospice-Project-Background.pdf.*

[5] Subcommittee of Health of the Committee of Ways and Means, House of Representatives, March 25, 1982.

[6] Mor V. Masterson-Allen S. (1987): *Hospice care systems: Structure, process, costs and outcome.* New York: Springer Publishing Company.

the last 6 months of life for a cancer patient not utilizing hospice care versus the cost of hospice care for the 6 months preceding death.[7] The original language for § 1814(i) of the Act (prior to August, 29, 1983) set the hospice aggregate cap amount at 40 percent of the average Medicare per capita expenditure amount for cancer patients in the last 6 months of life. When the hospice benefit was created, the average lifetime length of stay for a hospice patient was between 55 and 75 days. Since the implementation of the Medicare hospice benefit, the principal diagnosis for patients electing the hospice benefit has changed from primarily cancer diagnoses in 1983 to primarily non-cancer diagnoses in FY 2014.[8] Alzheimer's disease and Congestive Heart Failure (CHF) were the most reported principal diagnoses comprising 17 percent of all diagnoses reported (see Table 2 in section II.E) in FY 2014.

Analysis was conducted to evaluate pre-hospice spending for beneficiaries who used hospice and who died in FY 2013. To evaluate pre-hospice spending, we calculated the median daily Medicare payments for such beneficiaries for the 180 days, 90 days, and 30 days prior to electing hospice care. We then categorized patients according to the principal diagnosis reported on the hospice claim. The analysis revealed that for some patients, the Medicare payments in the 180 days prior to the hospice election were lower than Medicare payments associated with hospice care once the benefit was elected (see Table 3 and Figure 1 below). Specifically, median Medicare spending for a beneficiary with a diagnosis of Alzheimer's disease, non-Alzheimer's dementia, or Parkinson's in the 180 days prior to hospice admission (about 20 percent of patients) was $66.84 per day compared to the daily RHC rate of $153.45 in FY 2013 (see Table 3 below). Closer to the hospice admission, the median Medicare payments per day increase, as would be expected as the patient approaches the end of life and patient needs intensify. However, 30 days prior to a hospice election, median Medicare spending was $105.24 for patients with Alzheimer's disease, non-Alzheimer's dementia, or Parkinson's. In contrast, the median Medicare payments prior to hospice election for patients with a principal hospice diagnosis of cancer were $143.56 in the 180 days prior to hospice admission and increased to $289.85 in the 30 days prior to hospice admission. The average length of stay for hospice elections where the principal diagnosis was reported as Alzheimer's disease, non-Alzheimer's Dementia, or Parkinson's is greater than patients with other diagnoses, such as cancer, Cerebral Vascular Accident (CVA)/stroke, chronic kidney disease, and Chronic Obstructive Pulmonary Disease (COPD). For example, the average lifetime length of stay for an Alzheimer's, non-Alzheimer's Dementia, or Parkinson's patient in FY 2013 was 119 days compared to 47 days for patients with a principal diagnosis of cancer (or in other words, 150 percent longer).

TABLE 3—MEDIAN PRE-HOSPICE DAILY SPENDING ESTIMATES AND INTERQUARTILE RANGE BASED ON 180, 90, AND 30 DAY LOOK-BACK PERIODS PRIOR TO INITIAL HOSPICE ADMISSION WITH ESTIMATES OF AVERAGE LIFETIME LENGTH OF STAY (LOS) BY PRIMARY DIAGNOSIS AT HOSPICE ADMISSION, FY 2013

	Estimates of daily non-hospice medicare spending prior to first hospice admission									Mean lifetime LOS
	180 day look-back			90 day look-back			30 day look-back			
	25th Pct.	Median	75th Pct.	25th Pct.	Median	75th Pct.	25th Pct.	Median	75th Pct.	
All Diagnoses	$47.04	$117.73	$240.73	$55.75	$157.89	$337.97	$57.66	$266.84	$545.44	73.8
Alzheimer's, Dementia, and Parkinson's	23.39	66.84	162.60	23.06	82.00	220.12	21.02	105.24	368.30	119.3
CVA/Stroke	56.18	116.86	239.30	82.32	170.40	352.74	150.21	352.41	622.23	47.4
Cancers	62.81	143.56	265.58	78.30	188.08	360.92	81.52	289.85	569.67	47.1
Chronic Kidney Disease	94.78	217.46	402.10	126.41	293.18	541.41	199.01	466.25	820.78	27.3
Heart (CHF and Other Heart Disease)	61.28	135.48	255.53	80.62	186.52	364.24	101.80	325.15	588.50	77.2
Lung (COPD and Pneumonias)	65.53	142.78	272.13	90.68	201.02	401.12	126.51	367.68	685.17	67.5
All Other Diagnoses	36.00	99.80	222.25	39.45	132.88	316.15	38.96	213.84	504.57	85.3

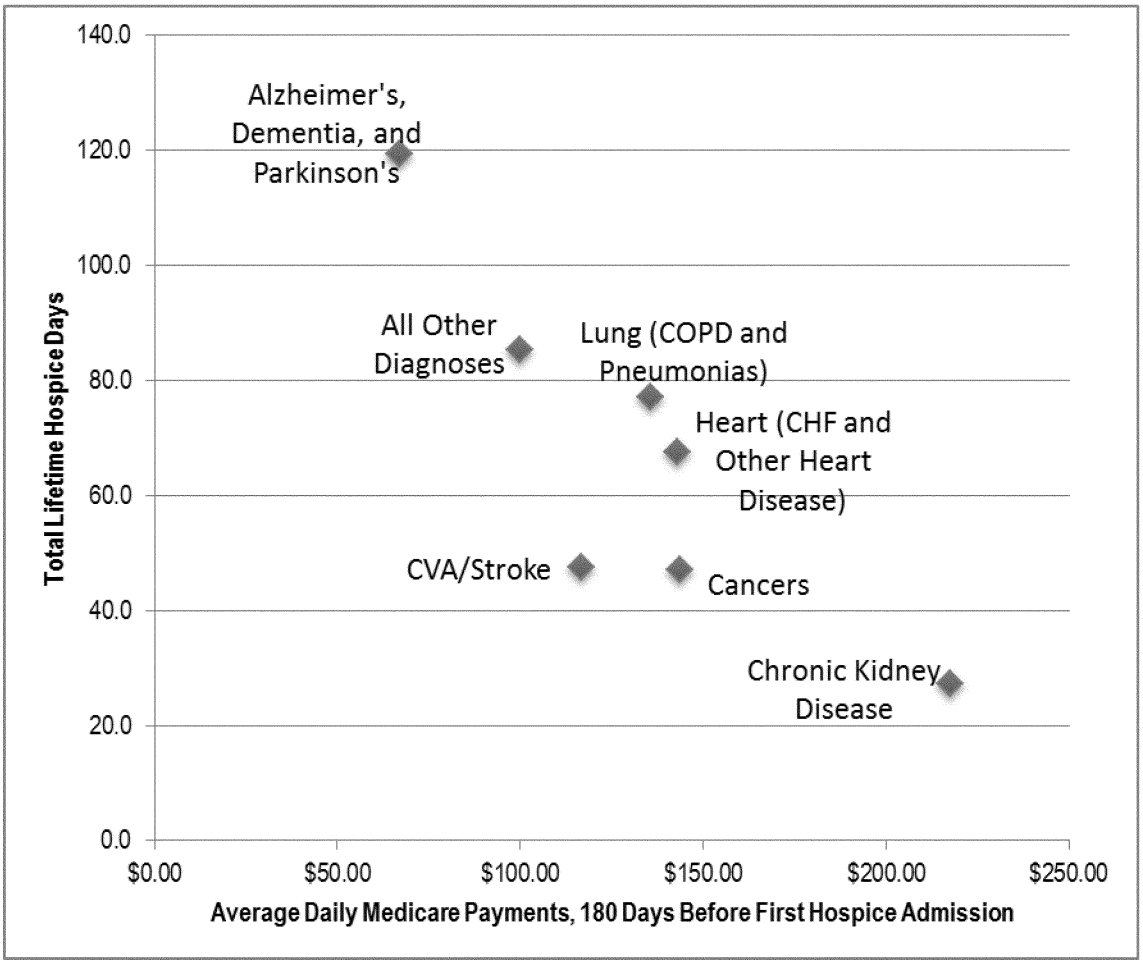
Source: All Medicare Parts A, B, and D claims for FY 2013 from the Chronic Conditions Data Warehouse (CCW) retrieved March, 2015.

Note(s): Estimates drawn from FY2013 hospice decedents who were first-time hospice admissions, ages 66+ at hospice admission, admitted since 2006, and not enrolled in Medicare Advantage prior to admission. All payments are inflation-adjusted to September 2013 dollars using the Consumer Price Index (Medical Care; All Urban Consumers).

[7] Fogel, Richard. (1983): *Comments on the Legislative Intent of Medicare's Hospice Benefit (GAO/HRD–83–72).*

[8] Connor, S. (2007). Development of Hospice and Palliative Care in the United States. OMEGA. 56(1), 89–99. doi:102190/OM.5.1.h

Figure 1: Average Pre-Hospice Daily Spending Estimates based on a180-day Look-Back Period Prior to Initial Hospice Admission with Estimates of Lifetime Length of Stay by Primary Diagnosis at Hospice Admission, FY 2013



In the FY 2014 Hospice Wage Index and Payment Rate Update proposed and final rules (78 FR 27843 and 78 FR 48272), we discussed whether a case-mix system could be created in future refinements to differentiate hospice payments according to patient characteristics. While we do not have the necessary data on the hospice claim form at this time to conduct more thorough research to determine whether a case-mix system is appropriate, analyzing pre-hospice spending was undertaken as an initial step in determining whether patients required different resource needs prior to hospice based on the principal diagnosis reported on the hospice claim. Table 3 and Figure 1 above indicate that hospice patients with the longest length of stay had lower pre-hospice spending relative to hospice patients with shorter lengths of stay. These hospice patients tend to be those with neurological conditions, including those with Alzheimer's disease, other related dementias and Parkinson's disease. Typically, these conditions are associated with longer disease trajectories, progressive loss of functional and cognitive abilities, and more difficult prognostication.

Research has shown that the majority of dementia patients are cared for at home, leading to increased informal care costs that put an economic burden on families rather than on healthcare systems.[9] Additionally, research using the National Long-Term Care Survey (NLCS) merged with Medicare claims; found that patients with Alzheimer's disease and related conditions do not have higher Medicare expenditures over the last 5 years of their life compared to non-demented elderly.[10] Some researchers have measured whether hospice care reduces overall Medicare costs at the end of life. Research conducted by the RAND Corporation and published in the Annals of Internal Medicine in February of 2004 found that ''adjusted mean [Medicare] expenditures were 4.0 percent higher overall among hospice enrollees than among non-enrollees. Adjusted mean [Medicare] expenditures were 1 percent lower for hospice enrollees with cancer than for patients with cancer who did not use hospice. Savings were highest (7 percent to 17 percent) among enrollees with lung cancer and other very aggressive types of cancer diagnosed in the last year of life. [Medicare] Expenditures for hospice enrollees without cancer were 11 percent higher than for non-enrollees, ranging from 20

[9] Schaller, S., Mauskopf, J., Kriza, C., Wahlster, P., Kolominsky-Rabas, P. (2015). The main cost drivers in dementia: a systematic review. International Journal of Geriatric Psychiatry. 15, 111–129. doi: 10.1002/gps.4198.

[10] Ayyagari, P., M. Salm, and F. Sloan. 2008. ''Effects of Diagnosed Dementia on Medicare and Medicaid Program Costs.'' Inquiry 44 (Winter 2007/2008): 481–94. Lamb, V., F. Sloan, and A. Nathan. 2008. ''Dementia and Medicare at Life's End.'' Health Services Research 43 (2): 714–32.

percent to 44 percent for patients with dementia and 0 percent to 16 percent for those with chronic heart failure or failure of most other organ systems.'' [11] While analyses examining pre-hospice spending for hospice patients according to their diagnosis reported on the hospice claim has some limitations, it does show that, depending on the type of research study design selected, different conclusions can be drawn regarding the effect of Alzheimer's disease and dementia on medical care costs.[12] An article was released in May of 2015 by the New England Journal of Medicine titled ''Changes in Medicare Costs with the Growth of Hospice Care in Nursing Homes,'' that examined the impact of hospice use for nursing home residents on end of life costs. This article found that between 2004 and 2009, the expansion of hospice was associated with a mean net increase in Medicare expenditures of $6,761 (95 percent confidence interval, 6,335 to 7,186), reflecting greater additional spending on hospice care ($10,191) than reduced spending on hospital and other care ($3,430). The growth in hospice care for nursing home residents was associated with less aggressive care near death but at an overall increase in Medicare expenditures.'' [13]

2. Non-Hospice Spending for Hospice Beneficiaries During an Election

When a beneficiary elects the Medicare hospice benefit, he or she waives the right to Medicare payment for services related to the terminal illness and related conditions, except for services provided by the designated hospice and the attending physician (as described in section II of this rule). However, Medicare payment is allowed for covered Medicare items and services that are unrelated to the terminal illness and related conditions (that is, the terminal prognosis). When a hospice beneficiary receives items or services unrelated to the terminal illness and related conditions from a non-hospice provider, that provider can bill Medicare for the items or services, but must include on the claim a GW (service not related to the hospice patient's terminal condition) modifier (if billed on a professional claim),[14] or condition code 07 (if billed on an institutional claim).[15] Prescription Drug Events (PDEs) unrelated to the terminal prognosis for which hospice beneficiaries are receiving hospice care are billed to Part D and do not require a modifier or a condition code. We reported initial findings on CY 2012 non-hospice spending during a hospice election in the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50452). This section updates our analysis of non-hospice spending during a hospice election using FY 2013 data.

For FY 2013, we found that Medicare paid $694.1 million for Part A and Part B items or services while a beneficiary was receiving hospice care. The $694.1 million paid for Part A and Part B items or services was for durable medical equipment (6.4 percent), inpatient care (care in long- term care hospitals, inpatient rehabilitation facilities, acute care hospitals; 28.6 percent), outpatient Part B services (16.6 percent), other Part B services (also known as physician, practitioner and supplier claims, such as labs and diagnostic tests, ambulance transports, and physician office visits; 38.8 percent), skilled nursing facility care (5.3 percent), and home health care (4.3 percent). Part A and Part B non-hospice spending occurred mostly for hospice beneficiaries who were at home (56.0 percent). We also found that on hospice service days in which non-hospice spending occurred, 25.7 percent of hospice beneficiaries were in a nursing facility, 1.9 percent were in an inpatient setting, 15.1 percent were in an assisted living facility, and 1.3 percent were in other settings. Although the average daily rate of expenditures outside the hospice benefit was $7.65, we found geographic differences where beneficiaries receive care. The highest rates per day occurred for hospice beneficiaries residing in West Virginia ($13.74), Delaware ($12.76), Mississippi ($12.31), South Florida ($12.24), and Texas ($12.10).

Table 4 below details the various components of Part D spending for patients receiving hospice care. The portion of the $439.5 million total Part D spending which was paid by Medicare is the sum of the Low Income Cost-Sharing Subsidy and the Covered Drug Plan Paid Amount, or $347.1 million.

TABLE 4—DRUG COST SOURCES FOR HOSPICE BENEFICIARIES' FY 2013 DRUGS RECEIVED THROUGH PART D

Component	FY 2013 expenditures
(Patient Pay Amount)	$50,871,517
(Low Income Cost-Sharing Subsidy)	116,890,745
(Other True Out-of Pocket Amount)	2,125,071
(Patient Liability Reduction due to Other Payer Amount)	6,678,561
(Covered Drug Plan Paid Amount)	230,216,153
(Non-Covered Plan Paid Amount	28,733,518
(Six Payment Amount Totals)	435,515,566
(Unknown/Unreconciled)	3,945,667
(Gross Total Drug Costs, Reported)	439,461,233

Source: Abt Associates analysis of 100% FY 2013 Medicare Claim Files. For more information on the components above and on Part D data, go to the Research Data Assistance Center's (ResDAC's) Web site at: *http://www.resdac.org/.*

Non-hospice Medicare expenditures occurring during a hospice election in FY 2013 were $694.1 million for Parts A and B plus $347.1 million for Part D spending, or approximately $1 billion dollars total. This figure is comparable to the estimated $1 billion MedPAC reported during its December 2013 public meeting.[16] Associated with this $1 billion in Medicare spending were cost sharing liabilities such as co-payments and deductibles that beneficiaries incurred. Hospice beneficiaries had $132.5 million in cost-sharing for items and services that were billed to Medicare Parts A and B, and $50.9 million in cost-sharing for drugs that were billed to Medicare Part D, while they were in a hospice election. In total, this represents an FY 2013 beneficiary liability of $183.4 million for Parts A, B, and D items or services provided to hospice beneficiaries during a hospice election. Therefore, the total non-hospice costs paid by Medicare or beneficiaries for items or services provided to hospice beneficiaries during a hospice election were over $1.2 billion in FY 2013.

In a recent report, the HHS Office of Inspector General (OIG) identified instances where Medicare may be

[11] *http://www.rand.org/pubs/external_publications/EP20040207.html.* Accessed on April 23, 2015.

[12] Yang, Z., Zhang, K., Lin, P., Clevenger, C., & Atherly, A. (2012). A Longitudinal Analysis of the Lifetime Cost of Dementia. Health Services Research, 47(4), 1660–1678. doi:10.1111/j.1475–6773.2011.01365.x.

[13] Gozalo, P., Plotske, M., Mor, V., Miller, S. & Teno, J. (2015). Changes in Medicare Costs with the Growth of Hospice Care in Nursing Homes. New England Journal of Medicine, 372:19, 1823–1831.

[14] Medicare Claims Processing Manual, Chapter 11-Processing Hospice Claims, Section 30.4-Claims from Medicare Advantage Organizations, B-Billing of Covered Services. *http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c11.pdf.*

[15] Medicare Claims Processing Manual, Chapter 11-Processing Hospice Claims, Section 30.3-Data Required on the Institutional Claim to Medicare Contractors, Conditions Codes. *http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c11.pdf.*

[16] MedPAC, ''Assessing payment adequacy and updating payments: hospice services'', December 13 2013. Available at: *http://www.medpac.gov/documents/december-2013-meeting-transcript.pdf.*

paying twice under Part D for drugs that should be provided by the hospice as part of the plan of care.[17] To assist CMS in identifying and evaluating instances where drugs, supplies, durable medical equipment (DME), and Part B services provided to hospice patients appear to be related to the principal diagnosis reported on the hospice claim, but were billed separately to other parts of the Medicare program, Acumen, LLC developed case studies that were reviewed and evaluated by CMS clinical staff.[18] Although hospice beneficiaries are allowed to continue receiving care outside the hospice benefit for conditions that are unrelated to the terminal illness and related conditions (that is, unrelated to the terminal prognosis), § 418.56(c) requires hospices to provide all services necessary for the palliation and management of the terminal illness and related conditions.

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies Across Terminal Conditions

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) products whose use was initiated during a hospice stay are likely related to the terminal prognosis. Table 5 and 6 below summarizes total concurrent billing for DMEPOS products by Berenson-Eggers Types of Service (BETOS) categories and concurrent DME billing by the top 20 principal diagnoses as reported on hospice claims in CY 2013.[19] These diagnoses comprised 2.3 million hospice stays, and accounted for $27.1 million in total concurrent spending for DME products. This amount does not include spending for DME rental products that beneficiaries began using prior to a hospice stay.

TABLE 5—CONCURRENT PAYMENTS FOR ALL DME USE INITIATED DURING A HOSPICE STAY BY BETOS CATEGORY, CY 2013

DMEPOS BETOS category	Total payment for related DME
Hospital Beds	$943,731
Wheelchairs	2,295,038
Oxygen and Supplies	2,412,281
Orthotics and Prosthetics	4,400,353
Medical/Surgical Supplies	7,467,616
Other DME	9,585,003
Total	27,104,022

TABLE 6—CONCURRENT PAYMENTS FOR ALL DME USE INITIATED DURING A HOSPICE STAY BY TOP 20 PRINCIPAL DIAGNOSIS REPORTED ON HOSPICE CLAIM, CY 2013

Principal diagnosis	Total payment for related DME
Heart failure	$3,365,348
Malignant neoplasm of trachea, bronchus, and lung	1,519,514
Other cerebral degenerations	2,979,399
Other organic psychotic conditions (chronic)	2,540,146
Chronic airways obstruction, not elsewhere classified	2,610,628
Senile and presenile organic psychotic conditions	2,868,760
Other ill-defined and unknown causes of morbidity and mortality	2,349,855
Ill-defined descriptions and complications of heart disease	1,584,522
Acute but ill-defined cerebrovascular disease	1,092,772
Other diseases of lung	412,501
Chronic renal failure	415,800
Symptoms concerning nutrition, metabolism, and development	1,390,685
Malignant neoplasm of pancreas	297,573
Malignant neoplasm of female breast	486,019
Malignant neoplasm of colon	521,690
Parkinson's disease	955,390
Malignant neoplasm of prostate	312,754
Late effects of cerebrovascular disease	559,253
Other forms of chronic ischemic heart disease	670,947
Malignant neoplasm of liver and intrahepatic bile ducts	170,470

We noted that hospice beneficiaries with hospice claims-reported principal diagnoses of chronic airway obstruction, congestive heart failure, cerebral degeneration and lung cancer were receiving services clinically indicated and recommended for these conditions outside of the hospice benefit, which is in violation of requirements regarding the Medicare hospice benefit. This could be attributed to hospices incorrectly classifying conditions as unrelated and referring patients to non-hospice providers, not communicating and coordinating the care and services needed to manage the needs of the hospice beneficiary, or deliberately, to avoid costs. The case studies below are focused on four of the most commonly reported principal hospice diagnoses on hospice claims (see Table 2 in section II.E) based on clinical guidelines as described for each principal hospice diagnosis.

[17] *oig.hhs.gov/oas/region6/61000059.pdf* ''Medicare Could Be Paying Twice for Prescriptions For Beneficiaries in Hospice.''

[18] The case studies were developed using CY 2013 claims data for only those beneficiaries with Parts A, B and D coverage throughout their hospice. In identifying services that overlapped with a hospice election, we used two methods. The first method identified a match between the first three diagnosis codes of the hospice claim and the diagnosis codes of the overlapping services in the Part A, Part B, and Part D claim for the same beneficiary. The second method identified a match between the hospice diagnoses and the diagnosis codes of the overlapping services in the Part A, Part B and Part D based on a diagnosis code on the overlapping claim and any diagnosis on the hospice claim mapping to the same Healthcare Cost and Utilization Project (HCUP).

[19] DMEPOS HCPCS codes are summarized by Berenson-Eggers Types of Service (BETOS) categories. BETOS categories were developed by the American Medical Association (AMA) and aggregate HCPCS codes into clinically coherent groups.

Malignant Neoplasm of the Trachea, Bronchus, and Lung

Malignant neoplasm of the trachea, bronchus, and lung (or lung cancer) is defined by ICD–9 diagnosis codes beginning with 162 and describes malignant cancers affecting various part of the pulmonary system. Symptoms for this class of conditions may include chronic and worsening cough, shortness of breath, chest pain, metastatic bone pain, and anorexia and weight loss. Clinical practice guidelines for end-stage cancer recommend treatment and management of refractory symptoms including pain, mucositis, dyspnea, fatigue, depression and anorexia through the use of pharmacological interventions including nonsteroidal anti-inflammatories, corticosteroids, opioids and antidepressants.[20] Additionally, evidence shows that palliative chemotherapy and radiotherapy can provide symptom relief from bone and brain metastasis.[21] Recommended interventions for dyspnea include treatment of the underlying reason such as, thoracentesis for pleural effusion, bronchodilators and systemic corticosteroids for inflammation and secretions, and supportive measures such supplemental oxygen, opioids and anxiolytics to decrease the sensation of breathlessness.[22]

Our assessment of concurrently billed Part D drugs included 89,925 stays for beneficiaries with ICD–9 code 162 listed as a primary diagnosis on the hospice claim. Our assessment of concurrently billed Part B services included 153,199 stays. In CY 2013, concurrent billing for all services related this terminal condition comprised $3.4 million. Table 7 below summarizes concurrent payments for services that were potentially related to this class of conditions. Part D drugs that should have been covered under the hospice benefit for the treatment of this condition accounted for $2.1 million. DME services that were billed during hospice stays related to this condition during the same time cost $640,166. Concurrent services provided in Part B institutional settings accounted for $591,772.

TABLE 7—CONCURRENT PAYMENTS FOR SERVICES PROVIDED TO HOSPICE BENEFICIARIES WITH MALIGNANT NEOPLASM OF THE TRACHEA, BRONCHUS, AND LUNG, CY 2013

Type of service	Description	Total payment
Drugs/Part D	Common Palliative Drugs	$851,639
Drugs/Part D	Anti-neoplastics (chemotherapy)	1,321,507
DME	Oxygen Equipment and Supplies	454,068
DME	Hospital Beds	47,781
DME	Wheelchairs	138,316
Part B Inst	Diagnostic Imaging	341,601
Part B Inst	Radiation	250,171
Total		3,405,083

Chronic Airway Obstruction

Chronic airway obstruction is defined by ICD–9 diagnosis codes beginning with 496 and includes chronic lung disease with unspecified cause, and is characterized by inflammation of the lungs and airways. Typical symptoms of these pulmonary diseases include increasing and disabling shortness of breath, labored breathing, increased coughing, increased heart rate, decreased functional reserve, increased infections and unintentional, progressive weight loss. Evidence-based practice supports the benefits of oral opioids, neuromuscular electrical stimulation, chest wall vibration, walking aids, respiratory assist devices and pursed-lip breathing in the management of dyspnea in the individual patient with advanced COPD.[23] Oxygen is recommended for COPD patients with resting hypoxemia for symptomatic benefit.[24] Additionally, clinical practice guidelines recommend inhaled bronchodilators, systemic corticosteroids, and pulmonary physiotherapy for the management of COPD exacerbations.[25] Analysis conducted by Acumen, LLC, shows concurrently billed Part D drugs included 130,283 stays for beneficiaries with ICD–9 code 469 listed as a primary diagnosis on the hospice claim. Additionally, concurrently billed Part B services included 198,098 such stays. Table 8 below summarizes concurrent payments for services that are potentially related to this class of conditions. In CY 2013, concurrent billing for all services related this terminal condition comprised $10.4 million. Part D drugs that should have been covered under the hospice benefit for the treatment of this condition accounted for $8.6 million. DME services that were billed during hospice stays related to this condition during the same time amounted to $1.2 million dollars.[26] Finally, concurrent services provided in Part B institutional settings accounted for $605,110.

[20] Qaseem A, Snow V, Shekelle P, Casey DE, Cross JT, Owens DK, et al. Evidence-Based Interventions to Improve the Palliative Care of Pain, Dyspnea, and Depression at the End of Life: A Clinical Practice Guideline from the American College of Physicians. Ann Intern Med. 2008;148:141–146. doi:10.7326/0003–4819–148–2–200801150–00009.

[21] Palliative care in lung cancer*: accp evidence-based clinical practice guidelines (2nd edition) Kvale PA, Selecky PA, Prakash US. Chest. 2007;132(3_suppl):368S–403S.

[22] Ibid.

[23] DD Marciniuk, D Goodridge, P Hernandez, et al. (2011). Canadian Thoracic Society COPD Committee Dyspnea Expert Working Group. Managing dyspnea in patients with advanced chronic obstructive pulmonary disease: A Canadian Thoracic Society clinical practice guideline. Canadian Respiratory Journal. 18(2), 1–10.

[24] Ibid.

[25] National Clinical Guideline Centre for Acute and Chronic Conditions. Chronic obstructive pulmonary disease. Management of chronic obstructive pulmonary disease in adults in primary and secondary care. London (UK): National Institute for Health and Clinical Excellence (NICE); 2010 Jun. 61 p. (Clinical guideline; no. 101). Retrieved from the National Guideline Clearinghouse on February 19, 2015. *http://www.guideline.gov/*.

[26] DMEPOS HCPCS codes are summarized by Berenson-Eggers Types of Service (BETOS) categories. BETOS categories were developed by the American Medical Association (AMA) and aggregate HCPCS codes into clinically coherent groups.

TABLE 8—CONCURRENT PAYMENTS FOR SERVICES PROVIDED TO HOSPICE BENEFICIARIES WITH CHRONIC AIRWAY OBSTRUCTION, CY 2013

Type of service	Description	Total payment
Drugs/Part D	Common Palliative Drugs [27]	$1,757,326
Drugs/Part D	Antiasthmatics & Bronchodilators	6,545,089
Drugs/Part D	Corticosteroids	141,179
Drugs/Part D	Respiratory Agents	148,793
DME	Oxygen Equipment and Supplies [28]	525,276
DME	Hospital Beds	480,854
DME	Wheelchairs	196,692
Part B Institutional	Diagnostic Imaging	605,110
Total		10,400,319

Cerebral Degeneration

Cerebral degeneration is defined by ICD–9 diagnosis codes beginning with 331, and includes conditions such as Alzheimer's disease and Reye's syndrome. These conditions are typically characterized by a progressive loss of cognitive function with symptoms including the loss of memory and changes in language ability, behavior, and personality. Additionally, as these cerebral degenerations progress, other clinical manifestations occur such as dysphagia, motor dysfunction, impaired mobility, increased need for activities of daily living assistance, urinary and fecal incontinence, weight loss and muscle wasting. Individuals with these conditions are also at increased risk for aspiration, falls, pneumonias, decubitus ulcers and urinary tract infections. Clinical practice guidelines for the treatment of cerebral degenerative conditions includes pharmacological interventions including Angiotensin Converting Enzyme inhibitors, memantine or combination therapy depending on severity of disease, as well as antidepressants, antipsychotics, psychostimulants, mood stabilizers, benzodiazepines and neuroleptics, depending on behavioral manifestations. Non-pharmacological interventions recommended include mental, behavioral and cognitive therapy, speech language pathology to address swallowing issues, and other interventions to treat and manage manifestations including pressure ulcers, cachexia and infections.[29]

Our assessment of concurrently billed Part D drugs included 208,346 stays for beneficiaries with ICD–9 code 331 listed as a primary diagnosis on the hospice claim. Our assessment of concurrently billed Part B services included 318,044 stays. In CY 2013, concurrent billing for all services related to this principal diagnosis comprised $11.2 million. Table 9 below summarizes concurrent payments for services that are potentially related to this class of conditions. Part D drugs that should have been covered under the hospice benefit for the treatment of this condition accounted for $10.3 million. Concurrently billed DME products that were related this condition cost Medicare an additional $390,476. Concurrent services provided in Part B institutional settings accounted for $496,790.

TABLE 9—CONCURRENT PAYMENTS FOR SERVICES PROVIDED TO HOSPICE BENEFICIARIES WITH CEREBRAL DEGENERATION, CY 2013

Type of service	Description	Total payment
Drugs/Part D	Common Palliative Drugs	$1,184,005
Drugs/Part D	Antipsychotic/Antimanic Agents	2,336,504
Drugs/Part D	Psychotherapeutic & Neurological Agents	6,752,270
DME	Hospital Beds	138,249
DME	Wheelchairs	252,228
Part B Inst.	Diagnostic Imaging	496,790
Total		11,160,046

Congestive Heart Failure

CHF is defined by ICD–9 diagnosis codes beginning with 428. CHF is characterized by symptoms such as shortness of breath, edema, diminished endurance, angina, productive cough and fatigue. For the management of congestive heart failure, clinical practice guidelines recommend pharmacological interventions including beta blockers, angiotensin converting enzyme inhibitors, angiotensin receptor blockers, diuretics, anti-platelets, anti-coagulants and digoxin, depending on symptomology and response or nonresponse to other treatments.[30] Nonpharmacological interventions recommended include continuous positive airway pressure and supplemental oxygen for those with coexisting pulmonary disease.[31]

[27] Includes all analgesics, anxiolytics, antiemetics, and laxatives. These four drug types are considered ''nearly always covered under the hospice benefit'' and as such are rarely expected to be billed separately during a hospice stay.

[28] For COPD, we also include respiratory assist devices (RADs) in this category.

[29] Development Group of the Clinical Practice Guideline [trunc]. Clinical practice guideline on the comprehensive care of people with Alzheimer's disease and other dementias. Barcelona (Spain): Agency for Health Quality and Assessment of Catalonia (AQuAS); 2010. 499 p. Retrieved from the National Guideline Clearinghouse on February 19, 2015. *http://www.guideline.gov/*.

[30] Scottish Intercollegiate Guidelines Network (SIGN). Management of chronic heart failure. A national clinical guideline. Edinburgh (Scotland): Scottish Intercollegiate Guidelines Network (SIGN); 2007 Feb. 53 p. (SIGN publication; no. 95).

[31] Lindenfeld J, Albert NM, Boehmer JP, Collins SP, Ezekowitz JA, Givertz MM, Klapholz M, Moser

Our assessment of concurrently billed Part D drugs included 158,220 stays for beneficiaries with ICD–9 code 428 listed as a primary diagnosis on the hospice claim. Our assessment of concurrently billed Part B services included 256,236 stays. In CY 2013, concurrent billing for all services related this terminal condition comprised $5.8 million. Table 10 below summarizes concurrent payments for services that are potentially related to this class of conditions. Part D drugs that should have been covered under the hospice benefit for the treatment of this condition accounted for $3.8 million. DME services that were billed during hospice stays related to this condition during this time cost $843,534. Concurrent services provided in Part B institutional settings accounted for $1.2 million.

TABLE 10—CONCURRENT PAYMENTS FOR SERVICES PROVIDED TO HOSPICE BENEFICIARIES WITH CONGESTIVE HEALTH FAILURE, CY 2013

Type of service	Description	Total payment
Drugs/Part D	Common Palliative Drugs	$1,229,748
Drugs/Part D	Diuretics	334,700
Drugs/Part D	Beta Blockers	363,480
Drugs/Part D	Anti-hypertensives	584,799
Drugs/Part D	Anti-anginal Agents	468,333
Drugs/Part D	Cardiovascular Agents—Misc	799,605
Drugs/Part D	Vasopressors	43,496
DME	Oxygen Equipment and Supplies	471,376
DME	Hospital Beds	96,219
DME	Wheelchairs	275,940
Part B Inst	Diagnostic Imaging	690,726
Part B Inst	EKGs	72,933
Part B Inst	Cardiac Devices	242,819
Part B Inst	Diagnostic Clinical Labs	79,999
Part B Prof	Diagnostic Clinical Labs	64,698
Total		5,818,871

Our regulations at § 418.56(c) require that hospices provide all services necessary for the palliation and management of the terminal illness and related conditions. We have discussed recommended evidence-based practice clinical guidelines for the hospice claims-reported principal diagnoses mentioned in this section. However, this analysis reveals that these recommended practices are not always being covered under the Medicare hospice benefit. We believe the case studies in this section highlight the potential systematic unbundling of the Medicare hospice benefit by some providers and may be valuable analysis to inform policy stakeholders.

3. Live Discharge Rates

Currently, federal regulations allow a patient who has elected to receive Medicare hospice services to revoke their hospice election at any time and for any reason. The revocation shall act as a waiver of the right to have payment made for any hospice care benefits for the remaining time in such period. The patient may, at a subsequent time, re-elect to receive hospice coverage for additional hospice election periods if he or she is eligible to receive them (§ 418.28(c)(3) and § 418.24(e)). During the time period between revocation/discharge and the re-election of the hospice benefit, Medicare coverage would resume for those Medicare benefits previously waived. A revocation can only be made by the beneficiary, in writing, that he or she is revoking the hospice election; and must indicate the effective date of the revocation. A hospice cannot ''revoke'' a beneficiary's hospice election, nor is it appropriate for hospices to encourage, request or demand that the beneficiary revoke his or her hospice election. Like the hospice election, a hospice revocation is to be an informed choice based on the beneficiary's goals, values and preferences for the services they wish to receive.

Federal regulations only provide limited opportunity for a Medicare hospice provider to discharge a patient from its care. In accordance with § 418.26, discharge from hospice care is permissible when the patient moves out of the provider's service area, is determined to be no longer terminally ill, or for cause. Hospices may not automatically or routinely discharge the patient at its discretion, even if the care may be costly or inconvenient. As we indicated in the FY 2015 Hospice Wage Index and Payment Rate Update proposed and final rules, we understand that the rate of live discharges should not be zero, given the uncertainties of prognostication and the ability of patients and their families to revoke the hospice election at any time. On July 1, 2012, we began collecting discharge information on the claim to capture the reason for all types of discharges which includes, death, revocation, transfer to another hospice, moving out of the hospice's service area, discharge for cause, or due to the patient no longer being considered terminally ill (that is, no longer qualifying for hospice services). Based upon the additional discharge information, Abt Associates, our research contractor performed analysis on FY 2013 claims to identify those beneficiaries who were discharged alive. The details of this analysis will be reported in the 2015 technical report and will be made available on the Hospice Center Web page. Several key conclusions from the 2015 technical report are included below. In order to better understand the characteristics of hospices with high live discharge rates, we examined the aggregate cap status, skilled visit intensity; average lengths of stay; and non-hospice spending rates per beneficiary.

Between 2000 and 2013, the overall rate of live discharges increased from 13.2 percent in 2000 to 18.3 percent in 2013. Among hospices with 50 or more

DK, Rogers JG, Starling RC, Stevenson WG, Tang WHW, Teerlink JR, Walsh MN. Executive Summary: HFSA 2010 Comprehensive Heart Failure Practice Guideline. J Card Fail 2010;16:475e539.

discharges (discharged alive or deceased), there is significant variation in the rate of live discharge between the 10th and 90th percentiles (see Table 11 below). Most notably, hospices at the 95th percentile discharged 50 percent or more of their patients alive.

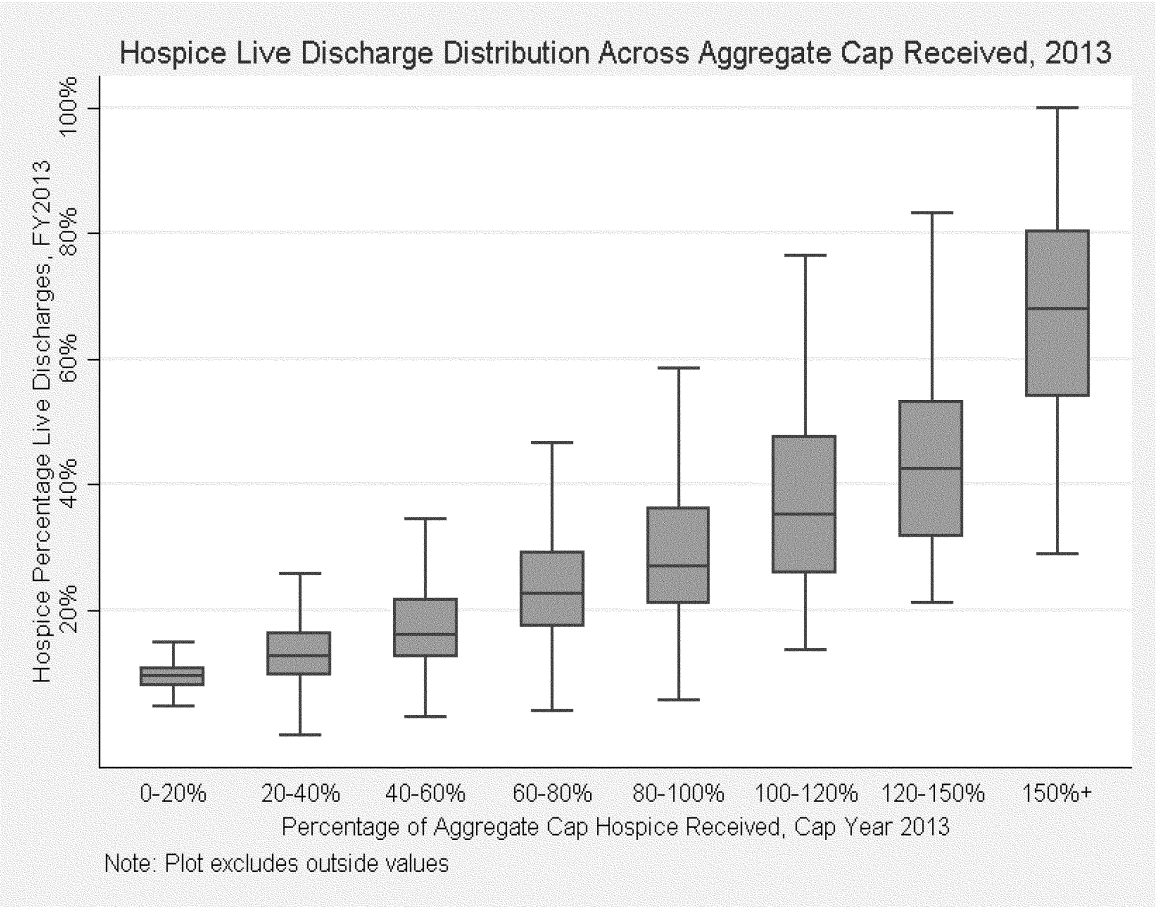
TABLE 11—DISTRIBUTION OF LIVE DISCHARGE RATES IN FY 2013 FOR HOSPICES WITH 50 OR MORE LIVE DISCHARGES

Statistic	Live discharge rate %
5th Percentile	8.1
10th Percentile	9.5
25th Percentile	12.9
Median	18.3
75th Percentile	26.6
90th Percentile	39.1
95th Percentile	50.0

Note: n = 3,096.

We analyzed hospices' aggregate cap status to determine whether there is a relationship between live discharge rates and their aggregate cap status. As described in section III.4.C and section III.D, when the Medicare Hospice Benefit was implemented, the Congress included an aggregate cap on hospice payments, which limits the total aggregate payments any individual hospice can receive in a year. Our FY 2013 analytic file contained 3,061 hospices with aggregate cap information and with more than 50 discharges in FY 2013. We found that 40.3 percent of hospices above the 90th percentile were also above the aggregate cap for the 2013 cap year. Conversely, only 3.8 percent of hospices below the 90th percentile were above the aggregate cap. As illustrated by the box plot below, the vertical axis represents the hospices' live discharge rates in FY 2013 and the horizontal axis represents the total payments hospices received at the end of the cap year of November 2012 through October 2013 relative to the total cap amount. Hospices under 100 percent on the X-axis are below the cap and those 100 percent or higher on the X-axis are above the cap. Our analysis found that hospices with higher live discharge rates are also above the cap. Specifically, the top of the rectangle represents the 75th percentile of live discharge rates, the middle line represents the median for that group, and the bottom of the rectangle is the 25th percentile of live discharge rates among all hospices ending the year within the range of cap percentages of live discharge rates as indicated by the horizontal axis (see Figure 2 below). We found that there appears to be a relationship with hospices with high live discharge rates and those that are above the aggregate cap.

FIGURE 2: DISTRIBUTION OF HOSPICE LIVE DISCHARGE RATES BY HOSPICE PAYMENT RECEIVED RELATIVE TO THE HOSPICE'S AGGREGATE CAP AMOUNT, FY 2013



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In FY 2013, we found that hospices with high live discharge rates also, on average, provide fewer visits per week. Those hospices with live discharge rates at or above the 90th percentile provide, on average, 3.97 visits per week. Hospices with live discharge rates below the 90th percentile provide, on average, 4.48 visits per week. We also found in FY 2013 that, when focusing on visits classified as skilled nursing or medical social services, hospices with live discharge rates at or above the 90th percentile provide, on average, 1.91 visits per week versus hospices with live discharge rates below the 90th percentile that provide, on average, 2.35 visits per week.

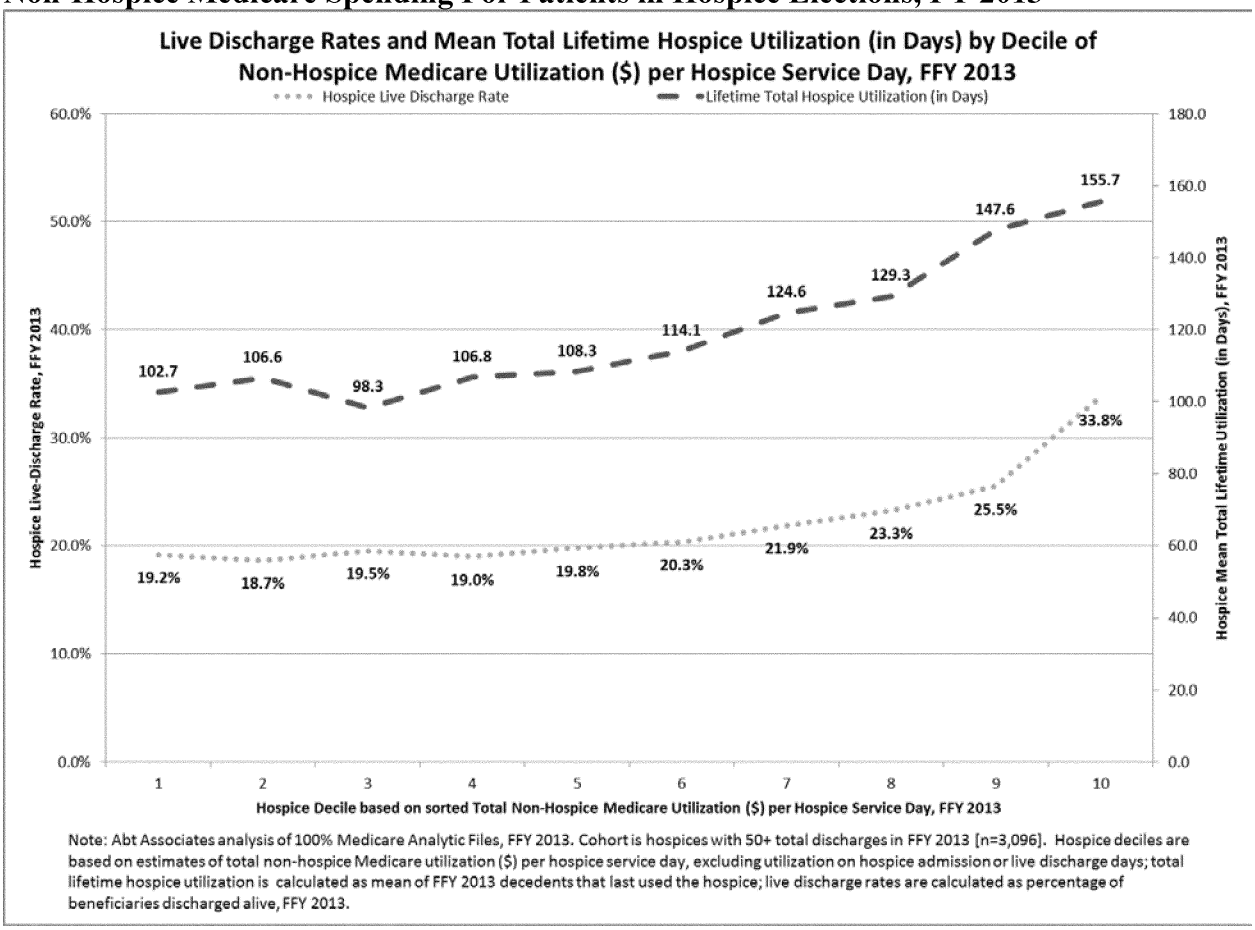
We examined whether there was a relationship between hospices with high live discharge rates, average length of stay, and non-hospice spending per beneficiary per day (see Table 12 and Figure 3 below). As described above in section III.A.2, we identified instances, in the aggregate and illustrated by case studies, where Medicare appeared to be paying for services twice because we would expect them to be covered by the hospice base payment rate, but were receiving items and services characterized as ''non-hospice'' under ''regular'' Medicare. Hospices with patients that, on average, accounted for $30 per day in non-hospice spending while in hospice (decile 10 in Table 12 and Figure 3 below) had live discharge rates that were, on average, about 33.8 percent and had an average lifetime length of stay of 156 days. In contrast, hospices with patients that, on average, accounted for $4 per day in non-hospice spending while in a hospice election (decile 1 in Table 12 and Figure 3 below) had live discharge rates that were, on average, about 19.2 percent and an average lifetime length of stay of 103 days. In other words, hospices in the highest decile, according to their level of non-hospice spending for patients in a hospice election, had live discharge rates and average lifetime lengths of stay that averaged 76 percent and 52 percent higher, respectively, than the hospices in lowest decile.

TABLE 12—MEAN DAILY NON-HOSPICE MEDICARE UTILIZATION AND SUM TOTAL NON-HOSPICE UTILIZATION BY HOSPICE PROVIDER DECILE BASED ON SORTED NON-HOSPICE MEDICARE UTILIZATION PER HOSPICE DAY, FFY 2013

Decile	Non-hospice medicare ($) per hospice service day	Total non-hospice medicare ($)
1	$4.15	$24,683,958
2	6.30	47,971,918
3	7.86	56,871,943
4	9.22	69,879,537
5	10.63	105,399,628
6	12.13	116,697,215
7	13.82	154,499,596
8	15.89	177,609,853
9	19.43	214,073,434
10	29.47	256,226,963
All Hospices	12.89	1,223,914,046

Note: Abt Associates analysis of 100% Medicare Analytic Files, FFY 2013. Cohort is hospices with 50+ total discharges in FFY 2013 [n = 3,096]. Hospice deciles are based on estimates of total non-hospice Medicare utilization ($) per hospice service day, excluding utilization on hospice admission or live discharge days.

Figure 3: Average Hospice Live Discharge Rates and Lifetime Lengths of Stay by Decile of Non-Hospice Medicare Spending For Patients in Hospice Elections, FY 2013



Note: Abt Associates analysis of 100% Medicare Analytic Files, FFY 2013. Cohort is hospices with 50+ total discharges in FFY 2013 [n=3,096]. Hospice deciles are based on estimates of total non-hospice Medicare utilization ($) per hospice service day, excluding utilization on hospice admission or live discharge days; total lifetime hospice utilization is calculated as mean of FFY 2013 decedents that last used the hospice; live discharge rates are calculated as percentage of beneficiaries discharged alive, FFY 2013.

The analytic findings presented above suggests that some hospices may consider the Medicare Hospice program as a long-term custodial benefit rather than an end of life benefit for beneficiaries with a medical prognosis of 6 months or less if the illness runs its normal course. As previously discussed in reports by MedPAC and the OIG, there is a concern that hospices may be admitting individuals who do not meet hospice eligibility criteria. We continue to communicate and collaborate across CMS to improve monitoring and oversight activities. We expect to analyze the additional claims and cost report data reported by hospices in the future to determine whether additional regulatory proposals to reform and strengthen the Medicare Hospice benefit are warranted.

We did not propose any new regulations or solicit any comments with this update on our hospice payment reform research and analyses. However, we received several comments.

A few commenters asserted that the fact that CMS did not release the technical report with the rule prevented them from being able to fully evaluate the impact of hospice payment reform. The 2015 Technical Report, that is planned for release later in 2015, describes some of the findings described above in this section of the rule. The 2015 Technical Report will not contain analyses described in section III.B related to hospice payment reform. All of the analysis in support of hospice payment reform can be found in section III.B of this final rule. In addition, a couple of commenters noted concerns about questionable provider behavior and asked what CMS plans to do in response to these findings. These providers felt that a targeted approach to address program integrity concerns may be more effective than a universal payment reform approach, which may harm those providers who are compliant with coverage requirements. Several commenters also noted concerns that a more timely and coordinated system is needed to address some of the payment vulnerabilities identified in our research. One industry commenter stated that there are many reasons that services are rendered outside of the Medicare hospice benefit and that often these reasons are result from a misunderstanding of the concept of ''relatedness''. This commenter discussed an industry-driven relatedness initiative that has been developed to help inform hospice decision making. Another commenter urged CMS to consider the reasons why hospices would counsel beneficiaries to revoke the hospice benefit to seek care outside of hospice. Several commenters stated that they have no control or knowledge over what services non-hospice providers are rendering or billing. They suggested that CMS provide outreach and education to hospitals, physicians, DME suppliers and other non-hospice providers on those services covered under the Medicare hospice benefit. Some commenters suggested a claims-based edit to prevent inappropriate payments. We appreciate these comments on the ongoing analysis presented and will continue to monitor hospice trends and vulnerabilities within the hospice

program to help inform future policy efforts and program integrity measures.

B. Routine Home Care Rates and Service Intensity Add-On Payment

1. Statutory Authority and Background

Section 3132(a) of the Affordable Care Act amended 1814(i) of the Act by adding paragraph (6)(D), that instructs the Secretary, no earlier than October 1, 2013, to implement revisions to the methodology for determining the payment rates for RHC and other services included in hospice care as the Secretary determines to be appropriate. The revisions may be based on an analysis of new data and information collected and such revisions may include adjustments to per diem payments that reflect changes in resource intensity in providing such care and services during the course of the entire episode of hospice care. In addition, we are required to consult with hospice programs and MedPAC on the revised hospice payment methodology.

This legislation emerged largely in response to MedPAC's March 2009 Report to Congress, which cited rapid growth of for-profit hospices and longer lengths of stay that raised concerns regarding a per diem payment structure that encouraged inappropriate utilization of the benefit.[32] MedPAC stated that a revised payment system would encourage hospice stays consistent with meeting the eligibility requirements of a medical prognosis of 6 months or less if the illness runs its normal course and increase greater provider accountability to monitor patients' conditions. In that same report, MedPAC stated that their goal was to ''strengthen the hospice payment system and not discourage enrollment in hospice, while deterring program abuse.''

As described in section III.A, CMS has transparently conducted payment reform activities and released research findings to the public since 2010. At that time, Abt Associates conducted a literature review and carried out original research to provide background on the current state of the Medicare hospice benefit. The initial contract also included several technical expert panel meetings with national hospice association representatives, academic researchers, and a cross-section of hospice programs that provided valuable insights and feedback on baseline empirical analyses provided by ASPE. A subsequent award to Abt Associates continues to support the dissemination of research analyses and findings, which are located in the ''Research and Analyses'' section of the Hospice Center Web page (*http://cms.hhs.gov/Center/Provider-Type/Hospice-Center.html*). In addition, research findings and payment reform concepts were set out in a 2013 technical report and a 2014 technical report, as well as in the FY 2014 Hospice Wage Index and Payment Rate Update final rule (78 FR 48234) and in the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50452). These research findings and concepts provide a basis for an important initial step toward payment reform outlined in section III.B.2 below.

Over the past several years, MedPAC, the Government Accountability Office (GAO), and OIG, have all recommended that CMS collect more comprehensive data to better evaluate trends in utilization of the Medicare hospice benefit. Furthermore, section 3132(a)(1)(C) of the Affordable Care Act specifies that the Secretary may collect additional data and information on cost reports, claims, or other mechanisms as the Secretary determines to be appropriate. We have received many suggestions for ways to improve data collection to support larger payment reform efforts in the future. Based on those suggestions and industry feedback, we began collecting additional information on the hospice claim form as of April 1, 2014.[33] Additionally, revisions to the cost report form for freestanding hospices became effective for cost reporting periods beginning on or after October 1, 2014. The instructions for completing the revised freestanding hospice cost report form are found in the Medicare Provider Reimbursement Manual-Part 2, chapter 43.[34] Once available, we expect the data from hospice claims and cost reports to provide more comprehensive information on the costs associated with the services provided by hospices to Medicare beneficiaries by level of care.

a. U-Shaped Payment Model

For over a decade, MedPAC and other organizations have reported findings that suggest that the hospice benefit's fixed per-diem payment system is inconsistent with the true variance of service costs over the course of an episode. Specifically, MedPAC cited both academic and non-academic studies, as well as its own analyses (as summarized and articulated in MedPAC's 2002,[35] 2004,[36] 2006,[37] 2008[38] and 2009[39] Reports to Congress), demonstrating that the intensity of services over the duration of a hospice stay manifests in a 'U-Shaped' pattern (that is, the intensity of services provided is higher both at admission and near death and, conversely, is relatively lower during the middle period of the hospice episode). Since hospice care is most profitable during the long, low-cost middle portions of an episode, longer episodes have very profitable, long middle segments. This financial incentive appears to have resulted in hospices enrolling beneficiaries that are not truly eligible for the benefit (that is, do not have a life expectancy of 6 months or less) and ''may lead some patients, families, and providers to implicitly regard hospice as a source of basic health care for failing patients who did not qualify for skilled nursing facility or home health care and did not qualify for Medicaid or otherwise could not afford other sources of long-term custodial care,''[40] rather than the end-of-life care for which the benefit was originally designed.

In its March 2009 report, ''Reforming Medicare's Hospice Benefit,'' MedPAC recommended that the Congress require CMS to implement a payment system that would adjust per-diem hospice rates based on the day's timing within the hospice episode, with the express goal of mitigating the apparent inconsistency between payments and resource utilization (that is, costs) in hospice episodes.[41] Specifically, MedPAC recommended that payments near the beginning and ending of a stay be set at higher levels (weighted upwards) and payments during the

[32] Medicare Payment Advisory Commission (MedPAC). ''Reforming Medicare's Hospice Benefit.'' *Report to the Congress: Medicare Payment Policy*. March, 2009. Web. 18 Feb. 2015. *http://medpac.gov/documents/reports/Mar09_Ch06.pdf?sfvrsn=0.*

[33] CMS Transmittal 2864. ''Additional Data Reporting Requirements for Hospice Claims''. Available at: *http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R2864CP.pdf.*

[34] *http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021935.html?DLPage=1&DLSort=0&DLSortDir=ascending.*

[35] *http://www.medpac.gov/documents/contractor-reports/report-to-the-congress-medicare-beneficiaries'-access-to-hospice-(may-2002).pdf.*

[36] *http://www.medpac.gov/documents/reports/June04_ch6.pdf.*

[37] *http://www.medpac.gov/documents/reports/Jun06_Ch03.pdf.*

[38] *http://www.medpac.gov/documents/reports/Jun08_Ch08.pdf.*

[39] *http://www.medpac.gov/documents/reports/Mar09_Ch06.pdf.*

[40] *http://www.medpac.gov/documents/reports/Mar09_Ch06.pdf?sfvrsn=0.*

[41] Medicare Payment Advisory Commission (MedPAC). ''Reforming Medicare's Hospice Benefit.'' *Report to the Congress: Medicare Payment Policy*. March, 2009. Web. 18 Feb. 2015. *http://medpac.gov/documents/reports/Mar09_Ch06.pdf?sfvrsn=0.*

middle portion of care be set at lower levels (weighted downwards) to better mirror documented variation in cost over an episode's duration. Two primary weighting schemes were outlined in MedPAC's 2009 Report: A ''larger intensity adjustment'' (essentially a deeper U-shaped payment model, paying twice the base rate in the first 30/last 7 days and just a quarter of the daily rate in days 181+) and a ''smaller intensity adjustment'' (a relatively shallower U-shaped model, paying 1.5 times the base rate in the first 30/last 7 days and 0.375 times the daily rate in days 181+).

In its March 2015 Report to the Congress,[42] MedPAC reiterated its continued concerns regarding the ''mismatch between payments and hospice service intensity'' in the current hospice system and the ongoing need for payment reform. The Commission stated that ''Medicare's hospice payment system is not well aligned with the costs of providing care throughout a hospice episode. As a result, long hospice stays are generally more profitable than short stays.'' The Commission previously ''recommended that the hospice payment system be reformed to better match service intensity throughout a hospice episode of care (higher per diem payments at the beginning of the episode and at the end of the episode near the time of death and lower payments in the middle)''.

Other organizations have also explored the concept of a U-shaped payment model. ASPE, in conjunction with its contractor, Acumen LLC, analyzed hospice enrollment and utilization data. ASPE's research demonstrated that the resource use curve becomes more pronounced as episode lengths increase for hospice users, indicating that this effect occurs because resource use declines more substantially for the middle days relative to beginning and ending days in longer episodes of hospice care than it does for shorter episodes. The decline in the center of the 'U' is deeper for those users who receive RHC only during their hospice episode, which is the case for the majority of hospice patients. Recently, CMS' contracting partner, Abt Associates, conducted analysis of FY 2013 hospice claims data, showing that of the approximately 92 million hospice days billed, 97.45 percent are categorized as RHC.

b. Tiered Payment Model

As required under section 3132(a) of the Affordable Care Act, CMS also explored other options for hospice payment reform. Taking into consideration the research and analysis performed by MedPAC, ASPE, and others, our payment reform contractor, Abt Associates, examined hospice utilization data and modeled a hypothetical ''tiered'' payment system similar to MedPAC's U-shaped payment model by paying different per-diem rates for RHC according to the timing of the RHC day in the patient's episode of care. However, because analysis of hospice claims data found that a relatively high percentage of patients were not receiving skilled visits during the last days of life, the ''tiered payment model'' made the increased payments at end of life contingent on whether skilled services were provided. As reported in the FY 2015 Hospice Payment Rate Update final rule, in CY 2012, approximately 14 percent beneficiaries did not receive any skilled visits in the last 2 days of life (79 FR 50461). While this could be explained, in part, by sudden or unexpected death, the high percentage of beneficiaries with no skilled visits in the last 2 days of life causes concern as to whether beneficiaries and their families are not receiving needed hospice care and support at the very end of life. If hospices are actively engaging with the beneficiary and the family throughout the election, we would expect to see skilled visits during those last days of life. Therefore, in the tiered payment model, making the increased payment at the end of life contingent on whether skilled visits occurred in the last 2 days of life was thought of as one way to provide additional incentive for care to be provided when the patient needs it most.

The groupings in the tiered payment model, presented in Table13 below, were developed through Abt Associates' analyses of resource utilization over the hospice episode and clinical input. Using all RHC hospice service days from 2011, Abt then developed payment weights for each grouping by calculating its relative resource utilization rate compared to the overall estimate of resource use across all RHC days (see Table 13 below).

TABLE 13—AVERAGE DAILY RESOURCE USE BY PAYMENT GROUPS IN THE TIERED PAYMENT MODEL, CY 2011

Group	Days of hospice	Implied weight
Group 1: RHC Days 1–5	2,800,144	2.3
Group 2: RHC Days 6–10	2,493,004	1.11
Group 3: RHC Days 11–30	7,767,918	0.97
Group 4: RHC Days 31+	65,958,740	0.86
Group 5: RHC During Last Seven Days, Skilled Visits During Last 2 Days	2,832,620	2.44
Group 6: RHC During Last Seven Days, No Skilled Visits During Last 2 Days	476,809	0.91
Group 7: RHC When Hospice Length of Stay is 5 Days or Less, Patient Discharged as ''Expired''.	510,787	3.64
Total	82,840,022	1.0

The payment weighting scheme in this system, derived from observed resource utilization across the entire episode, would produce higher payments during times when service is more intensive (the beginning of a stay or the end of life) and produce lower payments during times when service is less intensive (such as the ''middle period'' of the stay). The tiered payment model was discussed in more detail in the FY 2014 Hospice Wage Index final rule (78 FR 48271) and in the Hospice Study Technical Report issued in April of 2013.[43]

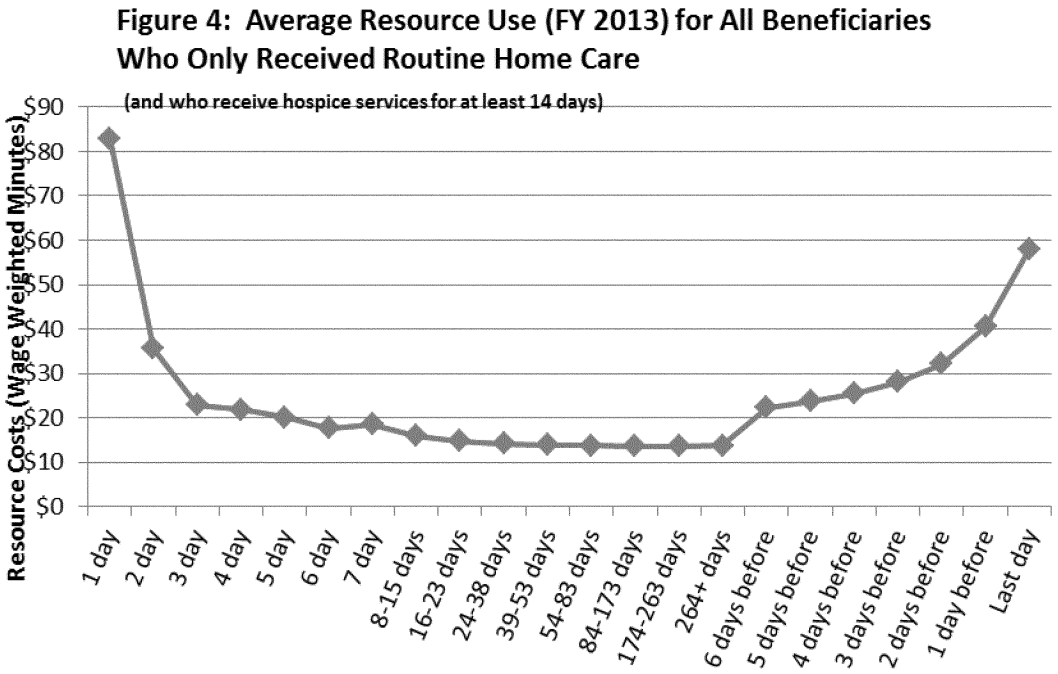
c. Visits During the Beginning and End of a Hospice Election

Updated analysis of FY 2013 hospice claims data continues to demonstrate a U-Shaped pattern of resource use. Increased utilization at both the beginning and end of a stay is demonstrated in Figure 4 below, where

[42] *http://medpac.gov/documents/reports/chapter-12-hospice-services-(march-2015-report).pdf?sfvrsn=0.*

[43] *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/Downloads/Hospice-Study-Technical-Report.pdf*

FY 2013 resource costs (as captured by wage-weighted minutes) are markedly higher in the first 2 days of a hospice election and once again in the 6 days preceding the date of death and on the date of death itself.



Analysis of skilled nursing and social work visits provided on the first day of a hospice election shows that nearly 89 percent of patients received a visit totaling 15 minutes or more, while 11 percent did not receive a skilled nursing visit or social work visit on the first day of a hospice election (see Table 14 below). The percentage of patients who did not receive a skilled nursing or social work visit on a given day increased to nearly 38 percent on the second day of a hospice election. In accordance with the hospice CoPs at § 418.54(a), hospices are required to have a RN complete an initial assessment of the hospice patient within 48 hours of election; therefore, we would expect to see a nursing visit occurring within the first 2 days of an election in order to be in compliance with the CoPs. We found that, in FY 2013, 96 percent of hospice patients did receive a skilled visit in the first 2 days of a hospice election. The percentage of patients that did not receive a skilled nursing or social work visit on any given day increased to about 65 percent by the sixth day of a hospice election. Overall, on any given day during the first 7 days of a hospice election, nearly 50 percent of the time the patient is not receiving a skilled visit (skilled nursing or social worker visit).

TABLE 14—FREQUENCY AND LENGTH OF SKILLED NURSING AND SOCIAL WORK VISITS (COMBINED) DURING THE FIRST SEVEN DAYS OF A HOSPICE ELECTION, FY 2013

Visit length	First day (%)	Second day (%)	Third day (%)	Fourth day (%)	Fifth day (%)	Sixth day (%)	Seventh day (%)	First through seventh day (%)
No Visit	11.0	37.7	56.0	59.1	62.0	65.6	64.2	49.3
15 mins to 1 hr	12.8	27.1	22.2	20.6	20.4	20.1	22.3	20.7
1 hr 15 m to 2 hrs	32.0	21.4	14.3	13.4	12.2	10.4	10.2	16.9
2 hrs 15 m to 3 hrs	22.8	8.6	4.8	4.5	3.6	2.5	2.2	7.5
3 hrs 15 m to 3hrs45m	8.5	2.6	1.3	1.2	0.9	0.6	0.5	2.4
4 or more hrs	13.0	2.6	1.3	1.2	0.9	0.7	0.6	3.2
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: FY 2013 hospice claims data from the Standard Analytic Files for CY 2012 (as of June 30, 2013) and CY 2014 (as of December 31, 2013).

As we noted above, we are concerned that many beneficiaries are not receiving skilled visits during the last few days of life. At the end of life, patient needs typically surge and more intensive services are warranted. However, analysis of FY 2013 claims data shows that on any given day during the last 7 days of a hospice election, nearly 50 percent of the time the patient is not receiving a skilled visit (skilled nursing or social worker visit) (see table 15 below). Moreover, on the day of death nearly 30 percent of beneficiaries did not receive a skilled visit (skilled nursing or social work visit).

TABLE 15—FREQUENCY AND LENGTH OF SKILLED NURSING AND SOCIAL WORK VISITS (COMBINED) DURING THE LAST SEVEN DAYS OF A HOSPICE ELECTION, FY 2013

Visit length (%)	Day of death (%)	One day before death (%)	Two days before death (%)	Three days before death (%)	Four days before death (%)	Five days before death (%)	Six days before death (%)	Last seven days combined (%)
No Visit	27.8	38.7	45.2	49.8	53.2	55.8	58.0	46.3
15 mins to 1 hr	23.9	27.9	26.5	25.1	24.2	23.5	22.8	24.9
1 hr 15 m to 2 hrs	24.2	19.3	17.4	15.9	14.5	13.6	12.7	17.1
2 hrs 15 m to 3 hrs	12.3	7.2	5.9	5.1	4.5	4.1	3.8	6.3
3 hrs 15 m to 3hrs45m	4.4	2.4	1.9	1.6	1.4	1.2	1.1	2.1
4 or more hrs	7.4	4.3	3.0	2.4	2.1	1.9	1.6	3.4
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: FY 2013 hospice claims data from the Standard Analytic Files for CY 2012 (as of June 30, 2013) and CY 2014 (as of December 31, 2013).

We would expect that skilled visits are provided to the patient and family at end of life as the changing condition of the individual and the imminence of death often warrants frequent changes to care to alleviate and minimize symptoms and to provide support for the family. Although previous public comments stated that patients and families sometimes request no visits at the end of life, and there are rare instances where a patient passes away unexpectedly, we would expect that these instances would be rare and represent a small proportion of the noted days without visits at the end of life. However, the data presented in Table 15 above suggests that it is not rare for patients and families to have not received skilled visits (skilled nursing or social work visits) at the end of life. In the FY 2015 Hospice Wage Index and Payment Rate Update final rule, we noted that nearly 5 percent of hospices did not provide any skilled visits in the last 2 days of life to more than 50 percent of their decedents receiving routine home care on those last 2 days and 34 hospices did not make any skilled visits in the last 2 days of life to any of their decedents who died while receiving routine home care (79 FR 50462).

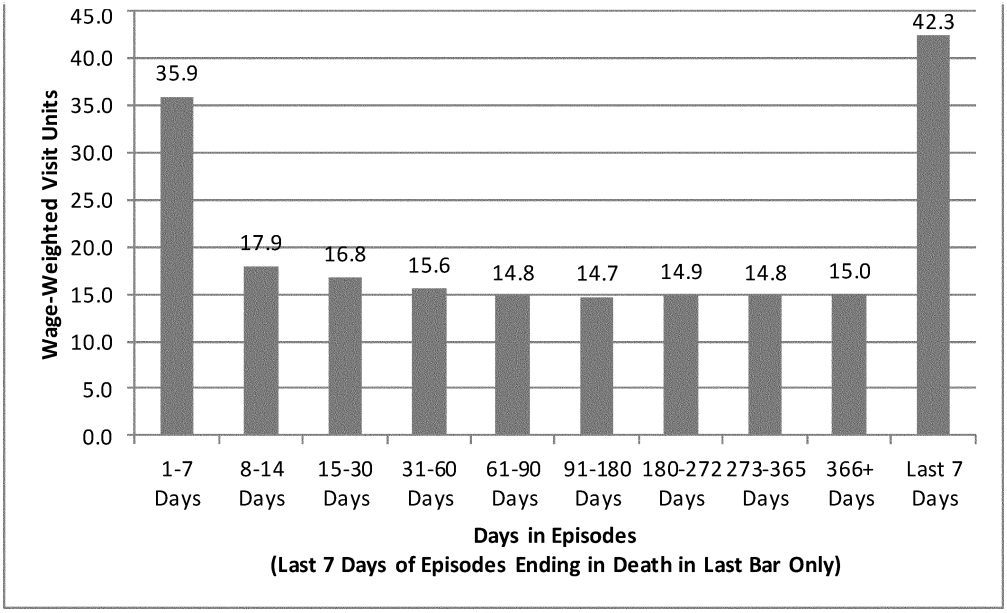
2. Routine Home Care Rates

RHC is the basic level of care under the Hospice benefit, where a beneficiary receives hospice care, but remains at home. With this level of care, hospice providers are currently reimbursed per day regardless of the volume or intensity of services provided to a beneficiary on any given day. As stated in the FY 2014 Hospice Wage Index and Payment Rate Update final rule (78 FR 48234), ''it is CMS' intent to ensure that reimbursement rates under the Hospice benefit align as closely as possible with the average costs hospices incur when efficiently providing covered services to beneficiaries.'' However, as discussed in section III.B.1 above, there is evidence of a misalignment between the current RHC per diem payment rate and the cost of providing RHC. In order to help ensure that hospices are paid adequately for providing care to patients regardless of their palliative care needs during the stay, while at the same time encouraging hospices to more carefully determine patient eligibility relative to the statutory requirement that the patient's life expectancy be 6 months or less, in the FY 2016 Hospice Wage Index and Payment Rate Update proposed rule (80 FR 25831), we proposed to use the authority under section 1814(i)(6)(D) of the Act, as amended by section 3132(a) of the Affordable Care Act to revise the current RHC per diem payment rate to more accurately align the per diem payments with visit intensity (that is, the cost of providing care for the clinical service (labor) components of the RHC rate). We proposed to implement, in conjunction with a SIA payment discussed in section III.B.3 below, two different RHC rates that would result in a higher base payment rate for the first 60 days of hospice care and a reduced base payment rate for days 61 and beyond of hospice care.

The proposed two rates for RHC were based on an extensive body of research concerning visit intensity during a hospice episode as cited throughout this section. We consider a hospice ''episode'' of care to be a hospice election period or series of election periods. Visit intensity is commonly measured in terms of wage-weighted minutes and reflects variation in the provision of care for the clinical service (labor) components of the RHC rate. The labor components of the RHC rate comprise nearly 70 percent of the RHC rate (78 FR 48272). Therefore, visit intensity is a close proxy for the reasonable cost of providing hospice care absent data on the non-labor components of the RHC rate, such as drugs and DME. As shown in Figures 5 and 6 below, the daily cost of care, as measured wage-weighted minutes, declines quickly for individual patients during their hospice episodes, and for long episode patients, remains low for a significant portion of the episode. Thus, long episode patients are potentially more profitable than shorter episode patients under the current per diem payments system in which the payment rate is the same for the entire episode. At the same time, the percent of beneficiaries that enter hospice less than 7 days prior to death has remained relatively constant (approximately 30 percent) over this time period, meaning the increase in the average episode length can be attributed to an increasing number of long stay patients. We found that the percent of episodes that are more than 6 months in length has nearly doubled from about 7 percent in 1999 to 13 percent in 2013.

Figure 5 displays the pattern of wage-weighted minutes by time period within beneficiary episodes, but separating out the last 7 days of the episode for decedents. The wage-weighted minutes for the last 7 days are displayed separately by the bar furthest to the right of the Figure 5. The visit intensity curve declines rapidly after 7 days and then at a slower rate until 60 days when the curve becomes flat throughout the remainder of episodes (excluding the last 7 days prior to death). It is for this reason that we proposed to pay a higher rate for the first 60 days and a lower rate thereafter. It is clear from the figure that visit utilization is constant from day 61 on, until the last 7 days for decedents. We believe the most important reason for implementing a different RHC rate for the first 60 days versus days 61 and beyond is that we must account for differences in average visit intensity between episodes that will end within 60 days and those that will go on for longer episodes.

Figure 5: Wage-Weighted Minutes per RHC Day, CY 2013



As Figure 6 demonstrates, beneficiaries whose entire episode is between 8 and 60 days do have higher wage-weighted minute usage than those with longer stays. Using 60 days for the high RHC rate as opposed to an earlier time assures that hospices have sufficient resources for providing high quality care to patients (for example, 1 through 60 days) whose average daily visit intensity is higher than for longer stay patients.

Figure 6: RHC Wage-Weighted Minutes Per Day, Minus Last 7 Days, All Episodes Ending in CY 2013

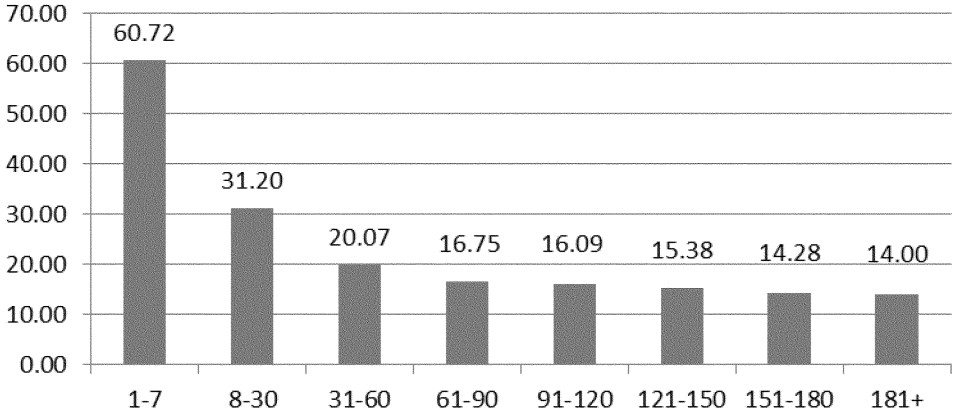


Table 16 below describes the average wage-weighted minutes for RHC days in FY 2014, calculated both in specific phases within an episode as well as overall.

TABLE 16—AVERAGE WAGE WEIGHTED MINUTES PER RHC DAY, FY 2014

Phase of days in episode	Average wage-weighted minutes	RHC days	Ratio of wage weighted minutes for each row divided by wage weighted minutes for days 1–7
1–7 Days	$39.29	5,446,868	1.0000
8–14 Days	20.12	4,310,630	0.5121
15–30 Days	17.96	7,752,375	0.4570
31–60 Days	16.09	10,758,904	0.4097
61–90 Days	15.44	8,123,686	0.3930
91–180 Days	14.93	16,271,786	0.3799
181–272 Days	14.78	10,118,998	0.3762
273–365 Days	14.90	6,876,814	0.3793
365 up Days	15.05	16,029,597	0.3830
Total RHC Days	17.21	85,689,658	0.4380

In Table 16, the average wage-weighted minutes per day for days 1 through 7 describe the baseline for the other phases of care, set at a value of one. Given the demands of the initial care in an episode, resource intensity is highest during this first week of an episode, and resource needs decline steadily over the course of an episode. The overall average wage-weighted minutes per day across all RHC days equals $17.21 as described in the last row in table 16 above. We then calculated the average wage-weighted minute costs for the two groups of days (Days 1 through 60 and Days 61+) utilizing FY 2014 RHC days multiplied by the 2013 Bureau of Labor Statistics (BLS) average hourly wage values for the relevant disciplines, as follows: Skilled Nursing: $40.07; Physical Therapy: $55.93; Occupational Therapy: $55.57; Speech Language Pathology: $60.21; Medical Social Services: $38.25; and Aide: $14.28. The average wage-weighted minute cost for days 1 through 60 equals to $21.69 while the average wage weighted minutes for days 61 or more equals $15.01.

To calculate the RHC payment rate for days 1 through 60, we compared the average wage-weighted minutes per day for days 1 through 60 to the overall average wage-weighted minutes per day multiplied by the labor portion of the FY 2015 RHC rate (column 4 in Table 17 below), which equals ($21.69/$17.21)*$109.48 = $137.98. Similarly, the RHC payment rate for days 61+ equals the average wage-weighted minutes per day for days 61+ divided by the overall average wage-weighted minutes per day multiplied by the labor portion of the FY 2015 RHC rate (column 4 in Table 17 below), which equals ($15.01/$17.21)*$109.48 = $95.49.

TABLE 17—FY 2015 RHC RATE REVISED LABOR PORTION CALCULATION

(1)	(2)	(3)	(4)	(5)	(6)
	FY 2015 RHC Payment rate	RHC Labor-related share	FY 2015 RHC Payment rate—labor portion	Average wage weighted minutes for RHC differential rate/overall RHC average wage weighted minutes	Revised FY 2015 labor portion
Days 1–60	$159.34	× 0.6871	$109.48	× 1.2603 ($21.69/$17.21)	$137.98
Days 61+	159.34	× 0.6871	109.48	× 0.8722 ($15.01/$17.21)	95.49

As discussed in section III.C of this rule, currently, the labor-related share of the hospice payment rate for RHC is 68.71 percent. The non-labor share is equal to 100 percent minus the labor-related share, or 31.29 percent. Given the current base rate for RHC for FY 2015 of $159.34, the labor and non-labor components are as follows: For the labor-share portion, $159.34 multiplied by 68.71 percent equals $109.48; for the non-labor share portion, $159.34 multiplied by 31.29 percent equals $49.86. After determining the labor portion for the RHC rate for the first 60 days and the labor portion for the RHC rate for days 61 and over, we add the non-labor portion ($49.86) to the revised labor portions. In order to maintain budget neutrality, as required under section 1814(i)(6)(D)(ii) of the Act, the RHC rates will be adjusted by a ratio of the estimated total labor payments for RHC using the current single rate for RHC to the estimated total labor payments for RHC using the two rates for RHC and taking into account area wage adjustment. This ratio results in a budget neutrality adjustment of 0.9978, which is due to differences in the average wage index for days 1–60 compared to days 61 and beyond, as shown in column 3 in Table 18 below. Finally, adding the revised labor portion with budget neutrality to the non-labor portion results in revised FY 2015 RHC payment rates of $187.54 for days 1 through 60 and $145.14 for days 61 and beyond.

TABLE 18—RHC BUDGET NEUTRALITY ADJUSTMENT FOR RHC RATES

(1)	(2)	(3)	(4)	(5)	(6)
	Revised FY 2015 Labor portion	Budget neutrality factor [1]	Revised FY 2015 labor portion with budget neutrality	FY 2015 Non-labor portion	FY 2015 Revised RHC payment rates
Days 1–60	$137.98	× 0.9978	$137.68	$49.86	$187.54
Days 61+	95.49	× 0.9978	95.28	49.86	145.14

[1] The budget neutrality adjustment is required due to differences in the average wage index for days 1–60 compared to days 61 and beyond.

The RHC rates for days 1 through 60 and days 61 and over (column 6 of Table 18 above) would replace the current single RHC per diem payment rate with two new RHC per diem rates for patients who require RHC level of care during a hospice election. In order to mitigate potential high rates of discharge and readmissions, we proposed that the count of days follow the patient. For hospice patients who are discharged and readmitted to hospice within 60 days of that discharge, his or her prior hospice days would continue to follow the patient and count toward his or her patient days for the receiving hospice upon hospice election. The hospice days would continue to follow the patient solely to determine whether the receiving hospice would receive payment at the day 1 through 60 or day 61 and beyond RHC rate. Therefore, we consider an ''episode'' of care to be a hospice election period or series of election periods separated by no more than a 60 day gap.

Summaries of the public comments and our responses to comments on all aspects of the RHC payment rates are summarized below:

Comment: Nearly all commenters were supportive of our proposal to create two RHC rates, one higher rate for the first 60 days of hospice care and a second lower rate for days 61 and beyond. MedPAC supported both the proposed new structure for RHC payments and the proposed Service Intensity Adjustment (SIA) in section III.B.3 below, and stated that these two proposals begin to better align payments with the u-shaped pattern of hospice visits throughout an episode. Several commenters went on to add that the proposed RHC rates would increase reimbursement and accurately align the higher cost of care for relatively short stay patients while fairly reimbursing the lower cost of care for long stay patients.

Response: We thank the commenters for their support. We agree that our proposal to create two RHC rates, one for days 1–60 and another for days 61 and beyond, addresses observed differences in resource intensity between the first 60 days of hospice care and hospice care that extends beyond 60 days.

Comment: Several commenters questioned why CMS differentiated between a higher and a lower RHC rate at 60 days. Several commenters stated that the costs do not decrease after 60 days and that costs often increase near the end of life. While the proposed SIA, discussed in section III.B.3 below, helps to compensate for increased costs at end of life, the proposed RHC rates do not take into consideration the increased costs of medications, sometimes extra equipment, nor the real costs of providing care. One commenter stated that once a patient exceeds 60 days of care, the lower RHC rate simply re-introduces the current incentive to provide long spells of potentially unnecessary care. The commenter went on to add that the proposed RHC rates are, in reality, two flat per diem rates that perpetuate the shortcomings of the current payment approach.

A few commenters recommended that CMS maintain consistency with already established benefit periods and should, instead of differentiating payment at 60 days, differentiate RHC payments between days 1–90 and days 91 and beyond, or even apply the higher rate for the first 6 months and then the lower rate thereafter to maintain consistency with the eligibility requirement of a ''life expectancy of 6 months or less if the illness runs its normal course''. One commenter agreed with CMS' proposal to create two RHC rates, but recommended that in the future, CMS consider establishing a separate rate for the first 7 or 14 days of care and a lower rate thereafter.

Several commenters stated that while they support the proposal to create two RHC rates, further refinements may be necessary in the future. Specifically, one commenter stated that CMS may need to further weight the first 60 days or transition from the first to the second RHC rate earlier than day 61. Several commenters added that CMS may find that hospice payments should be adjusted based on beneficiary characteristics, such as comorbidities and socio-economic status and that CMS should develop a reimbursement methodology that reflects the actual cost of caring for individuals with different diagnoses related to the terminal illness as well as individuals that receive higher cost treatments (for example, chemotherapy, total parenteral nutrition).

Response: As discussed above, visit intensity declines after 7 days of hospice care until day 60 of hospice care when the visit intensity becomes flat throughout the remainder of the hospice episode (excluding the last 7 days prior to death). It is for this reason that we proposed to pay a higher rate for the first 60 days and a lower rate thereafter. CMS did consider establishing an even higher rate for the first 7 days of care; however, given concerns voiced by the National Hospice and Palliative Care Organization (NHPCO), MedPAC, and others that short lengths of stay may prevent patients and family caregivers from benefiting fully from the range of specialized services and compassionate care that hospices offer, we decided to propose a higher RHC rate for days 1–60 and an lower RHC rate for days 61 and beyond as to not provide a larger incentive for hospices to target short stay patients. In addition to the higher RHC rate for days 1–60, the proposed SIA, discussed in section III.B.3 below, would increase the reimbursement further for short stay patients, including those with lengths of stay of 7 days or less, as long as skilled visits by a registered nurse or social worker are provided to the patient at end of life. For those commenters that suggested CMS pay a higher rate for the first 90 days and then a lower rate thereafter, we concur with MedPAC's comments on the proposed rule cautioning against any changes to the proposed structure that would lengthen the period for the initial payment rate (for example, days 1–90) because that would result in a lower initial payment rate and represent

a smaller increase in reimbursement for shorter stays.

CMS recently revised the freestanding hospice cost report form for cost reporting periods beginning on or after October 1, 2014. On April 1, 2014, we began requiring hospices to report on the hospice claim, in line item detail, the charges associated with infusion pumps and non-injectable and injectable prescription drugs (as dispensed). In section III.F of this final rule, we are clarifying that, effective October 1, 2015, hospices are to report all patient diagnoses (related and unrelated) on the hospice claim form. Once several years of additional data are available for analysis, we will determine whether additional changes to the hospice payment system are needed in the future, including analysis to determine whether a case-mix system for hospice payments would be an appropriate, viable option.

Comment: Several commenters stated that the proposed RHC rates would allow some hospices to ''game the system'' by receiving the full benefit of the initial 60 day period then discharging the patient, leaving other smaller, non-profit hospices to assume care for someone with decreased reimbursement. Commenters expressed concern that this payment differential could provide an incentive for hospices to target and admit larger numbers of short stay patients, and to discharge or decline to admit, patients who hospice care would be paid at the lower rate causing more patients to show up at the emergency room multiple times for pain management and symptom control. One commenter stated that the proposed RHC rates could cause hospices to shift away from caring for patients with non-cancer diagnoses with unpredictable lengths of stay. Commenters further urged CMS to monitor for discharges around day 60 and to put mechanisms in place to prevent hospices from discharging a patient around day 60. Some commenters suggested that CMS address the areas of illegal and unethical behaviors of those individual hospices who do not comply with the rules and regulations of the Medicare hospice benefit and that CMS not apply a universal payment reform that impacts those hospice providers who are in compliance with the rules and regulations.

Response: Reiterating what we stated in the FY 2016 Hospice Wage Index and Payment Rate Update proposed rule (80 FR 25831), we will monitor the impact of this proposal, including trends in discharges and revocations, and propose future refinements if necessary. We want to remind hospices that, pursuant to section 418.26, there are only three reasons why a hospice may discharge a patient—(1) If the hospice patient moves outside of the hospice's service area or transfers to another hospice; (2) if the hospice determines the patient is no longer terminally ill; or (3) for cause when the patient or others living in the patient's home are disruptive, abusive, or uncooperative. Program integrity and oversight efforts are being considered to address fraud and abuse and such efforts include, but are not limited to, medical review, MAC audits, Zone Program Integrity Contractor actions, RAC activities, or suspension of provider billing privileges.

Comment: Commenters stated that the proposed RHC rates do not address the challenges faced by hospices with very short stay patients. A few commenters stated that instead of adding complexity to the billing process, CMS should target its efforts on ensuring beneficiaries are informed early and often on the value of services they are entitled to under the Medicare hospice benefit and target providers experiencing high profit margins and separately evaluate the level and intensity of such providers and those providers' case-mix and staffing strategies.

Response: While the proposed RHC rates themselves do not specifically address very short stay patients, the proposed SIA, discussed in section III.B.3 below, would apply to the last 7 days of life. We believe that the higher RHC rate in conjunction with the proposed SIA payment will mitigate some of the financial concerns associated with these very short stay patients. CMS makes every effort to provide outreach and education to Medicare beneficiaries and providers regarding all Medicare benefits, including those services available under the Medicare hospice benefit. Information regarding benefit coverage is available via MLN articles, the annual Medicare & You handbook, and on the Medicare.gov Web site, to name a few. We will continue to monitor provider behavior and will continue efforts to protect beneficiary access to high quality, coordinated and comprehensive hospice care under the Medicare hospice benefit.

Comment: Most commenters, including MedPAC, generally agreed that for hospice patients who are discharged and readmitted to hospice within 60 days of that discharge, his or her prior hospice days should continue to follow the patient and count toward his or her patient days for the receiving hospice upon hospice election. MedPAC stated that this policy is necessary to minimize financial incentives for hospice patients to be dis-enrolled and re-enrolled, or transferred between hospice providers, for the purposes of obtaining a higher payment rate. MedPAC went on to state that they would also support a longer ''break'' than 60 days, but does not believe this threshold should be shorter. A few commenters did not agree with having the hospice days follow the patient and added that concerns exist about instances where the patient transfers to another hospice and the inequities for the second hospice if they are not entitled to the higher RHC rate after 60 days have lapsed. A few commenters suggested that CMS allow the second hospice to receive the higher RHC rate or an add-on payment just for the first seven days of a new election after being discharged from a different hospice provider. One commenter suggested that for live discharges prior to 60 days, the lower tiered RHC rate be applied to all claims where a patient is in their initial 60 days. Other commenters suggested that CMS monitor this issue and whether it has any effect on access to hospice care. One commenter suggested that CMS' proposed ''episode'' definition (a hospice election period or series of election periods separated by no more than a 60 day gap) may be most appropriate to apply to those hospices that share common ownership rather than to all hospice providers.

Response: We thank the commenters for their support. We want to reiterate that in order to mitigate potential high rates of discharge and readmissions (''churning''), we proposed that the count of days follow the patient. We continue to believe that this policy is both necessary and appropriate. Allowing for a higher payment for the first seven days of a new hospice election without a gap in hospice care of greater than 60 days goes against our intent to mitigate the incentive to discharge and readmit patients at or around day 60 for the purposes of obtaining a higher payment. As we stated above, we will monitor the impact of the new RHC rates policy based on claims data, including trends in discharges and revocations, and implement future refinements to the rates or policy changes, if necessary. In response to the commenter that suggested that for live discharges prior to 60 days, the lower tiered RHC rate be applied to all claims where a patient is in their initial 60 days, we will take this suggestion under advisement for future rulemaking after analyzing any trends in discharges and revocations as a result of the policy changes finalized in this rule. Finally, the Medicare claims processing

system is not able to identify hospices that share common ownership. In the future, if this capability is developed in the future, we will consider whether it would be appropriate to restrict the application of episode definition to hospices that share common ownership.

Comment: Some commenters expressed concern about the ability of CMS, the state Medicaid agencies, and hospices to make the necessary systems changes and undertake education and training to be ready to implement the new billing system by October 1, 2015. Commenters urged CMS to be mindful to the challenges associated with any new hospice payment system that affects Medicaid. A few commenters suggested that CMS should pilot test this new methodology before implementation in order to determine any unintended consequences as well as better determine the administrative burden imposed. Other commenters suggested that CMS consider a one-year demonstration project to test the new RHC payment rates for all hospices under the jurisdiction of one MAC. A few commenters stated that the two RHC rates should be phased in, similar to how CMS implemented the new Ambulatory Surgical Center (ASC) payment system and the phase-out of the hospice BNAF. One commenter suggested that CMS delay implementation of this final rule until after ICD–10–CM implementation.

Response: Although some commenters suggested that, before national implementation, CMS should conduct a demonstration project or pilot test the two proposed RHC rates, we do not believe that a demonstration project or pilot test is warranted. CMS has been working with our contractors to develop systems changes to the fullest extent possible in parallel with the development of this rule. Our system maintainers will have their full software development lifecycle to implement these changes. We do not have concerns about the readiness of Medicare systems on October 1, 2015. Regarding hospice system changes, we do not anticipate that this rule will require any changes to hospice billing instructions so systems for submitting claims and receiving Medicare payment should not be affected and the need for retraining billing staff should be limited, but hospices may need to change their internal accounting systems . Further, the data presented in the proposed rule sufficiently demonstrate that CMS needs to implement the proposed RHC payment rate change to better align hospice payments with resource use. Any phase-in of the proposed RHC rates would not be appropriate given the current misalignment between payments and resource use and the ability of CMS to effectively implement the required systems changes. Likewise, CMS does not believe that a delay in the implementation of the two RHC rates would be warranted due to the implementation of ICD–10–CM.

While CMS is ready and able to make the required systems changes to implement a change from a single RHC per diem payment rate to two RHC per diem payment rates, we anticipate that state Medicaid agencies may encounter difficulties in making the necessary systems and software changes to be ready to implement the proposed RHC rates on October 1, 2015. Therefore, we will delay implementation of both the proposed RHC rates and the SIA payment until January 1, 2016 in order to ensure, to the greatest extent possible, that the state Medicaid agencies can likewise implement these changes. Between October 1, 2015 and December 31, 2015, hospices will continue to be paid a single FY 2016 RHC per diem payment amount. Effective January 1, 2016, the RHC rates for days 1 through 60 and days 61 and beyond would replace the single RHC per diem payment rate (the RHC per diem rates are listed in section III.C of this final rule). We assure hospices that CMS and the MACs will take steps to educate and train hospice providers and state Medicaid agencies on the policy changes and associated systems changes finalized in this rule so that hospices and the state Medicaid agencies are ready to implement the two RHC rates on January 1, 2016.

Comment: Several commenters stated that the proposed rule did not describe how hospice days will be counted for beneficiaries in existing hospice episodes that continue through October 1, 2015. Several commenters, including MedPAC, stated that the patient's day count on October 1, 2015 should be based on the total number of days in the hospice episode, even those days prior to October 1, 2015 (taking into account the proposed policy that the episode days follow the patient and 60 days without hospice care would trigger a new hospice episode). A few commenters stated that the new RHC rates should apply just for new admissions starting on or after October 1, 2015 and a few other commenters added that existing admissions should continue to be paid the existing single RHC rate for a year after implementation. A few commenters asked whether the 60 day hospice episode period is counting 60 days of continuous days of hospice care regardless of level of care or whether it is only counting days at the RHC level of care and whether days of care that were provided, but not billable, would be included in the count.

Response: Table 16, used to establish the proposed RHC payment rates for days 1–60 and days 61 and beyond, takes into account the patient's episode day count based on the total number of days included in that episode regardless of level of care, whether those days were billable or not, and taking into account any instances where the patient was not receiving hospice care for more than 60 days, which would trigger a new hospice episode for the purpose of determining whether to pay the higher versus the lower RHC rate. We agree with MedPAC that it would not be appropriate to reset all hospice patients' episodes to day 1 on January 1, 2016 since patients who have already been in hospice for at least 60 days would not require the higher base payment rate associated with the first 60 days of the hospice episode. Likewise, we agree with MedPAC that allowing patients in existing elections to remain under the prior single RHC rate system would perpetuate concerns about payments being misaligned with costs for the longest-stay patients. Therefore, we believe that the most appropriate approach is to calculate the patient's episode day count based on the total number of days the patient has been receiving hospice care, separated by no more than a 60 day gap in hospice care, regardless of level of care or whether those days were billable or not. This calculation would include hospice days that occurred prior to January 1, 2016.

Comment: Some commenters stated that it was unclear from the proposal whether hospices will simply bill a RHC day and CMS will determine the count of days for the patient and pay the appropriate rate, or whether hospices will be responsible for determining the patient day count and billing at the correct rate. A few commenters questioned how CMS would address instances where a hospice is delayed in filing a Notice of Termination/Revocation and the days that the beneficiary was served by a previous hospice program may not be ''visible'' for purposes of determining the day count and the appropriate billing rate. One commenter suggested that CMS should be responsible for the count of days, rather than individual hospices. One commenter recommended that CMS not finalize its proposal to have the count of days follow the patient as this could become problematic from a billing perspective for receiving hospices in instances where a previous hospice provider does not bill their

hospice claims for its patients in a timely manner. Another commenter recommended that CMS eliminate the sequential billing requirement so that there would be fewer implementation problems associated with the proposed reimbursement changes. Finally, one commenter questioned if payments are made to the hospice and are later found to have been the wrong rate because of missing or inaccurate information on the day count, what the process would be for reconciliation and recoupment and over what time period might this occur.

Response: Hospices will not be required to change how they bill for RHC days to comply with the proposed higher RHC rate for the first 60 days of care and a lower rate thereafter. CMS' claims processing system will be responsible for the count of days, rather than the individual hospices, and will pay the appropriate rate accordingly. We believe this should alleviate hospice providers' concerns about having access to timely information on the patients' day count. There may be cases where a hospice submits a claim for a new admission and expects payment days under the high RHC rate because they are unaware of a prior admission in a sequence of elections. If the prior hospice's benefit period is posted in the Common Working File (CWF) at the time the second hospice's claim is processed, Medicare systems will pay the low RHC rate on that claim and no recoupment will result. If the two hospices' benefit periods are processed out of sequence, this typically requires that the second hospice's claims be cancelled and reprocessed. When Medicare systems reprocess the claims, they will pay the low RHC rate and any difference between the two rates will be recouped on the provider's next remittance advice. While we are not eliminating the sequential billing requirement at this time, we will consider whether the elimination of that requirement may be appropriate in the future.

Comment: Several commenters asked how hospices will be able to determine and confirm the days on service for a new hospice admission. One commenter recommended that a separate count be established to track and report the 60 day ''break'' in service so it is clear to hospice providers if a patient is within the first 60 days of a hospice episode. One commenter provided the following scenario:

- Patient begins hospice care on day one
- Patient discharged on day five
- Patient does not receive hospice care for 50 days
- Patient is then re-admitted.

The commenter asked whether the day count would leave 55 more days to be paid the higher RHC rate, or only 5 days to be paid at the higher RHC rate. One commenter questioned how the count of days would work for transfers where both hospices may bill on the day of transition.

Response: If a patient is discharged and readmitted within 60 days of that discharge, then the day count would start back where they were at discharge. In the scenario described above, the day count would leave 55 more days to be paid the higher RHC rate. When a patient transfers hospices and there is no gap in care, the transfer day (both hospices will be including the same date on their claim) will only be counted as 1 day. Hospices can access this information through the HIPAA Eligibility Transaction System (HETS), which is intended to allow the release of eligibility data to Medicare Providers, Suppliers, or their authorized billing agents for the purpose of preparing an accurate Medicare claim, determining Beneficiary liability or determining eligibility for specific services. The hospice data provided by the Common Working File (CWF) and the HETS system includes the actual start and end date of the hospice benefit days. That information will help hospices determine how many days the hospice benefit was utilized. The HETS system allowable date span is up to 12 months in the past, based on the date the transaction was received. The data return in the HETS system is driven by the date requested in the hospice's eligibility request. To ensure that all hospice episodes available in the HETS system are returned, hospices should request a date 12 months prior from the date of the request. If a hospice does not have access to the CWF or the HETS system, the hospice can access this data via their MAC's Portal, the MAC's Interactive Voice Response (IVR) unit, or request a direct access to the HETS system. A hospice that uses a clearinghouse may already have access to the HETS system.

Comment: A few commenters had extensive comments on the technical aspects in implementing the proposed RHC rates and the SIA payments. For example, some commenters questioned: (1) Whether the claims processing system can accommodate a break in line item detail when the revenue code does not change, but the rate does; (2) how the electronic remittance advice will reflect multiple payment rates for revenue code 0651; (3) will the two RHC rates affect revenue reporting on the hospice cost report, and if so, will the PS&R report summarize the needed data appropriately; and (4) how will Medicare secondary payer processing apply the two RHC rates on claims billed to a primary payer that utilizes a single rate.

Response: We do not anticipate that this rule will require any changes to the hospice cost report form to differentiate between the two RHC rates and thus we do not anticipate that this rule will require CMS modify the PS&R report. There will often be cases where the RHC rate changes during a period RHC that is shown on a single line item on a claim (for example, an RHC line shows 20 days of care and the high RHC rate ends after day 10). The line item should not be split in this case. Medicare billing instructions for hospice are not changing due to this rule. Existing instructions require that level of care revenue code lines should only be repeated if the site of service changes. A claim submitted with consecutive RHC lines reporting the same site of service HCPCS code will be returned to the provider. Medicare systems will combine the high and low RHC rates for the applicable days in the total payment for the RHC line item. No changes to the electronic remittance advice are planned as a result of this rule. If remittance advice coding to identify lines that are paid using the high RHC rate or that are paid at multiple rates would be beneficial, CMS will consider requesting and implementing such coding in future program instructions. Regarding Medicare Secondary Payer (MSP), a primary payer's method of payment frequently differs from Medicare's method. This policy does not change the calculation of MSP amounts. The primary payer's total payment for the claim, the claim charges and the Medicare primary payment amount are subject to the MSP calculations required by law and the MSP payment is determined accordingly.

Comment: One commenter stated that its state Medicaid system does not utilize the CMS 1450 claim form for hospice elections nor do they make benefit utilization information available to providers and questioned whether Medicaid reimbursement would be changing to a two-tiered system for RHC level of care. A few commenters stated that the Affordable Care Act authorized concurrent care for children, so they could receive hospice services while continuing to receive treatment intended to prolong their lives and was specifically intended to enable children and their parents to access hospice services earlier in the course of disease.

The commenter stated that a reduction in reimbursement for services longer than 60 days could undercut the intent of the concurrent care provision. One commenter asked whether any provisions would be made to facilitate a later implementation date for Medicaid if there is no delay to the October 1, 2015 effective date of the proposals in the proposed rule.

Response: Section 2302 of the Affordable Care Act requires states to make hospice services available to children eligible for Medicaid without forgoing any other service to which the child is entitled under Medicaid for treatment of the terminal condition. As a general matter, individuals under age 21 in Medicaid receive all medically necessary services coverable under the mandatory and optional categories in section 1905(a) of the Social Security Act, including hospice. Therefore, payment changes in the Medicaid hospice program should not affect the curative services a child receives. As we noted above, we will finalize a delay in the implementation of both the proposed RHC rates and the proposed SIA payment until January 1, 2016. Between October 1, 2015 and December 31, 2015, hospices will continue to be paid a single FY 2016 RHC per diem payment amount while the operational transition is being finalized at CMS. Effective January 1, 2016, the RHC rates for days 1 through 60 and days 61 and beyond would replace the single RHC per diem payment rate (the RHC per diem rates are listed in section III.C of this final rule). Therefore, the effective date for both Medicare and Medicaid will be January 1, 2016. As we noted above, for Medicare reimbursement, hospices will not be required to change how the bill for RHC days to comply with the proposed higher RHC rate for the first 60 days of care and a lower rate thereafter. CMS' claims processing system will be responsible for the count of days, rather than the individual hospices, and will pay the appropriate rate accordingly. We defer to the states on how they will implement this change in Medicare reimbursement for their state Medicaid programs.

Comment: One commenter questioned, with two RHC rates, how CMS and the MACs will determine which RHC payment rate will be applicable when a hospice exceeds the General Inpatient Cap and the rate is changed to the RHC rate.

Response: If a hospice's inpatient days (GIP and respite) exceed 20 percent of all hospice days then, for inpatient care, the hospice is paid: (1) The sum of the total reimbursement for inpatient care multiplied by eighty percent, the maximum allowable inpatient days percentage; and (2) The sum of the actual number of inpatient days in excess of the limitation multiplied by the routine home care rate. Since the inpatient cap determination is done in the aggregate and not on an individual claim-by-claim basis, CMS will be using the RHC rate for days 61 and beyond when reconciling payments for hospices that exceed the inpatient cap. Using the RHC rate for days 61 and beyond is the most appropriate RHC rate to use for this purpose since the RHC rate for days 1–60 currently exceeds the inpatient respite care (IRC) payment rate.

Comment: One commenter stated that some hospice patients revoke the hospice benefit to pursue curative treatment and then return to the benefit in a matter of days or weeks. Does the 60 day period start and stop with these patient requests?

Response: CMS will not count the days in between an election as hospice days. Anytime there is a discharge (patient revocation, patient discharged as no longer terminally ill, patient transfer, patient discharge for cause) the days where the patient was receiving care under the Medicare hospice benefit will be included as part of the hospice day count for the next election, unless the patient does not receive hospice services for 60 consecutive days. As we stated above, we consider a hospice ''episode'' of care to be a hospice election period or series of election periods separated by no more than a 60 day gap in hospice care. However, we note that if a patient is electing the hospice benefit, revoking the hospice benefit to seek curative care, and then re-electing the hospice benefit within a few days, we are concerned about whether these patients are truly appropriate for the hospice benefit and/or whether hospices are fully explaining and obtaining patient acknowledgement of the palliative versus curative nature of hospice care.

Comment: One commenter expressed confusion in how CMS calculated the budget neutrality factors for the proposed RHC payment rates in Table 18. The commenter provided a series of tables that used information in Table 16 in an effort to replicate the budget neutrality factor.

Response: The commenter was using information in Table 16 to calculate the budget neutrality factor in Table 18 above. Table 16 is used to create the two RHC rates that are budget neutral to one another without the application of area wage adjustment. Once we calculate RHC payments taking into account area wage adjustment, an additional budget neutrality factor is necessary to ensure overall hospice payments remain budget neutral. The footnote for Table 18 above notes that a budget neutrality adjustment to the two RHC rates is required to maintain overall budget neutrality for the hospice benefit due to differences in the average wage index for days 1–60 compared to days 61 and over when making payments based on the two RHC rates, rather than the one RHC rate.

Comment: One commenter stated that after the revision to the labor portion applicable to the proposed two RHC rate structure, the labor portion of each rate is now different. The commenter questioned whether CMS would be revising the labor-related share for each of the two proposed RHC rates or whether CMS would still be applying the labor-related share of 68.71 percent to each of the two proposed RHC rates.

Response: The calculations in Tables 17 and 18 above make adjustments to the labor portion of the FY 2015 RHC rate to create two new RHC rates based on observed differences in visit intensity (as measured by wage-weighted minutes) between days 1–60 of the hospice episode of care and days 61 and beyond. These calculations were performed to set two RHC rates that sufficiently align with the expected visit intensity differences observed in days 1–60 versus days 61 and beyond in accordance with section 1814(i)(1)(A) of the Act, which requires hospice payment amounts to equal the reasonable cost of providing hospice care. As outlined in Table 19 below, multiplying the labor-portion of the two RHC rates, prior to the budget neutrality adjustment for average wage index differences between days 1–60 and days 61 and beyond, in column 2 of Table 18 above ($137.98 for days 1–60 and $95.49 for days 61+) by the number of respective RHC days (column 2 in Table 19 below), produces the total amount of RHC payments attributable to the labor portion of the two RHC rates. Total RHC payments attributable to the labor portion is equal to the sum of payments for the two RHC rates attributable to the labor portion and likewise for the payments attributable to the non-labor portion. Table 19 below shows the results.

TABLE 19—ESTIMATED RHC LABOR PORTION PAYMENTS, RHC NON-LABOR PORTION PAYMENTS AND TOTAL RHC PAYMENTS FOR DAYS 1–60 AND DAYS 61 AND BEYOND, FY 2015

	RHC days	Labor portion of payments	Non-labor portion of payments	Total payments
Days 1–60	28,052,004	$3,870,615,511.92	$1,398,672,919.44	$5,269,288,431.36
Days 61+	57,082,561	5,450,813,749.89	2,846,136,491.46	8,296,950,241.35
Total		9,321,429,261.81	4,244,809,410.90	13,566,238,672.71

When you divide the amount of total payments attributable to the labor portion of the proposed RHC rates of $9,321,429,261.81 by the amount of total payments of $13,566,238,672.71, the result is 68.71 percent, which is the labor-related share for the RHC rate. Therefore, these calculations do not ultimately change the labor-related share of 68.71 percent that will be used for geographic area wage adjustment required per section 1814(i)(2)(D) of the Act. We will consider changes to the labor-related share for the purposes of geographic wage adjustment once cost report data by level of care is available for analysis.

Comment: One commenter asked if CMS performed any analysis on how the proposed RHC rates would impact hospices that exceed their aggregate cap.

Response: Yes, CMS did perform analysis on how the proposed RHC payment rates for days 1–60 and days 61 and beyond would impact both hospice providers who did not exceed their aggregate cap in 2013 and for those hospice providers who did exceed their aggregate cap in 2013. For those hospice providers who did not exceed their aggregate cap in 2013, we estimated that the proposed RHC rates would result in a 0.14 percent increase in payments. However, for those hospice providers that exceeded their aggregate cap, hospice payments were estimated to decrease by 5.40 percent.

Comment: One commenter objected to payment rates being based, at least in part, on information that has never been audited (cost reports). The commenter implored CMS to develop a strategy to establish a base year and audit hospice cost reports to determine costs for future rate setting and/or further changes in payment methodologies. Another commenter noted that the data used to determine the proposed RHC rates are old data that do not reflect the shift in coverage occurring as a result in the clarification by CMS that hospices are expected to cover ''virtually all'' care. The commenter stated that additional analysis of more recent data is needed to determine a sufficient base rate for RHC.

Response: We note that the proposed RHC rates and the proposed SIA payment policy were established based on analysis of visit intensity during a hospice episode of care and visit patterns during the last seven days of life using hospice claims data. As noted above, CMS recently revised the freestanding hospice cost report form for cost reporting periods beginning on or after October 1, 2014. Once the new cost report data are available for analysis, we will be able to analyze hospice costs by level of care. We want to remind hospices that each hospice cost report is required to be certified by the Officer or Administrator of the hospice and that the Hospice Medicare Cost Report (MCR) Form (CMS–1984–14) states the following:

MISREPRESENTATION OR FALSIFICATION OF ANY INFORMATION CONTAINED IN THIS COST REPORT MAY BE PUNISHABLE BY CRIMINAL, CIVIL, AND ADMINISTRATIVE ACTION, FINE AND/OR IMPRISONMENT UNDER FEDERAL LAW. FURTHERMORE, IF SERVICES IDENTIFIED IN THIS REPORT WERE PROVIDED THROUGH THE PAYMENT DIRECTLY OR INDIRECTLY OF A KICKBACK OR WERE OTHERWISE ILLEGAL, CRIMINAL, CIVIL, AND ADMINISTRATIVE ACTION, FINES AND/OR IMPRISONMENT MAY RESULT.

I HEREBY CERTIFY that I have read the above certification statement and that I have examined the accompanying electronically filed or manually submitted cost report and the Balance Sheet and Statement of Revenue and Expenses prepared by _____ {Provider Name(s) and Provider CCN(s)} for the cost reporting period beginning _____ and ending _____ and that to the best of my knowledge and belief, this report and statement are true, correct, complete and prepared from the books and records of the provider in accordance with applicable instructions, except as noted. I further certify that I am familiar with the laws and regulations regarding the provision of health care services, and that the services identified in this cost report were provided in compliance with such laws and regulations.

As always, we encourage providers to fill out the Medicare cost reports as accurately as possible.

Comment: Some commenters urged CMS to review its policies and payments for CHC and General Inpatient Care (GIP). One commenter stated that both these levels of care are highly abused and used for the wrong reasons. The commenter suggested that CMS require pre-authorization for those two levels of care. The commenter stated that they are pressured to admit patients to GIP at the end of a hospital stay or in a SNF just because they are dying and stated that many nursing homes/hospices/hospitals are operating in this matter. The commenter went on to state that all states should require a Certificate of Need for hospice and all hospices should be non-profit as it is very disturbing to see companies that own nursing homes and hospices gaming payments to increase profits. Other commenters expressed frustration regarding the Notice of Election (NOE) timely filing requirement that was finalized in the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50452).

Response: While these comments are outside the scope of this rule, we thank the commenters for their comments and will take them under consideration for future rulemaking.

Final Action: We are finalizing this proposal as proposed with an effective date of January 1, 2016. This delay in implementation from October 1, 2015 to January 1, 2016 will allow for state Medicaid agencies to make the necessary systems and software changes. Between October 1, 2015 and December 31, 2015, hospices will continue to be paid a single FY 2016 RHC per diem payment amount. Effective January 1, 2016, a higher RHC rate for days 1 through 60 of a hospice episode of care and a lower RHC rate for days 61 and beyond of a hospice episode of care will replace the single RHC per diem payment rate (the RHC per diem rates are listed in section III.C of this final rule). An episode of care for hospice RHC payment purposes is a hospice election period or series of election periods separated by no more than a 60 day gap in hospice care. For hospice patients who are discharged and readmitted to hospice within 60 days of that discharge, a patient's prior hospice days would continue to follow the patient and count toward his or her patient days for the new hospice

election. We will calculate the patient's episode day count based on the total number of days the patient has been receiving hospice care separated by no more than a 60 day gap in hospice care, regardless of level of care or whether those days were billable or not. This calculation would include hospice days that occurred prior to January 1, 2016.

3. Service Intensity Add-On (SIA) Payment

Section 1814(i)(1)(A) of the Act states that payment for hospice services must be equal to the costs which are reasonable and related to the cost of providing hospice care or which are based on such other tests of reasonableness as the Secretary may prescribe in regulations. In addition, section 1814(i)(6)(D) of the Act, as amended by section 3132(a) of the Affordable Care Act, requires the Secretary to implement revisions to the methodology for determining the payment rates for the RHC level of care and other services included in hospice care under Medicare Part A as the Secretary determines to be appropriate as described in section III.B.1 above. Given that independent analyses demonstrate a U-shaped cost pattern across hospice episodes, CMS believes that implementing revisions to the payment system that align with this concept supports the requirements of reasonable cost in section 1814(i)(A) of the Act.

As articulated in section III.B.1.b above, CMS considered implementing a tiered payment model as described in the FY2014 Hospice Wage Index final rule (78 FR 48271) and in the Hospice Study Technical Report issued in April of 2013,[44] in order to better align payments with observed resource use over the length of a hospice stay. However, operational concerns and programmatic complexity led us to explore the concept of an approach that could be implemented with minimal systems changes that limit reprocessing of hospice claims due to sequential billing requirements. In addition, while the tiered model represented a move toward better aligning payments with resource use, it only accounted for whether skilled services were provided in the last 2 days of life (Groups 5 and 6 in Table 13 above). Section III.B.1.c, above notes that on any given day during the first 7 days of a hospice election and last 7 days of life, only about 50 percent of the time are visits being made. In our view, increasing payments at the end of life for days where visits are not occurring does not align with the requirements of reasonable cost articulated in statute in section 1814(i)(A) of the Act. Therefore, as one of the first steps in addressing the observed misalignment between resource use and associated Medicare payments and in improving patient care through the promotion of skilled visits at end of life with minimal claims processing systems changes, CMS proposed to provide an SIA payment if the conditions outlined below are satisfied.

To qualify for the SIA payment, the following criteria must be met: (1) The day is a RHC level of care day; (2) the day occurs during the last 7 days of life (and the beneficiary is discharged dead); and, (3) direct patient care is provided by a RN or a social worker (as defined by § 418.114(c) and § 418.114(b)(3), respectively) that day. The SIA payment will be equal to the CHC hourly payment rate (the current FY 2015 CHC rate is $38.75 per hour), multiplied by the amount of direct patient care provided by a RN or social worker for up to 4 hours total, per day, as long as the three criteria listed above are met. The SIA payment will be paid in addition to the current per diem rate for the RHC level of care.

CMS will create two separate G-codes for use when billing skilled nursing visits (revenue center 055x), one for a RN and one for a Licensed Practical Nurse (LPN). During periods of crisis, such as the precipitous decline before death, patient needs intensify and RNs are more highly trained clinicians with commensurately higher payment rates who can appropriately meet those increased needs. Moreover, our rules at § 418.56(a)(1) require the RN member of the hospice interdisciplinary group to be responsible for ensuring that the needs of the patient and family are continually assessed. We expect that at end of life, the needs of the patient and family will need to be frequently assessed; thus the skills of the interdisciplinary group RN are required.

We note that social workers also often play a crucial role in providing support for the patient and family when a patient is at end of life. While the nature of the role of the social worker does facilitate interaction via the telephone, CMS will only pay an SIA for those social work services provided by means of in-person visits. Analysis conducted by Abt Associates on the FY 2013 hospice claims data shows that in the last 7 days of life only approximately 10 percent of beneficiaries received social work visits of any kind. Moreover, we also found that only about 13 percent of social work ''visits'' are provided via telephone; therefore, the proportion of social work calls likely represents a very small fraction of visits overall in the last few days of life. The SIA payment will be in addition to the RHC payment amount. The costs associated with social work phone conversations; visits by LPNs, hospice aides, and therapists; counseling; drugs; medical supplies; DME; and any other item or service usually covered by Medicare will still be covered by the existing RHC payment amount in accordance with section 1861(dd)(1) of the Act.

In 2011, the OIG published a report that focused specifically on Medicare payments to hospices that served a high percentage of nursing facility residents. The OIG found that from 2005 to 2009, the total Medicare spending for hospice care for nursing facility residents increased from $2.55 billion to $4.31 billion, an increase of almost 70 percent (OIG, 2011). When looking at hospices that had more than two-thirds of their beneficiaries in nursing facilities, the OIG found that 72 percent of these facilities were for-profit and received, on average, $3,182 more per beneficiary in Medicare payments than hospices overall. High-percentage hospices were found to serve beneficiaries who spent more days in hospice care, to the magnitude of 3 weeks longer than the average beneficiary. In addition, when looking at distributions in diagnoses, OIG found that high-percentage hospices enrolled beneficiaries who required less skilled care. In response to these findings, OIG recommended that CMS modify the current hospice reimbursement system to reduce the incentive for hospices to seek out beneficiaries in nursing facilities, who often receive longer but less complex and costly care.[45] Given the OIG recommendation, CMS proposed excluding SNF/NF sites of service from eligibility for the SIA payment.

The for-profit provider community has frequently highlighted its concerns regarding the lack of adequate reimbursement for hospice short stays in its public filings with the Securities and Exchange Commission (SEC) as described in MedPAC's 2008 Report to Congress.[46] Specifically, MedPAC cited records from the SEC for publicly traded for-profit hospice chains as evidence of a general acknowledgement of the nonlinear cost function of resource use within hospice episodes. For instance:

[44] *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/Downloads/Hospice-Study-Technical-Report.pdf.*

[45] *http://oig.hhs.gov/oei/reports/oei-02-10-00070.pdf.*

[46] *http://www.medpac.gov/documents/reports/Jun08_Ch08.pdf.*

• VistaCare: ''Our profitability is largely dependent on our ability to manage costs of providing services and to maintain a patient base with a sufficiently long length of stay to attain profitability,'' and that ''cost pressures resulting from shorter patient lengths of stay . . . could negatively impact our profitability.'' [47]

• Odyssey HealthCare: ''Length of stay impacts our direct hospice care expenses as a percentage of net patient service revenue because, if lengths of stay decline, direct hospice care expenses, which are often highest during the earliest and latter days of care for a patient, are spread against fewer days of care.'' [48]

Short lengths of stay were also cited as a source of financial difficulties for small rural hospices (implying that longer stays were more profitable).[49] In the FY 2014 Hospice Wage Index and Payment Rate Update proposed rule, we stated that ''analysis conducted by Abt Associates found that very short hospice stays have a flatter curve than the U-shaped curve seen for longer stays, and that average hospice costs are much higher. These short stays are less U-shaped because there is not a lower-cost middle period between the time of admission and the time of death.'' The FY 2014 Hospice Wage Index and Payment Rate Update proposed rule went on to note that a ''short stay add-on'' was under consideration as a possible reform option (78 FR 27843). Public comments received in response to the proposed rule were favorable regarding a possible short stay add-on payment.

Since the SIA payment will be applicable to any 7-day period of time ending in a patient's death, hospice elections with short lengths of stay are eligible to receive an additional payment that will help mitigate the marginally higher costs associated with short lengths of stay, consistent with the 'reasonable cost' structure of the hospice payment system. For FY 2013, 32 percent of hospice stays were 7 days or less with 60 percent of stays lasting 30 days or less. The median length of stay in FY 2013 was 17 days.

Although Figure 4 above demonstrates that there is increased resource use during the first 2 days of an election, we are not proposing an additional SIA payment for the first or second day of a hospice election when the length of stay is beyond 7 days. The SIA payment for the last 7 days of life will provide additional reimbursement to help to mitigate the higher costs for stays lasting less than the median length of stay, where spreading out the initial costs of the first 2 days of the election over a smaller number of days may not be enough to make the overall stay profitable. Any stay of 7 days or less before death will be eligible for SIA payment on all RHC days.

We believe that the SIA payment would help to address MedPAC and industry concerns regarding the visit intensity at end of life and the concerns associated with the profitability of hospice short stays. The RHC rates described in section III.B.2 above and SIA payment will advance hospice payment reform incrementally, as mandated by the Affordable Care Act while simultaneously maintaining flexibility for future refinements. Since this approach will be implemented within the current constructs of the hospice payment system, no major overhaul of the claims processing system or related claims/cost report forms will be required, minimizing burden for hospices as well as for Medicare.

As required by Section 1814(i)(6)(D)(ii) of the Act, any changes to the hospice payment system must be made in a budget neutral manner in the first year of implementation. Based on the desire to improve patient care through the promotion of skilled visits at end of life, regardless of the patient's lifetime length of stay, we proposed that the SIA payments would be budget neutral through a reduction to the RHC rates. The SIA payment budget neutrality factor (SBNF) used to reduce the RHC rates is outlined in section III.C.3.

Finally, we solicited public comment on all aspects of the SIA payment as articulated in this section as well as the corresponding changes to the regulations at § 418.302 in section VI. We also proposed changing the word ''Intermediary'' to ''Medicare Administrative Contractor'' in the regulations text at § 418.302 and technical regulations text changes to § 418.306 as described in section VI.

Summaries of the public comments and our responses to comments on all aspects of the SIA payment are summarized below:

Comment: Nearly all commenters support the implementation of the SIA payment policy, stating that the need for skilled direct patient care and support is greater at end of life, causing an increase in hospice costs. Many commenters further suggested that implementation occur as soon as possible and appreciate the opportunity for incremental payment reform.

Response: We thank the commenters for their support. We agree that our proposal helps to reinforce the provision of skilled direct patient care when the need is greater at end of life.

Comment: Several commenters suggested that services provided by chaplains and other spiritual care counselors should be eligible for the SIA payment. In addition, several commenters asked whether services provided by LPNs, hospice aides, and other professionals (therapists, etc.) would be covered under the SIA payment provisions. Many commenters note that the services provided by LPNs are currently covered in the CHC level of care. One commenter asked if visits for the pronouncement of death will be considered eligible for the SIA payment.

Response: While we acknowledge the tremendous value delivered by spiritual care counseling and other disciplines during hospice episodes, Section 1814(i)(1)(A) of the Act explicitly precludes Medicare payment for bereavement counseling and other counseling services (including nutritional and dietary counseling) as separate services. Therefore, no payment will be extended for those services under the SIA policy. While CMS recognizes that the services rendered by all hospice professionals, including LPNs, are extremely valuable, the primary goal of the SIA policy is to promote the highest-quality, skilled care to beneficiaries at the end of life. Given that RNs provide higher-skilled services, as required by CMS's Conditions of Participation, and social workers provide a skilled level of support for both the patient and family, CMS will only pay an SIA amount for those services rendered by RNs and social workers. CMS will not pay an SIA amount for those services rendered by other professionals. The base RHC rate is intended to cover other skilled and non-skilled services that may be needed at the end of life. However, at the end of life, where a rapid decline is often expected, patient and family needs intensify and typically there are frequent care plan changes necessitating the immediate need for RN and SW services. In accordance with the hospice CoPs, an RN, and not an LPN, is required to be part of the hospice IDT to provide coordination of care and to ensure continuous assessment of the patient. Therefore, to ensure continuous

[47] Health Care Strategic Management. 2004. Hospice companies benefit from favorable Medicare rates. Health Care Strategic Management 22, no. 1: 13–14.

[48] Odyssey HealthCare, Inc. 2004. Annual report to shareholders, form 10–K. Filed with the Securities and Exchange Commission, Washington, DC, March 11. Dallas, TX: Odyssey HealthCare, Inc.

[49] Virnig, B. A., I. S. Moscovice, S. B. Durham, et al. 2004. Do rural elders have limited access to Medicare hospice services? Journal of the American Geriatrics Society 52, no. 5: 731–735.

assessment and coordination of care at the very end of life, the skills of an RN would be needed and we believe hospices should be encouraged to meet the needs of the patient and family. Additionally, given commenters' overwhelming support for incremental payment reform, CMS hopes to advance hospice payment changes over time; therefore, in the future, we will re-evaluate whether the inclusion of services provided by LPNs for the SIA is warranted and re-assess the policies and payments around the CHC level of care as well as other facets of the Medicare Hospice Benefit.

Comment: Several commenters noted that they are concerned that setting the SIA add-on payment equal to the CHC hourly payment rate multiplied by the amount of direct patient care up to 4 hours total per day does not adequately cover the cost of hospice care, especially for individuals with certain diagnoses related to their terminal illness. The commenters also noted that the Continuous Home Care Payment rate currently has a minimum 8 hour requirement to meet these complex needs. One commenter asked if the CHC level of care could still be provided in the last 7 days of an episode.

Response: The primary purpose of the SIA payment is to promote visits during the end of life and account for the associated increased resources required. We believe that using the CHC hourly payment rate is a reasonable proxy for the costs of providing such care. The CHC level of care will still be available to both beneficiaries and providers, as the patient's status dictates. For the purposes of the SIA payment, the claims processing systems will evaluate all 7 days prior to death. If any of the days meet the eligibility criteria (RHC level of care with appropriate staffing, etc.), then those days will be eligible for the SIA payment. Other levels of hospice care are still eligible for payment as appropriate. Given that CMS intends to promote direct patient care in the 7 days prior to death, visits for the pronouncement of death will not be included as eligible visits for SIA payments. As CMS collects more data related to the costs of providing care, specifically data included in the newly-revised cost reports, we will reassess the appropriate payment level for all aspects of the hospice payment system, including the SIA payment as well as the four levels of care.

Comment: Several commenters suggested that hospices should be given the opportunity to provide additional RN and social work services approved by the patient's physician in order to deliver more than 4 hours of RN or social work time and receive payment for these additional service hours. One commenter requested clarification regarding the payment for services for concurrent care from both a RN and social worker during the last 7 days of life.

Response: While we understand the interest in providing a SIA payment for services beyond the 4 hour threshold established by the SIA policy, we do believe that the RHC rate level of care plus the SIA payment for services up to 4 hours will provide sufficient payment to cover the increased cost of patient care. If a patient's needs intensify further, requiring more intensive supports, hospices will still be able to provide the CHC level of care for 8 hours of service and beyond as well as utilize the other levels of hospice care as appropriate. CMS acknowledges that there may be a need for concurrent care from both an RN and a social worker during the days preceding death. The natures of the two disciplines are distinct, and we acknowledge that the RN may need to focus on the clinical aspects of the patient while the social worker meets separately with the family and others to process anticipatory grief. Therefore, concurrent services will be eligible for the SIA payment, according to the criteria outlined above.

Comment: Many commenters had concerns regarding the ''billing'' of SIA days and requested clarification of the provider's responsibility for ''billing'' days for the SIA payment. In addition, several commenters requested clarification on the time increments provided by the RN and social workers that would be eligible for the SIA payment, asking for detail on whether or not service should be tracked in 15 minute increments. One commenter asked how the SIA payment will apply if a patient's last 7 days of life spans 2 months. Another commenter questioned whether CMS has the time, energy, and staff to review all claims for appropriate distribution of SIA payments.

Response: Hospices will continue to submit claims with revenue center lines appropriately noted in appropriate increments. CMS' claims processing system will assess the last 7 days of services before end of life and determine if the RHC level of care was provided on any of those 7 days, regardless of other levels of care also provided during that period. We acknowledge that the term 'billing' may have been misleading. Hospices should submit claims per the established protocols, and the claims processing system will determine the SIA payment eligibility of the 7 days preceding death. For eligible stays, the SIA payment will be calculated by the number of hours (in 15 minute increments) of service provided by an RN or social worker during last 7 days of life for a minimum of 15 minutes and up to 4 hours total per day. CMS appreciates the concern regarding the appropriate disbursement of SIA payments. We will be working with our operational staff and contracting partners in order to fully automate the review of claims with a discharge of death in order to identify eligible visits and generate appropriate SIA outlays.

Comment: Several commenters recommended that CMS include episodes in SNF/NF as eligible for the SIA payment. The commenters stated that the needs of dying patients were not specific to any particular physical location. Commenters stated that more intensive services are merited in any 'home' setting. Additionally, commenters noted that the Medicare Conditions of Participation for hospices require the provision of the same level of care and service to patients, regardless of setting.

Response: We agree that the payment of the SIA for additional RN and SW services during the last 7 days of life in these settings is appropriate and thus we are finalizing a policy that pays the SIA payment for patients that reside in a SNF/NF. We will monitor the SIA based on claims data and continue to investigate whether a differential site of service payment could be an appropriate mechanism to address OIG and MedPAC concerns.

Comment: One commenter asked whether the SIA payment policy will apply for both new and existing hospice elections. Several commenters asked if different or additional documentation would be required for SIA visits. Some commenters suggested that criteria be developed demonstrating the need for additional hours per day similar to the protocols around CHC. Such documentation could potentially require that the clinician document why additional hours are needed. Several commenters expressed concern that hospice providers may begin making 'unnecessary' visits to hospice patients at the end of life in order to capitalize on potential SIA payments. The same commenters further suggested that CMS not use an SIA-type payment approach but instead utilize a high RHC rate for the last 7 days of life.

Response: Both new and existing hospice elections will be eligible for the SIA payment, as long as the criteria for the add-on are met. No additional documentation will be required in order to receive the SIA payment. The Medicare claims processing system will evaluate the days within a hospice

election for SIA eligibility and calculate the add-on payment accordingly. We appreciate the concern that some hospices may attempt to capitalize on extra payments made possible through the SIA policy. CMS will certainly continue to monitor hospice behavior for any concerning patterns as well as any impact to future payment updates. However, we maintain that providing payment for increased services at the end of life is consistent with the goal of responding to and providing for intensified patient needs. Conversely, paying an increased RHC rate for the last 7 days of life regardless of whether or not skilled visits (RN or social worker) are provided would not encourage the hospice to schedule skilled visits during that timeframe. With this SIA policy, we strive to encourage the hospice to provide skilled care in a patient's most intense moments of need by dispersing additional payment for actual services rendered by the appropriate skilled staff.

Comment: Several commenters raised concerns regarding the criteria that the RN and SW visit be an in-person visit in order to be reimbursable, stating that there are many hospice patients in rural and frontier areas that require long travel times for hospice staff. The commenters stated that telephone interaction becomes an important part of the hospice service and suggested that as long as hospice providers document the reason for the telephone call versus an in-person visit the call should be reimbursable.

Response: We appreciate the comments regarding the value of hospice social work services provided via the telephone. CMS recognizes that this support is vital and provides needed assistance in crucial circumstances. However, the primary purpose of the SIA payment is to encourage direct patient care in the last days of life. Therefore, CMS will only be paying the SIA payment for those services provided directly to the patient in his/her last week of life by an RN or SW in his or her home setting.

Comment: Several commenters noted their support for CMS' proposal to continue to make the SIA payments budget neutral in future years through annual determination of the Service Intensity Add-On Budget Neutrality Factor (SBNF) based on the most current and complete fiscal year utilization data available at the time of rulemaking.

Response: We appreciate the support of our budget neutrality approach for the SIA payment policy proposal. We believe that this will help to create an incentive in the longer term for the provision of services in patients' moments of most intensive need.

Comment: Several commenters stated that CMS should provide stakeholders adequate time to test, assess, perform necessary software updates, receive education, and provide feedback on changes due to the SIA payments, either by delaying its implementation or initiating a pilot program before applying the policy across all providers. Many commenters noted concern over the potential impact of the SIA payment proposal to state Medicaid programs, which are currently unprepared for the transition to this payment methodology and would need time to prepare for this significant change.

Response: CMS has been working with our contractors to develop systems changes to the fullest extent possible in parallel with the development of this rule. Our system maintainers will have their full software development lifecycle to implement these changes. We do not have concerns about the readiness of Medicare systems on October 1, 2015. Regarding hospice system changes, we do not anticipate that this rule will require any changes to hospice billing instructions so systems for submitting claims and receiving Medicare payment should not be affected and the need for retraining billing staff should be limited, but hospices may need to change their internal accounting systems. However, given the delay in the implementation date for the two RHC rates in section III.B.2 above, CMS will delay the effective date of the SIA policy to January 1, 2016 in order to better coordinate implementation of hospice payment reforms.

Comment: Several commenters noted concern that the length of stay for a beneficiary is out of the patient's control and should not be factored into the SIA. Additionally, several commenters further noted that hospice providers will not likely be able to forecast an accurate and reliable operating budget to include the proposed 7 day payment add-on at the patient's end of life.

Response: CMS appreciates that the nature of the hospice population leads to difficulty in prognosticating the required length of services. However, the SIA payment policy is meant to encourage visits in the last 7 days of life, regardless of the length of stay, so an episode will be eligible for the payment regardless of the patient's overall total days in hospice care. Moreover, CMS notes that the expectation is that providers would be supplying the needed services to patients during the RHC and other levels of care, regardless of budgeting prognostication for any potential SIA payment amounts.

Comment: A few commenters expressed concern over the two proposed SIA budget neutrality factors, stating that the proposed budget neutrality factor for days 61 and beyond is higher than that of days 1–60, leading to a greater reduction to the High RHC rate for days 1–60. The commenters argue that a single SIA budget neutrality factor would yield a more equitable overall reduction with less of a decrease to the higher RHC rate.

Response: CMS appreciates the feedback regarding the application of the SIA budget neutrality factors. Because of the interaction between the SIA payment policy and the two RHC rates, we believe that it is appropriate that two factors be generated for each rate, maintaining a budget neutral system for the whole of the Medicare hospice benefit, so that our rates accurately align with and account for resource use differences during the first 60 versus days 61 and beyond of hospice care. However, CMS will consider this and other refinements to the policy for future payment and policy updates.

Comment: Several commenters suggested that CMS should increase its oversight of hospice providers not delivering the services required under the Hospice Conditions of Participation and exhibiting inappropriate practices highlighted by the OIG and the MedPAC.

Response: CMS appreciates the encouragement to continue overseeing and monitoring provider behavior for questionable activity. CMS is committed to encouraging providers to supply the best quality care in the most appropriate ways, and we will continue to work to incentivize and monitor for the most appropriate practices in the hospice provider community.

Comment: Several commenters requested information regarding the forthcoming G-codes that will be used to differentiate LPN and RN services. One commenter suggested that CMS provide detailed instructions and answer operational questions in this final rule as opposed to Change Requests, Medicare Learning Network articles, and other sub-regulatory guidance as is the typical process.

Response: Per the CMS protocols, the details regarding these newly-created G-codes will be forthcoming through the established Change Request process. CMS appreciates the desire for more education regarding the SIA; however, we will continue to utilize the established means to convey the systems changes as well as to educate the provider community regarding the policy and operational changes.

Comment: One commenter requested that CMS continue to evaluate cost data in order to identify any trends in 'co-factors' that may be related to service intensity at the end of life, such as visits from the Spiritual Care Coordinator and other disciplines, and propose further adjustments as data directs.

Response: CMS will continue to monitor and analyze data related to the cost of providing care in the hospice population. We will re-evaluate policies and payments in accordance to observed trends in the cost and other data gathered so long as it does not violate the Act.

Comment: One commenter requested that CMS consider paying the SIA to those hospices that receive a transfer hospice patient from another provider, as this additional funding could help mitigate the receiving hospice's costs for starting care.

Response: CMS recognizes that a hospice who receives a transfer hospice patient may experience increased start-of-care costs. However, we are not proposing to provide SIA payments at the start of an episode. We believe that the SIA payment coupled with the new RHC rates finalized in section III.B.2 above, provide sufficient payment for the delivery of hospice care.

Final Action: We are finalizing the SIA proposal as proposed; however, we will include episodes in SNF/NF as eligible for the SIA payment. We are finalizing the SIA proposal with an effective date of January 1, 2016 in order to better coordinate implementation of the hospice payment reforms, including the finalization of the new RHC rates discussed in section III.B.2 above. Finally, we will also finalize our proposal to continue to make the SIA payments budget neutral through an annual determination of the SBNF, which will then be applied to the RHC payment rates. The SBNF for the SIA payments will be calculated for each FY using the most current and complete fiscal year utilization data available at the time of rulemaking.

C. FY 2016 Hospice Wage Index and Rate Update

1. FY 2016 Hospice Wage Index

a. Background

The hospice wage index is used to adjust payment rates for hospice agencies under the Medicare program to reflect local differences in area wage levels based on the location where services are furnished. The hospice wage index utilizes the wage adjustment factors used by the Secretary for purposes of section 1886(d)(3)(E) of the Act for hospital wage adjustments. Our regulations at § 418.306(c) require each labor market to be established using the most current hospital wage data available, including any changes made by OMB to the Metropolitan Statistical Areas (MSAs) definitions.

We use the previous fiscal year's hospital wage index data to calculate the hospice wage index values. We have consistently used the pre-floor, pre-reclassified hospital wage index to derive the hospice wage index. For FY 2016, the hospice wage index will be based on the FY 2015 hospital pre-floor, pre-reclassified wage index. This means that the hospital wage data used for the hospice wage index is not adjusted to take into account any geographic reclassification of hospitals including those in accordance with section 1886(d)(8)(B) or 1886(d)(10) of the Act. The appropriate wage index value is applied to the labor portion of the payment rate based on the geographic area in which the beneficiary resides when receiving RHC or CHC. The appropriate wage index value is applied to the labor portion of the payment rate based on the geographic location of the facility for beneficiaries receiving GIP or Inpatient Respite Care (IRC).

In the FY 2006 Hospice Wage Index final rule (70 FR 45130), we adopted the revised labor market area definitions as discussed in the OMB Bulletin No. 03–04 (June 6, 2003). This bulletin announced revised definitions for MSAs and the creation of micropolitan statistical areas and combined statistical areas. The bulletin is available online at *http://www.whitehouse.gov/omb/bulletins/b03-04.html*. In adopting the CBSA geographic designations for FY 2006, we provided for a 1-year transition with a blended wage index for all providers. For FY 2006, the wage index for each geographic area consisted of a blend of 50 percent of the FY 2006 MSA-based wage index and 50 percent of the FY 2006 CBSA-based wage index. Since the expiration of this 1-year transition on September 30, 2006, we have used the full CBSA-based wage index values.

When adopting OMB's new labor market designations in FY 2006, we identified some geographic areas where there were no hospitals, and thus, no hospital wage index data, which to base the calculation of the hospice wage index. In the FY 2010 Hospice Wage Index final rule (74 FR 39386), we also adopted the policy that for urban labor markets without a hospital from which hospital wage index data could be derived, all of the CBSAs within the state will be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index value to use as a reasonable proxy for these areas. In FY 2016, the only CBSA without a hospital from which hospital wage data could be derived is 25980, Hinesville, Georgia.

In the FY 2008 Hospice Wage Index final rule (72 FR 50214), we implemented a new methodology to update the hospice wage index for rural areas without a hospital, and thus no hospital wage data. In cases where there was a rural area without rural hospital wage data, we used the average pre-floor, pre-reclassified hospital wage index data from all contiguous CBSAs to represent a reasonable proxy for the rural area. The term ''contiguous'' means sharing a border (72 FR 50217). Currently, the only rural area without a hospital from which hospital wage data could be derived is Puerto Rico. However, our policy of imputing a rural pre-floor, pre-reclassified hospital wage index based on the pre-floor, pre-reclassified hospital wage index (or indices) of CBSAs contiguous to a rural area without a hospital from which hospital wage data could be derived does not recognize the unique circumstances of Puerto Rico. For FY 2016, we will continue to use the most recent pre-floor, pre-reclassified hospital wage index value available for Puerto Rico, which is 0.4047.

b. Elimination of the Wage Index Budget Neutrality Factor (BNAF)

As described in the August 8, 1997 Hospice Wage Index final rule (62 FR 42860), the pre-floor and pre-reclassified hospital wage index is used as the raw wage index for the hospice benefit. These raw wage index values were then subject to either a budget neutrality adjustment or application of the hospice floor to compute the hospice wage index used to determine payments to hospices. Pre-floor, pre-reclassified hospital wage index values below 0.8 were adjusted by either: (1) The hospice BNAF; or (2) the hospice floor—a 15 percent increase subject to a maximum wage index value of 0.8; whichever results in the greater value.

The FY 2010 Hospice Wage Index rule finalized a provision to phase-out the BNAF over 7 years, with a 10 percent reduction in the BNAF in FY 2010, and an additional 15 percent reduction in each of the next 6 years, with complete phase out in FY 2016 (74 FR 39384). As discussed in the proposed rule, (80 FR 25860), the hospice BNAF for FY 2016 is reduced by an additional and final 15 percent for a cumulative reduction of 100 percent. Therefore, for FY 2016, the BNAF is completely phased-out and eliminated.

Hospital wage index values which are less than 0.8 are still subject to the hospice floor calculation. The hospice floor equates to a 15 percent increase, subject to a maximum wage index value of 0.8. For example, if County A has a pre-floor, pre-reclassified hospital wage index value of 0.3994, we would multiply 0.3994 by 1.15, which equals 0.4593. Since 0.4593 is not greater than 0.8, then County A's hospice wage index would be 0.4593. In another example, if County B has a pre-floor, pre-reclassified hospital wage index value of 0.7440, we would multiply 0.7440 by 1.15 which equals 0.8556. Because 0.8556 is greater than 0.8, County B's hospice wage index would be 0.8.

c. Implementation of New Labor Market Delineations

OMB has published subsequent bulletins regarding CBSA changes. On February 28, 2013, OMB issued OMB Bulletin No. 13–01, announcing revisions to the delineation of MSAs, Micropolitan Statistical Areas, and Combined Statistical Areas, and guidance on uses of the delineation in these areas. A copy of this bulletin is available online at: *http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf*. This bulletin states that it ''provides the delineations of all Metropolitan Statistical Areas, Metropolitan Divisions, Micropolitan Statistical Areas, Combined Statistical Areas, and New England City and Town Areas in the United States and Puerto Rico based on the standards published on June 28, 2010, in the **Federal Register** (75 FR 37246–37252) and Census Bureau data.''

Overall, we believe that implementing the new OMB delineations will result in wage index values being more representative of the actual costs of labor in a given area. Among the 458 total CBSA and statewide rural areas, 20 (4 percent) will have a higher wage index using the newer delineations. However, 34 (7.4 percent) will have a lower wage index using the newer delineations. Therefore, to remain consistent with the manner in which we ultimately adopted the revised OMB delineations for FY 2006 (70 FR 45138), we are implementing a 1-year transition to the new OMB delineations. Specifically, we will apply a blended wage index for 1 year (FY 2016) for all geographic areas that will consist of a 50/50 blend of the wage index values using OMB's old area delineations and the wage index values using OMB's new area delineations. That is, for each county, a blended wage index will be calculated equal to 50 percent of the FY 2016 wage index using the old labor market area delineation and 50 percent of the FY 2016 wage index using the new labor market area delineation. This results in an average of the two values. We refer to this blended wage index as the FY 2016 hospice transition wage index.

This 1-year transition policy is also consistent with the transition policies adopted by both the FY 2015 SNF PPS (79 FR 25767) and the CY 2015 HH PPS (79 FR 66032). This transition policy will be for a 1-year period, going into effect on October 1, 2015, and continuing through September 30, 2016. Thus, beginning October 1, 2016, the wage index for all hospice payments will be fully based on the new OMB delineations.

The wage index applicable to FY 2016 is available as a wage index file on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/index.html.* The wage index will not be published in the **Federal Register**. The hospice wage index for FY 2016 will be effective October 1, 2015 through September 30, 2016.

The wage index file provides a crosswalk between the FY 2016 wage index using the current OMB delineations in effect in FY 2015 and the FY 2016 wage index using the revised OMB delineations, as well as the transition wage index values that will be in effect in FY 2016. The wage index file shows each state and county and its corresponding transition wage index along with the previous CBSA number, the new CBSA number, and the new CBSA name.

Due to the way that the transition wage index is calculated, some CBSAs and statewide rural areas may have more than one transition wage index value associated with that CBSA or rural area. However, each county will have only one transition wage index. For counties located in CBSAs and rural areas that correspond to more than one transition wage index value, the CBSA number will not be able to be used for FY 2016 claims. In these cases, a number other than the CBSA number will be necessary to identify the appropriate wage index value on claims for hospice care provided in FY 2016. These numbers are five digits in length and begin with ''50.'' These codes are shown in the last column of the wage index file in place of the CBSA number where appropriate. For counties located in CBSAs and rural areas that still correspond to only one wage index value, the CBSA number will still be used.

A summary of the comments we received regarding the wage index and our responses to those comments appears below.

Comment: Several commenters support the use of the revised OMB CBSA delineations, which incorporate the 2010 Census data for FY 2016 and the proposed transition methodology that would apply a blended wage index for 1 year (FY 2016) for all geographic areas that would consist of a 50/50 blend of the wage index values using OMB's old area delineations and the wage index values using OMB's new area delineations. We received a few comments regarding the transition to the new delineations requesting a longer transition period or clarification of the transition year. One commenter requests that CMS review the impact this has on provider reimbursement and determine if changes need to be made beyond the 1 year transition period.

Response: We appreciate the commenters' support of the new delineations which will be incorporated into hospice reimbursement beginning in FY 2016. We established the use of the latest OMB delineations that are available since FY 2006 (70 FR 45138) in order to maintain a more accurate and up-to-date payment system that reflects the reality of population shifts and labor market conditions. We also agree that applying 50/50 blend of the wage index values using OMB's old area delineations and the wage index values using OMB's new area delineations for 1 year is an appropriate transition policy. We incorporated the CBSAs for FY 2006 using a 1-year transition policy and we continue to believe that 1 year is an appropriate length of time to transition to the new area delineations.

In order to determine the 50/50 blended wage index for FY 2016, we calculate the wage index values for each county by adding the wage index value under the county's old area delineation with the wage index value under the county's new area delineation. Then, we divide by two. The wage index values for each county may be found in the wage index file located at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/index.html.* For claim submission, hospices will use either the CBSA code or the special 50xxx number found in column L of the wage index file. The special 50xxx numbers will be applicable to FY 2016 claims only. Hospices need to use the correct CBSA or alternate 50xxx number. Our claims processing systems will match the correct wage index with the CBSA or alternate 50xxx number submitted on the claim. Hospices will not need to calculate the transition wage

index. Once the 1-year transition to the new area delineations is over, the 50xxx numbers will not be needed. We provide an impact analysis in Section V. ''Regulatory Impact Analysis'' of this final rule. At this time, our impact analysis does not lead us to conclude that changes need to be made beyond the 1 year transition period.

Comment: A commenter notes that hospices that serve more than one county may see large variations in the wage index even though the hospice pays standardized wages for all of their staff. We received a comment expressing concerns that the reduction in the wage index does not align with local market pressure. The commenter states that hospice wages and benefits are not reflective of those in hospitals and would like to see an approach focused solely on hospice data and trends. A commenter believes that the use of the hospital wage index methodology for both the hospice and home health benefits creates payment inaccuracies that, unlike those applied to hospitals, are not subject to correction through a reclassification process. The commenter urges CMS to take action to create a fair and level playing field through reform of the wage index process.

Response: For many years, hospices have been able to manage their business operations (including staff compensation) while receiving different reimbursements based on serving patients in a variety of locales which have differing wage indexes. Developing a wage index that utilizes data specific to hospices would require us to engage resources in an audit process. In order to establish a hospice specific wage index, we would need to collect data that is specific to hospices. This is not currently feasible due to the volatility of existing hospice wage data and the significant amount of resources that would be required to assess the quality of that data. Furthermore, hospices have expressed concerns over the past few years with recent data collection efforts to support payment reform, the Hospice Item Set Quality Reporting Program, and the CAHPS® Hospice Survey. At this time, we are not collecting hospice specific wage data that may place an additional burden on hospices. We continue to believe that in the absence of hospice or home health specific wage data, using the pre-floor, pre-reclassified hospital wage data is appropriate and reasonable for hospice reimbursement purposes.

The regulations that govern hospice reimbursement do not provide a mechanism for allowing hospices to seek geographic reclassification or to utilize the rural floor provisions that exist for IPPS hospitals. The rural floor provision in section 4410 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) is specific to hospitals. The reclassification provision found in section 1886(d)(10) of the Act is also specific to hospitals. CMS is exploring opportunities to reform the hospital wage index. We refer readers to the CMS Web site at: *www.cms.gov/Medicare/Medicare-Feefor-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html*).

Comment: A commenter believes that hospices in rural and frontier areas incur higher labor costs due to the need for staff to travel long distances. The commenter encourages CMS to analyze the impact of the change in the wage index area delineations especially on labor costs for hospices in rural and frontier areas.

Response: We appreciate the commenter's recommendation. Based on the limited hospice cost report data, we do not have the ability to determine whether an add-on or an adjustment to account for labor costs in different geographic areas would be appropriate at this time.

Comment: Commenters protest using CBSAs to determine the wage index for hospice and suggest that we discontinue the use of CBSAs. These commenters specifically mention Montgomery County, Maryland in their comments. Commenters stated that in the ten years since CMS has used CBSAs to determine payment, Montgomery Hospice has received lower payments than neighboring hospices in the Washington–Arlington–Alexandria, DC–VA–MD, WV CBSA. These commenters believe that Montgomery County has a similar cost of living compared to Washington, DC and that Montgomery County shares the same labor market when competing for labor. Therefore, commenters state that hospices in Montgomery County should be reimbursed at the same level as hospices in the Washington, DC area. Commenters stated that Montgomery County should be paid similarly to Washington, DC due to close commuting ties with the District and also due to the fact that Montgomery County is contiguous with Washington, DC. A commenter also protests the use of CBSAs to determine the wage index, specifically in Montgomery County, also notes that OMB cautions agencies concerning the use of the geographic area delineations in non-statistical programs.

Response: In the FY 2005 proposed rule (70 FR 22394), we indicated that the MSA delineations as well as the CBSA delineations are determined by the OMB. The OMB reviews its Metropolitan Area definitions preceding each decennial census to reflect recent population changes. We also indicated in the proposed rule, that we believed that the OMB's CBSA designations reflect the most recent available geographic classifications and were a reasonable and appropriate way to define geographic areas for purposes of wage index values. Ten years ago, in our FY 2006 Hospice Wage Index final rule (70 FR 45130), we finalized the adoption of the revised labor market area definitions as discussed in the OMB Bulletin No. 03–04 (June 6, 2003). In the December 27, 2000 **Federal Register** (65 FR 82228 through 82238), OMB announced its new standards for defining metropolitan and micropolitan statistical areas. According to that notice, OMB defines a CBSA, beginning in 2003, as ''a geographic entity associated with at least one core of 10,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. The general concept of the CBSAs is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus. The purpose of the standards is to provide nationally consistent definitions for collecting, tabulating, and publishing Federal statistics for a set of geographic areas. CBSAs include adjacent counties that have a minimum of 25 percent commuting to the central counties of the area. This is an increase over the minimum commuting threshold for outlying counties applied in the previous MSA definition of 15 percent.

Based on the OMB's current delineations, as described in the February 28, 2013 OMB Bulletin No. 13–01, Montgomery County (along with Frederick County, Maryland) belongs in a separate CBSA from the areas defined in the Washington–Arlington–Alexandria, DC–VA CBSA. Unlike IPPS, IRF, and SNF, where each provider uses a single CBSA, hospice agencies may be reimbursed based on more than one wage index. Payments are based upon the location of the beneficiary for routine and continuous home care or the location of the agency for respite and general inpatient care. It is very likely that hospices in Montgomery County, Maryland provide RHC and CHC to patients in the ''Washington-Arlington-Alexandria, DC–VA'' CBSA in addition to serving patients in the ''Baltimore-Columbia-Towson, Maryland'' CBSA.

While CMS and other stakeholders have explored potential alternatives to

the current CBSA-based labor market system (we refer readers to the CMS Web site at: *www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html*), no consensus has been achieved regarding how best to implement a replacement system. As discussed in the FY 2005 IPPS final rule (69 FR 49027), ''While we recognize that MSAs are not designed specifically to define labor market areas, we believe they do represent a useful proxy for this purpose.'' We further believe that using the most current OMB delineations will increase the integrity of the hospice wage index by creating a more accurate representation of geographic variation in wage levels. We have reviewed our findings and impacts relating to the new OMB delineations, and have concluded that there is no compelling reason to further delay implementation. We are implementing the new OMB delineations as described in the February 28, 2013 OMB Bulletin No. 13–01 for the hospice wage index effective beginning in FY 2016.

We recognize that the OMB cautions that the delineations should not be used to develop and implement Federal, state, and local nonstatistical programs and policies without full consideration of the effects of using these delineations for such purposes. The OMB states that, ''In cases where there is no statutory requirement and an agency elects to use the Metropolitan, Micropolitan, or Combined Statistical Area definitions in nonstatistical programs, it is the sponsoring agency's responsibility to ensure that the definitions are appropriate for such use. When an agency is publishing for comment a proposed regulation that would use the definitions for a nonstatistical purpose, the agency should seek public comment on the proposed use.''

While we recognize that OMB's geographic area delineations are not designed specifically for use in non-statistical programs or for program purposes, including the allocation of Federal funds, we continue to believe that the OMB's geographic area delineations represent a useful proxy for differentiating between labor markets and that the geographic area delineations are appropriate for use in determining Medicare hospice payments. In implementing the use of CBSAs for hospice payment purposes in our FY 2006 rule (70 FR 45130), we considered the effects of using these delineations. We have used CBSAs for determining hospice payments for ten years (since FY 2006). In addition, other provider types, such as IPPS hospital, home health, SNF, inpatient rehabilitation facility (IRF), and the ESRD program, have used CBSAs to define their labor market areas for the last decade.

Comment: A commenter noted that in Table 20 of the proposed rule (80 FR 25862), the state attributed to a county listed under CBSA 41540 ''Salisbury, MD–DE'' is incorrect.

Response: We thank the commenter for bringing this error to our attention. Worcester County, Maryland is part of CBSA 41540. We made a typographical error when we referred to Worcester County, Maryland as ''Worcester County, MA''. The correct reference should be ''Worcester County, MD''.

Final Action: We are implementing the hospice wage index with a 1-year transition period as proposed, meaning the counties impacted will receive 50 percent of the rate from the current CBSA and 50 percent from the new OMB CBSA delineations for FY 2016 effective October 1, 2015.

2. Hospice Payment Update Percentage

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) amended section 1814(i)(1)(C)(ii)(VI) of the Act to establish updates to hospice rates for FYs 1998 through 2002. Hospice rates were to be updated by a factor equal to the market basket index, minus one percentage point. Payment rates for FYs since 2002 have been updated according to section 1814(i)(1)(C)(ii)(VII) of the Act, which states that the update to the payment rates for subsequent FYs must be the market basket percentage for that FY. The Act requires us to use the inpatient hospital market basket to determine the hospice payment rate update. In addition, section 3401(g) of the Affordable Care Act mandates that, starting with FY 2013 (and in subsequent FYs), the hospice payment update percentage will be annually reduced by changes in economy-wide productivity as specified in section 1886(b)(3)(B)(xi)(II) of the Act. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable FY, year, cost reporting period, or other annual period) (the ''MFP adjustment''). A complete description of the MFP projection methodology is available on our Web site at *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.html*.

In addition to the MFP adjustment, section 3401(g) of the Affordable Care Act also mandates that in FY 2013 through FY 2019, the hospice payment update percentage will be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions specified in section 1814(i)(1)(C)(v) of the Act). The hospice payment update percentage for FY 2016 is based on the estimated inpatient hospital market basket update of 2.4 percent (based on IHS Global Insight, Inc.'s second quarter 2015 forecast with historical data through the first quarter of 2015). Due to the requirements at 1886(b)(3)(B)(xi)(II) and 1814(i)(1)(C)(v) of the Act, the estimated inpatient hospital market basket update for FY 2016 of 2.4 percent must be reduced by a MFP adjustment as mandated by Affordable Care Act (currently estimated to be 0.5 percentage point for FY 2016). The estimated inpatient hospital market basket update for FY 2016 is reduced further by a 0.3 percentage point, as mandated by the Affordable Care Act. In effect, the hospice payment update percentage for FY 2016 is 1.6 percent. If more recent data are subsequently available (for example, a more recent estimate of the inpatient hospital market basket update and MFP adjustment), we will use such data, if appropriate, to determine the FY 2016 market basket update and the MFP adjustment in the FY 2016 Hospice Rate Update final rule.

Currently, the labor portion of the hospice payment rates is as follows: For RHC, 68.71 percent; for CHC, 68.71 percent; for General Inpatient Care, 64.01 percent; and for Respite Care, 54.13 percent. The non-labor portion is equal to 100 percent minus the labor portion for each level of care. Therefore, the non-labor portion of the payment rates is as follows: For RHC, 31.29 percent; for CHC, 31.29 percent; for General Inpatient Care, 35.99 percent; and for Respite Care, 45.87 percent.

A summary of the comments we received regarding the payment rates and our responses to those comments appear below.

Comment: Several commenters expressed appreciation for the positive payment update for FY 2016. However, the commenters believe that the update does not keep pace with the cost of providing highest quality care for beneficiaries. One commenter states that costs associated with workforce recruitment and training, supplies, and technology are all rising faster than reimbursement. The commenter further states that non-profit, mission-based hospices already operate on extremely slim margins: MedPAC calculated average non-profit hospice margins at

3.7 percent for 2012 with an expectation for margins to decline further (MedPAC March 2015). Some commenters note that margins for non-profit hospices are much lower than margins for for-profit hospices. The commenters strongly encourage CMS to reevaluate the payment update for FY 2016.

Response: The payment update to the hospice rates is based in statute as previously described in detail in this section and we do not have regulatory authority to alter the payment update.

Final Action: We are implementing the hospice payment update as discussed in the proposed rule.

3. FY 2016 Hospice Payment Rates

Historically, the hospice rate update has been published through a separate administrative instruction issued annually in the summer to provide adequate time to implement system change requirements; however, beginning in FY 2014 and for subsequent FY, we are using rulemaking as the means to update payment rates. This change was proposed in the FY 2014 Hospice Wage Index and Payment Rate Update proposed rule and finalized in the FY 2014 Hospice Wage Index and Payment Rate Update final rule (78 FR 48270). It is consistent with the rate update process in other Medicare benefits, and provides rate information to hospices as quickly as, or earlier than, when rates are published in an administrative instruction.

There are four payment categories that are distinguished by the location and intensity of the services provided. The base payments are adjusted for geographic differences in wages by multiplying the labor share, which varies by category, of each base rate by the applicable hospice wage index. A hospice is paid the RHC rate for each day the beneficiary is enrolled in hospice, unless the hospice provides continuous home care, IRC, or general inpatient care. CHC is provided during a period of patient crisis to maintain the patient at home; IRC is short-term care to allow the usual caregiver to rest; and GIP is to treat symptoms that cannot be managed in another setting.

As discussed in section III.B, of this final rule, we will delay implementation of both the proposed RHC rates and the SIA payment until January 1, 2016. Between October 1, 2015 and December 31, 2015, hospices will continue to be paid a single RHC per diem payment amount. Effective January 1, 2016, the RHC rates for days 1 through 60 and days 61 and beyond would replace the single RHC per diem payment rate. As discussed in section III.B.3, we will make a SIA payment, in addition to the daily RHC payment, when direct patient care is provided by a RN or social worker during the last 7 days of the patient's life. The SIA payment will be equal to the CHC hourly rate multiplied by the hours of nursing or social work provided (up to 4 hours total) that occurred on the day of service. The SIA payment will also be adjusted by the appropriate wage index. In order to maintain budget neutrality, as required under section 1814(i)(6)(D)(ii) of the Act, for the SIA payment, the RHC rates will need to be adjusted by a budget neutrality factor. The budget neutrality adjustment that will apply to days 1 through 60 is equal to 1 minus the ratio of SIA payments for days 1 through 60 to the total payments for days 1 through 60 and is calculated to be 0.9806. The budget neutrality adjustment that will apply to days 61 and beyond is equal to 1 minus the ratio of SIA payments for days 61 and beyond to the total payments for days 61 and beyond and is calculated to be 0.9957. Lastly, the RHC rates will be increased by the FY 2016 hospice payment update percentage of 1.6 percent as discussed in section III.C.3. The FY 2016 RHC rate for hospice claims between October 1, 2015 and December 31, 2015 is shown in Table 20. The FY 2016 RHC rates for hospice claims for January 1, 2016 through September 30, 2016 are shown in Table 21. The FY 2016 payment rates for CHC, IRC, and GIP will be the FY 2015 payment rates increased by 1.6 percent. The rates for these three levels of care are shown in Table 22. The FY 2016 rates for hospices that do not submit the required quality data are shown in Tables 23, 24, and 25. The FY 2016 hospice payment rates will be effective for care and services furnished on or after October 1, 2015 through September 30, 2016.

TABLE 20—FY 2016 HOSPICE PAYMENT RATE FOR RHC FOR OCTOBER 1, 2015 THROUGH DECEMBER 31, 2015

Code	Description	FY 2015 Payment rate	FY 2016 Hospice payment update percentage	FY 2016 Payment rate
651	Routine Home Care	$159.34	× 1.016	$161.89

TABLE 21—FY 2016 HOSPICE PAYMENT RATES FOR RHC FOR JANUARY 1, 2016 THROUGH SEPTEMBER 30, 2016

Code	Description	Rates [1]	SIA Budget neutrality factor adjustment	FY 2016 Hospice payment update percentage	FY 2016 Payment rates
651	Routine Home Care (days 1–60)	$187.54	× 0.9806	× 1.016	$186.84
651	Routine Home Care (days 61+)	145.14	× 0.9957	× 1.016	146.83

[1] See section III.B.2 for the RHC rates for days 1–60, and days 61 and beyond before accounting for the Service Intensity Add-on (SIA) payment budget neutrality factor and the FY 2016 hospice payment update percentage of 1.6 percent as required by section 1814(i)(1)(C) of the Act.

TABLE 22—FY 2016 HOSPICE PAYMENT RATES FOR CHC, IRC, AND GIP

Code	Description	FY 2015 Payment rates	FY 2016 Hospice payment update percentage	FY 2016 Payment rate
652	Continuous Home Care Full Rate = 24 hours of care $ = 39.37 FY 2016 hourly rate	$929.91	× 1.016	$944.79
655	Inpatient Respite Care	164.81	× 1.016	167.45
656	General Inpatient Care	708.77	× 1.016	720.11

We reiterate in this final rule, that the Congress required in sections 1814(i)(5)(A) through (C) of the Act that hospices begin submitting quality data, based on measures to be specified by the Secretary. In the FY 2012 Hospice Wage Index final rule (76 FR 47320 through 47324), we implemented a HQRP as required by section 3004 of the Affordable Care Act. Hospices were required to begin collecting quality data in October 2012, and submit that quality data in 2013. Section 1814(i)(5)(A)(i) of the Act requires that beginning with FY 2014 and each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that FY. We remind hospices that this applies to payments in FY 2016 (See Tables 23 through 25 below). For more information on the HQRP requirements please see section III.E in this final rule.

TABLE 23—FY 2016 HOSPICE PAYMENT RATE FOR RHC FOR OCTOBER 1, 2015 THROUGH DECEMBER 31, 2015 FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

Code	Description	FY 2015 Payment rate	FY 2016 Hospice payment update of 1.6 percent minus 2 percentage points = −0.4 percent	FY 2016 Payment rate
651	Routine Home Care	$159.34	× 0.996	$158.70

TABLE 24—FY 2016 HOSPICE PAYMENT RATES FOR RHC FOR JANUARY 1, 2016 THROUGH SEPTEMBER 30, 2016 FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

Code	Description	RHC Rates [1]	SIA Budget neutrality factor adjustment	FY 2016 Hospice payment update of 1.6 percent minus 2 percentage points = −0.4 percent	FY 2016 Payment rates
651	Routine Home Care (days 1–60)	$187.54	× 0.9806	× 0.996	$183.17
651	Routine Home Care (days 61+)	145.14	× 0.9957	× 0.996	143.94

[1] See section III.B.2 for the RHC rates for days 1–60, and days 61 and beyond before accounting for the Service Intensity Add-on (SIA) payment budget neutrality factor and the FY 2016 hospice payment update percentage of 1.6 percent as required by section 1814(i)(1)(C) of the Act.

TABLE 25—FY 2016 HOSPICE PAYMENT RATES FOR CHC, IRC, AND GIP FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

Code	Description	FY 2015 Payment rates	FY 2016 Hospice payment update of 1.6 percent minus 2 percentage points = −0.4 percent	FY 2016 Payment rate
652	Continuous Home Care Full Rate = 24 hours of care $ = 38.67 hourly rate.	$929.91	× 0.996	$926.19
655	Inpatient Respite Care	164.81	× 0.996	164.15

TABLE 25—FY 2016 HOSPICE PAYMENT RATES FOR CHC, IRC, AND GIP FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA—Continued

Code	Description	FY 2015 Payment rates	FY 2016 Hospice payment update of 1.6 percent minus 2 percentage points = −0.4 percent	FY 2016 Payment rate
656	General Inpatient Care	708.77	× 0.996	705.93

4. Hospice Aggregate Cap and the IMPACT Act of 2014

When the Medicare hospice benefit was implemented, the Congress included 2 limits on payments to hospices: An inpatient cap and an aggregate cap. As set out in sections 1861(dd)(2)(A)(iii) and 1814(i)(2)(A) through (C) of the Act, respectively, the hospice inpatient cap limits the total number of Medicare inpatient days (general inpatient care and respite care) to no more than 20 percent of a hospice's total Medicare hospice days. The intent of the inpatient cap was to ensure that hospice remained a home-based benefit. The hospice aggregate cap limits the total aggregate payment any individual hospice can receive in a year. The intent of the hospice aggregate cap was to protect Medicare from spending more for hospice care than it would for conventional care at the end of life.

The aggregate cap amount was set at $6,500 per beneficiary when first enacted in 1983; this was an amount hospice advocates agreed was well above the average cost of caring for a hospice patient.[50] Since 1983, the $6,500 amount has been adjusted annually by the change in the medical care expenditure category of the consumer price index for urban consumers (CPI–U) from March 1984 to March of the cap year, as required by section 1814(i)(2)(B) of the Act. The cap amount is multiplied by the number of Medicare beneficiaries who received hospice care from a particular hospice during the year, resulting in its hospice aggregate cap, which is the allowable amount of total Medicare payments that hospice can receive for that cap year. The cap year is currently November 1 to October 31, and was set in place in the December 16, 1983 Hospice final rule (48 FR 56022).

[50] National Hospice and Palliative Care Organization (NHPCO), ''A Short History of the Medicare Hospice Cap on Total Expenditures.'' Web 19 Feb. 2014. *http://www.nhpco.org/sites/default/files/public/regulatory/History_of_Hospice_Cap.pdf.*

Section 1814(i)(2)(B)(i) and (ii) of the Act, as added by section 3(b) of the IMPACT Act requires, effective for the 2016 cap year (November 1, 2015 through October 31, 2016), that the cap amount for the previous year to be updated by the hospice payment update percentage, rather than the original $6,500 being annually adjusted by the change in the CPI–U for medical care expenditures since 1984. This new provision will sunset for cap years ending after September 30, 2025, at which time the annual update to the cap amount will revert back to the original methodology. This provision is estimated to result in $540 million in savings over 10 years starting in 2017.

As a result, we will update § 418.309 to reflect the new language added to section 1814(i)(2)(B) of the Act.

In accordance with section 1814(i)(2)(B)(i) of the Act, the hospice aggregate cap amount for the 2015 cap year, starting on November 1, 2014 and ending on October 31, 2015, will be $27,382.63. This amount was calculated by multiplying the original cap amount of $6,500 by the change in the CPI–U medical care expenditure category, from the fifth month of the 1984 accounting year (March 1984) to the fifth month the current accounting year (in this case, March 2015). The CPI–U for medical care expenditures for 1984 to present is available from the BLS Web site at: *http://www.bls.gov/cpi/home.htm.*

Step 1: From the BLS Web site given above, the March 2015 CPI–U for medical care expenditures is 444.020 and the 1984 CPI–U for medical care expenditures was 105.4.

Step 2: Divide the March 2015 CPI–U for medical care expenditures by the 1984 CPI–U for medical care expenditures to compute the change.
444.020/105.4 = 4.212713

Step 3: Multiply the original cap base amount ($6,500) by the result from step 2) to get the updated aggregate cap amount for the 2015 cap year.
$6,500 × 4.212713 = $27,382.63

As required by section 1814(i)(2)(B)(ii) of the Act, the hospice aggregate cap amount for the 2016 cap year, starting on November 1, 2015 and ending on October 31, 2016, will be the 2015 cap amount updated by the FY 2016 hospice payment update percentage (see section III.C.2 above). As such, the 2016 cap amount will be $27,820.75 ($27,382.63 * 1.016). A Change Request with the finalized hospice payment rates, a finalized hospice wage index, the Pricer for FY 2016, and the hospice cap amount for the cap year ending October 31, 2015 will be issued in the summer.

A summary of the comments we received regarding the aggregate cap and our responses to those comments appears below.

Comment: A number of commenters supported the use of payment update data to update the hospice aggregate cap. Some commenters suggested that CMS reduce the hospice aggregate cap between ten to fifteen percent and that a portion of the savings be utilized to support innovation and research around end-of-life, hospice, and palliative care. Another commenter stated that the aggregate cap should be adjusted to account for regional differences in payment. The commenter argued that providers in areas with an overall higher cost of living would hit the aggregate cap sooner than providers in areas with a lower cost of living and that the aggregate cap should be applied on a CBSA basis, not a national basis.

Response: We thank the commenters for their support. We reiterate that the use of hospice payment update percentage to update the hospice aggregate cap is mandated by the IMPACT Act. We also note that while we find the suggestion to adjust the hospice aggregate cap compelling, we would need statutory authority to reduce the hospice aggregate cap. In addition, we do not have statutory authority to change the aggregate cap amount by region or CBSA.

Comment: A commenter noted an error in our calculation of the aggregate cap amount for the 2015 cap year. In the proposed rule, (80 FR 25867), in Step 2,

we should have divided the March 2015 CPI–U for medical care expenditures, 444.020, by the 1984 CPI–U for medical care expenditures, 105.4. However, we inadvertently divided 440.020 by 105.4.

Response: We would like to thank the commenter for noticing the error and alerting us. We have corrected the error in the calculation in this final rule.

D. Alignment of the Inpatient and Aggregate Cap Accounting Year With the Federal Fiscal Year

As noted in section III.C.4, when the Medicare hospice benefit was implemented, the Congress included two limits on payments to hospices: An aggregate cap and an inpatient cap. The intent of the hospice aggregate cap was to protect Medicare from spending more for hospice care than it would for conventional care at the end-of-life. If a hospice's total Medicare payments for the cap year exceed such hospice's aggregate cap amount, then the hospice must repay the excess back to Medicare. The intent of the inpatient cap was to ensure that hospice remained a home-based benefit. If a hospice's inpatient days (GIP and respite) exceed 20 percent of all hospice days then, for inpatient care, the hospice is paid: (1) The sum of the total reimbursement for inpatient care multiplied by the ratio of the maximum number of allowable inpatient days to actual number of all inpatient days; and (2) the sum of the actual number of inpatient days in excess of the limitation by the routine home care rate.

1. Streamlined Method and Patient-by-Patient Proportional Method for Counting Beneficiaries To Determine Each Hospice's Aggregate Cap Amount

The aggregate cap amount for any given hospice is established by multiplying the cap amount by the number of Medicare beneficiaries who received hospice services during the year. Originally, the number of Medicare beneficiaries who received hospice services during the year was determined using a ''streamlined'' methodology whereby each beneficiary is counted as ''1'' in the initial cap year of the hospice election and is not counted in subsequent cap years. Specifically, the hospice includes in its number of Medicare beneficiaries those Medicare beneficiaries who have not previously been included in the calculation of any hospice cap, and who have filed an election to receive hospice care in accordance with § 418.24 during the period beginning on September 28th (34 days before the beginning of the cap year) and ending on September 27th (35 days before the end of the cap year), using the best data available at the time of the calculation. This is applicable for cases in which a beneficiary received care from only one hospice. If a beneficiary received care from more than one hospice, each hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care with that hospice in that cap year, using the best data available at the time of the calculation. Using the streamlined method, a different timeframe from the cap year is used to count the number of Medicare beneficiaries because it allows those beneficiaries who elected hospice near the end of the cap year to be counted in the year when most of the services were provided (48 FR 38158).

During FY 2012 rulemaking, in addition to the streamlined method, CMS added a ''patient-by-patient proportional'' method as a way of calculating the number of Medicare beneficiaries who received hospice services during the year in determining the aggregate cap amount for any given hospice (76 FR 47309). This method specifies that a hospice should include in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. The total number of Medicare beneficiaries for a given hospice's cap year is determined by summing the whole or fractional share of each Medicare beneficiary that received hospice care during the cap year, from that hospice. Under the patient-by-patient proportional methodology, the timeframe for counting the number of Medicare beneficiaries is the same as the cap accounting year (November 1 through October 31). The aggregate cap amount for each hospice is now calculated using the patient-by-patient proportional method, except for those hospices that had their cap determination calculated under the streamlined method prior to the 2012 cap year, did not appeal the streamlined method used to determine the number of Medicare beneficiaries used in the aggregate cap calculation, and opted to continue to have their hospice aggregate cap calculated using the streamlined method no later than 60 days after receipt of its 2012 cap determination.

2. Inpatient and Aggregate Cap Accounting Year Timeframe

As stated in section III.C.4, the cap accounting year is currently November 1 to October 31. In the past, CMS has considered changing the cap accounting year to coincide with the hospice rate update year, which is the federal fiscal year (October 1 through September 30). In the FY 2011 Hospice Wage Index notice (75 FR 42951), CMS solicited comments on aligning the cap accounting year for both the inpatient and aggregate hospice cap to coincide with the FY. In the FY 2012 Hospice Wage Index proposed rule, we summarized the comments we received, stating that ''several commenters supported the idea of our aligning the cap year with the federal fiscal year; with some noting that the change would be appropriate for a multi-year apportioning approach (the patient-by-patient proportional method).'' Other commenters stated that we should not change the cap year at this time, and recommended that we wait for this to be accomplished as part of hospice payment reform (76 FR 26812).

In FY 2012, we decided not to finalize changing the cap accounting year to the FY, partly because of a concern that a large portion of providers could still be using the streamlined method. As stated earlier, the streamlined method has a different timeframe for counting the number of beneficiaries than the cap accounting year, allowing those beneficiaries who elected hospice near the end of the cap year to be counted in the year when most of the services were provided. However, for the 2013 cap year, only 486 hospices used the streamlined method to calculate the number of Medicare hospice patients and the remaining providers used the patient-by-patient proportional method. Since the majority of providers now use the patient-by-patient proportional method, we believe there is no longer an advantage to defining the cap accounting year differently from the hospice rate update year; maintaining a cap accounting year (as well as the period for counting beneficiaries under the streamlined method) that is different from the federal fiscal year creates an added layer of complexity that can lead to hospices unintentionally calculating their aggregate cap determinations incorrectly. In addition, shifting the cap accounting year timeframes to coincide with the hospice rate update year (the federal fiscal year) will better align with the intent of the new cap calculation methodology required by the IMPACT Act of 2014, as discussed in section III.C.4. Therefore, we are aligning the cap accounting year for both the inpatient cap and the hospice aggregate cap with the federal fiscal year for FYs 2017 and later. In addition to aligning the cap accounting year with the federal fiscal year, we will also align the

timeframe for counting the number of beneficiaries with the federal fiscal year. This will eliminate timeframe complexities associating with counting payments and beneficiaries differently from the federal fiscal year and will help hospices avoid mistakes in calculating their aggregate cap determinations.

In shifting the cap accounting year to match the federal fiscal year, we note that new section 1814(i)(2)(B)(ii) of the Act, as added by section 3(b) of the IMPACT Act, requires the cap amount for 2016 to be updated by the hospice payment update percentage in effect ''during the FY beginning on the October 1 preceding the beginning of the accounting year''. In other words, we interpret this to mean that the statute requires the 2016 cap amount to be updated using the most current hospice payment update percentage in effect at the start of that cap year. For the 2016 cap year, the 2015 cap amount will be updated by the FY 2016 hospice payment update percentage outlined in section III.C.2. For the 2017 cap year through the 2025 cap year, we will update the previous year's cap amount by the hospice payment update percentage for that current federal fiscal year. For the 2026 cap year and beyond, changing the cap accounting year to coincide with the federal fiscal year will require us to use the CPI–U for February when updating the cap amount, instead of the current process which uses the March CPI–U to update the cap amount. Section 1814(i)(2)(B) of the Act requires us to update the cap amount by the same percentage as the percentage increase or decrease in the medical care expenditure category of the CPI–U from March 1984 to the ''fifth month of the accounting year '' for all years except those accounting years that end after September 30, 2016 and before October 1, 2025.

In shifting the cap year to match the federal fiscal year, we are aligning the timeframes in which beneficiaries and payments are counted for the purposes of determining each individual hospice's aggregate cap amount (see table 26 below) as well as the timeframes in which days of hospice care are counted for the purposes determining whether a given hospice exceeded the inpatient cap. In the year of transition (2017 cap year), for the inpatient cap, we will calculate the percentage of all hospice days of care that were provided as inpatient days (GIP care and respite care) from November 1, 2016 through September 30, 2017 (11 months). For those hospices using the patient-by-patient proportional method for their aggregate cap determinations, for the 2017 cap year, we will count beneficiaries from November 1, 2016 to September 30, 2017. For those hospices using the streamlined method for their aggregate cap determinations, we will allow 3 extra days to count beneficiaries in the year of transition. Specifically, for the 2017 cap year (October 1, 2016 to September 30, 2017), we will count beneficiaries from September 28, 2016 to September 30, 2017, which is 12 months plus 3 days, in that cap year's calculation. For hospices using either the streamlined method or the patient-by-patient proportional method, we will count 11 months of payments from November 1, 2016 to September 30, 2017 for the 2017 cap year. For the 2018 cap year (October 1, 2017 to September 30, 2018), we will count both beneficiaries and payments for hospices using the streamlined or the patient-by-patient proportional methods from October 1, 2017 to September 30, 2018. Likewise, for the 2018 cap year, we will calculate the percentage of all hospice days of care that were provided as inpatient days (GIP care or respite care) from October 1, 2017 to September 30, 2018. Because of the non-discretionary language used by Congress in determining the cap for a year, the actual cap amount for the adjustment year will not be prorated for a shorter time frame. We solicited public comment on all aspects of the proposed alignment of the cap accounting year for both the inpatient cap and hospice aggregate cap, as well as the timeframe for counting the number of beneficiaries for the hospice aggregate cap, with the federal fiscal year, as articulated in this section, as well as the corresponding proposed changes to the regulations at § 418.308(c) in section VI.

TABLE 26—HOSPICE AGGREGATE CAP TIMEFRAMES FOR COUNTING BENEFICIARIES AND PAYMENTS FOR THE ALIGNMENT OF THE CAP ACCOUNTING YEAR WITH THE FEDERAL FISCAL YEAR

Cap year	Beneficiaries		Payments	
	Streamlined method	Patient-by-patient proportional method	Streamlined method	Patient-by-patient proportional method
2016	9/28/15–9/27/16	11/1/15–10/31/16	11/1/15–10/31/16	11/1/15–10/31/16
2017 (Transition Year)	9/28/16–9/30/17	11/1/16–9/30/17	11/1/16–9/30/17	11/1/16–9/30/17
2018	10/1/17– 9/30/18	10/1/17– 9/30/18	10/1/17– 9/30/18	10/1/17– 9/30/18

Summaries of the public comments and our responses to comments on all aspects of the proposed alignment of the cap accounting year with the federal fiscal year as well as the proposed changes to the regulations at § 418.308(c) are summarized below:

Comment: Commenters supported the proposed alignment of the inpatient and aggregate cap with the federal fiscal year, as well as the alignment of the timeframe for counting the number of beneficiaries with the federal fiscal year, and supported the proposed methodology for the transition year. Commenters encouraged CMS to issue, and direct the MACs to provide, timely notice of forthcoming changes and reminders to minimize confusion when hospice providers calculate and self-report their aggregate cap and to allow hospices to adequately track their cap status. Commenters wanted education and information on the transition and changes to the cap accounting year timeframe.

Response: We thank the commenters for their support and will finalize this policy as proposed. We note that the MACs currently send a reminder notice to hospices no later than 30 days prior to the due date of the self-determined cap. We encourage hospices to visit their respective MAC Web site regularly for announcements and updates regarding the hospice program. Please contact your MAC if you need information regarding the cap calculation or additional information.

Comment: Some commenters stated that the proposed rule eliminates the reference to March 31st in § 418.308 and requested that the final rule clarify that hospices are still required to file a self-determined inpatient and aggregate cap determination on or before March 31, 2017 for the 2016 cap year and on or before February 28, 2018 for the 2017

cap year. One commenter requested that CMS provide early notice on the due date for filing the aggregate cap determination each year since the removal of the reference to March 31st may be a source of confusion for hospice providers.

Response: We note that the regulatory text still states that the hospice must file its aggregate cap determination notice with its Medicare contractor no later than 5 months after the end of the cap year and remit any overpayment due at that time. Therefore, the regulatory text change continues to provide hospices with sufficient information to determine when aggregate cap self-determinations must be submitted to the MAC. Hospices are required to file a self-determined inpatient and aggregate cap determination on or before March 31, 2017 for the 2016 cap year and on or before February 28, 2018 for the 2017 cap year. We will finalize this policy as proposed, aligning the cap accounting year with the federal fiscal year and removing the reference to March 31st in § 418.308. The end of the cap accounting year for the 2017 cap year and future years will be the same as the end of the fiscal year. Therefore, it is clear that the clause in the regulation text ''5 months after the end of the cap year'' refers to the end of February for cap years 2017 and beyond.

Final Action: We are finalizing the proposal and proposed methodology to align the inpatient and aggregate cap accounting year, as well as the timeframe for counting the number of beneficiaries, with the federal fiscal year. We are also finalizing the proposed changes to § 418.308(c).

E. Proposed Updates to the Hospice Quality Reporting Program (HQRP)

1. Background and Statutory Authority

Section 3004(c) of the Affordable Care Act amended section 1814(i)(5) of the Act to authorize a quality reporting program for hospices. Section 1814(i)(5)(A)(i) of the Act requires that beginning with FY 2014 and each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that FY. Depending on the amount of the annual update for a particular year, a reduction of 2 percentage points could result in the annual market basket update being less than 0.0 percent for a FY and may result in payment rates that are less than payment rates for the preceding FY. Any reduction based on failure to comply with the reporting requirements, as required by section 1814(i)(5)(B) of the Act, would apply only for the particular FY involved. Any such reduction would not be cumulative or be taken into account in computing the payment amount for subsequent FYs. Section 1814(i)(5)(C) of the Act requires that each hospice submit data to the Secretary on quality measures specified by the Secretary. The data must be submitted in a form, manner, and at a time specified by the Secretary.

2. General Considerations Used for Selection of Quality Measures for the HQRP

Any measures selected by the Secretary must be endorsed by the consensus-based entity, which holds a contract regarding performance measurement with the Secretary under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). However, section 1814(i)(5)(D)(ii) of the Act provides that in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the consensus-based entity, the Secretary may specify measures that are not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary. Our paramount concern is the successful development of a Hospice Quality Reporting Program (HQRP) that promotes the delivery of high quality healthcare services. We seek to adopt measures for the HQRP that promote patient-centered, high quality, and safe care. Our measure selection activities for the HQRP take into consideration input from the Measure Applications Partnership (MAP), convened by the NQF, as part of the established CMS pre-rulemaking process required under section 1890A of the Act. The MAP is a public-private partnership comprised of multi-stakeholder groups convened by the NQF for the primary purpose of providing input to CMS on the selection of certain categories of quality and efficiency measures, as required by section 1890A(a)(3) of the Act. By February 1st of each year, the NQF must provide that input to CMS. Input from the MAP is located at: (*http://www.qualityforum.org/Setting_Priorities/Partnership/Measure_Applications_Partnership.aspx.* We also take into account national priorities, such as those established by the National Priorities Partnership at (*http://www.qualityforum.org/npp/*), the HHS Strategic Plan *http://www.hhs.gov/secretary/about/priorities/priorities.html*), the National Strategy for Quality Improvement in Healthcare, (*http://www.ahrq.gov/workingforquality/nqs/nqs2013annlrpt.htm*) and the CMS Quality Strategy (*http://www.cms.gov/Medicare/Quality-Initiatives-Patient-AssessmentInstruments/QualityInitiativesGenInfo/CMS-Quality-Strategy.html*). To the extent practicable, we have sought to adopt measures endorsed by member organizations of the National Consensus Project recommended by multi-stakeholder organizations, and developed with the input of providers, purchasers/payers, and other stakeholders.

3. Proposed Policy for Retention of HQRP Measures Adopted for Previous Payment Determinations

Beginning with the FY 2018 payment determination, for the purpose of streamlining the rulemaking process, we proposed that when we adopt measures for the HQRP beginning with a payment determination year, these measures are automatically adopted for all subsequent years' payment determinations, unless we propose to remove, suspend, or replace the measures.

Quality measures may be considered for removal by CMS if:

- Measure performance among hospices is so high and unvarying that meaningful distinctions in improvements in performance can be no longer be made;
- Performance or improvement on a measure does not result in better patient outcomes;
- A measure does not align with current clinical guidelines or practice;
- A more broadly applicable measure (across settings, populations, or conditions) for the particular topic is available;
- A measure that is more proximal in time to desired patient outcomes for the particular topic is available;
- A measure that is more strongly associated with desired patient outcomes for the particular topic is available; or
- Collection or public reporting of a measure leads to negative unintended consequences.

For any such removal, the public will be given an opportunity to comment through the annual rulemaking process. However, if there is reason to believe continued collection of a measure raises potential safety concerns, we will take immediate action to remove the measure from the HQRP and will not wait for the annual rulemaking cycle. The measures will be promptly removed and we will immediately notify hospices and the public of such a decision through the

usual HQRP communication channels, including listening sessions, memos, email notification, and Web postings. In such instances, the removal of a measure will be formally announced in the next annual rulemaking cycle.

CMS did not propose to remove any measures for the FY 2017 reporting cycle. We invited public comment only on our proposal that once a quality measure is adopted, it be retained for use in the subsequent fiscal year payment determinations unless otherwise stated.

Public comments and our response to comments are summarized below. All comments received were supportive of the proposed policy that once a quality measure is adopted, it be retained for use in the subsequent fiscal year payment determinations until otherwise stated, as proposed.

Comment: CMS received several comments on our proposal that once a quality measure is adopted, it be retained for use in the subsequent fiscal year payment determinations until otherwise stated. All commenters were supportive of this proposal. Commenters appreciated the clarification from CMS and noted that the proposed reasons for removal of a measure are reasonable.

Response: CMS thanks commenters for their support of our proposal to retain measures that have been adopted for use in subsequent fiscal year payment determinations, unless otherwise stated.

Comment: Two commenters noted the effort required by hospices in reporting quality data, and stated that measures should be systematically reviewed on a regular basis to ensure they are able to distinguish performance among hospices, do not result in unintended consequences, and have demonstrated potential to improve care.

Response: CMS agrees with commenters that regularly assessing measures to ensure their value in distinguishing performance and improving care is vital to the success of the HQRP. For all measures implemented for use in the HQRP, CMS regularly conducts measure testing activities according to the blueprint for the CMS Measures Management System (*http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/MMS/Measures ManagementSystemBlueprint.html*) to ensure that measures continue to demonstrate scientific acceptability (including reliability and validity) and meet the goals of the HQRP, which include distinguishing performance among hospices and contributing to better patient outcomes. If measure testing activities reveal that a measure meets one of the conditions for removal that is listed the proposed rule (measure performance among hospices high and unvarying, performance or improvement in a measure does not result in better patient outcomes, etc.), the measure will be considered for removal from the HQRP to avoid unintended consequences and ensure that providers' data collection efforts are meaningful and are contributing to quality of care.

Comment: Finally, one commenter noted that both current and new measures should be thoroughly evaluated and tested before removal from or introduction to the HQRP. This commenter recommended that measure data from the first two quarters after implementation not be used for measure evaluation, and that a minimum of 1 years' worth of measure data after implementation be used to evaluate measures. The commenter also noted that the measure evaluation process should include analysis to demonstrate not only the psychometric properties of measures, but also evidence of the measure's relationship to meaningful outcomes.

Response: CMS thanks the commenter for their recommendation, and agrees that testing the measure's relationship to meaningful patient and family outcomes is an important part of the measure development and testing process, especially for process measures. As part of the validity testing, specifically convergent validity testing, CMS examines the relationship between various measures (for example, process and outcome measures) to support measure development and demonstrate relationships between processes and outcomes of care.

Final Action: After consideration of the comments, we are finalizing our proposal that once a quality measure is adopted, it be retained for use in the subsequent fiscal year payment determinations until otherwise stated, as proposed.

4. Previously Adopted Quality Measures for FY 2016 and FY 2017 Payment Determination

As stated in the CY 2013 HH PPS final rule (77 FR 67068, 67133), CMS expanded the set of required measures to include additional measures endorsed by NQF. We also stated that to support the standardized collection and calculation of quality measures by CMS, collection of the needed data elements would require a standardized data collection instrument. In response, CMS developed and tested a hospice patient-level item set, the Hospice Item Set (HIS). Hospices are required to submit an HIS-Admission record and an HIS-Discharge record for each patient admission to hospice on or after July 1, 2014. In developing the standardized HIS, we considered comments offered in response to the CY 2013 HH PPS proposed rule (77 FR 41548, 41573). In the FY 2014 Hospice Wage Index final rule (78 FR 48257), and in compliance with section 1814(i)(5)(C) of the Act, we finalized the specific collection of data items that support the following six NQF endorsed measures and one modified measure for hospice:

- NQF #1617 Patients Treated with an Opioid who are Given a Bowel Regimen,
- NQF #1634 Pain Screening,
- NQF #1637 Pain Assessment,
- NQF #1638 Dyspnea Treatment,
- NQF #1639 Dyspnea Screening,
- NQF #1641 Treatment Preferences,
- NQF #1647 Beliefs/Values Addressed (if desired by the patient) (modified).

To achieve a comprehensive set of hospice quality measures available for widespread use for quality improvement and informed decision making, and to carry out our commitment to develop a quality reporting program for hospices that uses standardized methods to collect data needed to calculate quality measures, we finalized the HIS effective July 1, 2014 (78 FR 48258). To meet the quality reporting requirements for hospices for the FY 2016 payment determination and each subsequent year, we require regular and ongoing electronic submission of the HIS data for each patient admission to hospice on or after July 1, 2014, regardless of payer or patient age (78 FR 48234, 48258). Collecting data on all patients provides CMS with the most robust, accurate reflection of the quality of care delivered to Medicare beneficiaries as compared with non-Medicare patients. Therefore, to measure the quality of care delivered to Medicare beneficiaries in the hospice setting, we collect quality data necessary to calculate the adopted measures on all patients. We finalized in the FY 2014 Hospice Wage Index (78 FR 48258) that hospice providers collect data on all patients in order to ensure that all patients regardless of payer or patient age are receiving the same care and that provider metrics measure performance across the spectrum of patients.

Hospices are required to complete and submit an HIS-Admission and an HIS-Discharge record for each patient admission. Hospices failing to report quality data via the HIS in FY 2015 will have their market basket update reduced by 2 percentage points in FY 2017 beginning in October 1, 2016. In the FY

2015 Hospice Wage Index final rule (79 FR 50485, 50487), we finalized the proposal to codify the HIS submission requirement at § 418.312. The System of Record (SOR) Notice titled ''Hospice Item Set (HIS) System,'' SOR number 09–70–0548, was published in the **Federal Register** on April 8, 2014 (79 FR 19341).

5. HQRP Quality Measures and Concepts Under Consideration for Future Years

We did not propose any new measures for FY 2017. However, we continue to work with our measure development and maintenance contractor to identify measure concepts for future implementation in the HQRP. In identifying priority areas for future measure enhancement and development, CMS takes into consideration input from numerous stakeholders, including the Measures Application Partnership (MAP), the Medicare Payment Advisory Commission (MedPAC), Technical Expert Panels, and national priorities, such as those established by the National Priorities Partnership, the HHS Strategic Plan, the National Strategy for Quality Improvement in Healthcare, and the CMS Quality Strategy. In addition, CMS takes into consideration vital feedback and input from research published by our payment reform contractor as well as from the Institute of Medicine (IOM) report, titled ''Dying in America'', released in September 2014.[51] Finally, the current HQRP measure set is also an important consideration for future measure development areas; future measure development areas should complement the current HQRP measure set, which includes HIS measures and Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Hospice Survey measures. Based on input from stakeholders, CMS has identified several high priority concept areas for future measure development:

- Patient reported pain outcome measure that incorporates patient and/or proxy report regarding pain management;
- Claims-based measures focused on care practice patterns including skilled visits in the last days of life, burdensome transitions of care for patients in and out of the hospice benefit, and rates of live discharges from hospice;
- Responsiveness of hospice to patient and family care needs;
- Hospice team communication and care coordination

These measure concepts are under development, and details regarding measure definitions, data sources, data collection approaches, and timeline for implementation will be communicated in future rulemaking. CMS invited comments about these four high priority concept areas for future measure development.

Summaries of the public comments and our responses to comments regarding the four high priority concept areas for future measure development are provided below:

Comment Summary: Many comments were received about the HQRP quality measures and concepts under consideration for future years. Overall, commenters were supportive of CMS's efforts to develop a more robust quality reporting program that includes development of outcome measures, and additional measures that better capture hospice performance. One of the commenters, MedPAC, supported the development of the measure areas identified by CMS in the proposed rule, strongly encouraging CMS to pursue the development of these measures. Several commenters were supportive of CMS's approach to quality measure development in the HQRP, specifically, the use of Technical Expert Panels (TEP) and listening sessions to obtain expert and other stakeholder input. In regards to the pain outcome measure, a majority of commenters were supportive of this measure concept as pain outcomes remain an important indicator of quality end of life care. Several commenters noted the complexities associated with developing a pain outcome measure, including the fact that pain is a subjective value and that pain outcome measures should take into account patient preference for pain levels and treatment, not just reduction in pain intensity. A few commenters noted additional complexities in proxy reporting of patient's pain. One commenter cautioned CMS against a pain outcome measure that could bear the risk of contacting the patient or family for feedback ''at the wrong time''. With respect to claims-based measures, although several commenters were supportive of the claims-based measure concept areas identified in the proposed rule, the majority of commenters had concerns about using claims data as a source for quality measures. Commenters also had concerns about linking these claims-based measure concepts to quality of care. Several commenters noted that performance measures should guide and promote the quality of direct care received by hospice patients and families. Commenters expressed that performance measures should not be implemented in order to discourage or correct undesirable organizational practices. These commenters felt that utilization metrics should be linked to quality of care or patient/caregiver perception of quality of care. Several commenters were concerned that given CMS's criteria for measure retention, which include measure performance that relates to better patient outcomes and ensuring that measures do not lead to unintended consequences, claims-based utilization metrics may be at risk for elimination from the HQRP unless they are specifically linked to quality of care outcomes. To help establish such a link between utilization metrics and quality of care, one commenter suggested that CMS compare claims-based data to Hospice CAHPS® survey data to verify whether any claims-based utilization metrics are correlated with caregiver perception of quality of care. Several commenters also stated that, as a data source, hospice claims were insufficient sources of information for quality measure purposes. These commenters noted that claims do not have sufficient information to inform performance measures. For example, several commenters stated that hospice claims do not capture visits offered by chaplains, spiritual care professionals, or volunteers. These commenters felt these disciplines made important contributions to hospice care and their role and involvement should be captured on claims in any claims-based quality metric. With respect to the live discharges measure concept, a few commenters questioned how CMS would calculate the live discharge rate, noting that there are both legitimate and questionable reasons why a live discharge may occur, and that claims data could not distinguish between the two. Two commenters suggested CMS use the Program for Evaluating Payment Patterns Electronic Report (PEPPER) report definition of live discharge. In regards to the responsiveness and communication and care coordination measure concepts, commenters had mixed opinions on this measure area. A few commenters supported measure development in these areas, but other commenters had concerns about developing quality measures that address these aspects of care. A few commenters had concerns about the subjective nature of these areas of care. One commenter noted that there are few data points or metrics that CMS could utilize for comparative analysis of these aspects of care, and that CMS would

[51] IOM (Institute of Medicine). 2014. *Dying in America: Improving quality and honoring individual preferences near the end of life.* Washington, DC: The National Academies Press.

have to develop new definitions and benchmarks to capture data on these areas of care. Several commenters requested additional information on the measure areas identified by CMS in the rule. These commenters requested CMS provide more information on the proposed measure concept areas to allow for more thorough provider input. Additionally, a few commenters noted that several of the measure concepts under consideration by CMS are also captured, in some way, by the Hospice CAHPS® survey. Providers cautioned CMS against developing new measures that were duplicative of other HQRP requirements. Several commenters urged CMS to explore measure development in other areas not mentioned in the proposed rule. One commenter encouraged CMS to consider measure development for other psychosocial symptoms, such as anxiety and depression. Another commenter suggested CMS explore development measures around the provision of bereavement care and services, such as contacts made by hospices to the bereaved. This commenter also suggested that CMS consider measuring value as part of the HQRP; the commenter suggested such metrics as mean cost per diem and percent of dollars directly related to care and services for the patient/family. Another commenter requested that CMS consider the role that occupational therapists play in future measure development work. Finally, one commenter suggested that CMS take into consideration the American Academy of Hospice and Palliative Medicine (AAHPM) and Hospice and Palliative Nurses Association (HPNA), ''Measuring What Matters'' recommendations when considering future measure development areas. One commenter supported the development of a standardized patient assessment instrument that would include the collection for quality measure data. A few commenters reiterated the ACA requirements that any measures that are part of the HQRP must be: ''. . . endorsed by the consensus-based entity . . . . However . . . in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the consensus-based entity, the Secretary may specify measures that are not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization . . .'' Commenters requested that CMS keep this statutory requirement in mind when developing and adopting measures for the HQRP. A few commenters asked that CMS be mindful of burden when considering new quality measures for adoption since quality data collection requires significant time and effort by providers. One commenter expressed concern about burden of data collection efforts, especially for small non-profit providers.

Response: CMS appreciates commenters' input and recommendations for future measure development areas for the HQRP. We plan to continue developing the HQRP to respond to the measure gaps identified by the Measures Application Partnership and others, and align measure development with the National Quality Strategy and the CMS Quality Strategy. We will take these comments into consideration in developing and implementing measures for future inclusion in the HQRP. CMS would like to take this opportunity to respond to commenters' concerns about the claims-based measure concepts outlined in the proposed rule, as well as commenters' concerns about using claims as a data source for quality performance measures. CMS appreciates commenters' concerns about linking any claims-based utilization or pattern of care measures with quality of care prior to implementation of any such measure in the HQRP. As noted by one commenter, developing and adopting measures that benefit patient outcomes and do not lead to negative unintended consequences is of the utmost importance to CMS. CMS convened a Technical Expert Panel (TEP) in May 2015 to inform the development of these measures under consideration, and linking these claims-based measure concepts to quality of care was an issue discussed by the TEP. Throughout the measure development process, CMS will conduct continued quantitative and qualitative analysis to determine correlation between these measure concepts and quality of care. CMS agrees that establishing a relationship between a measure concept and quality of care is a vital consideration in the measure development process. CMS submits all candidate measures for the HQRP for review by the Measure Applications Partnership (MAP), a public-private partnership convened by the National Quality Forum (NQF) and takes the MAP input into consideration in the measure development and implementation process. Per the requirements set forth in the ACA, CMS also re-iterates that our intent is to adopt measures that have been endorsed by NQF if at all possible. For more information on these measure concepts, CMS encourages readers to review the Measures Under Consideration (MUC) list and the MAP report, which are both published annually. More information on the MUC list and MAP report, as they relate to statutory requirements for pre-rulemaking can be found on the CMS Web site: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Quality Measures/Pre-Rule-Making.html*. Lastly, with respect to commenters' concerns about burden, CMS thanks the commenters for taking the time to express these views and suggestions. CMS attempts to reduce the regulatory burden of our quality reporting programs to the greatest extent possible. As required by the Paperwork Reduction Act (PRA) of 1995, any new data collection efforts or extensions of ongoing data collection efforts are submitted to the Office of Management and Budget (OMB) to ensure that federal agencies do not overburden the public with federally sponsored data collections.

6. Form, Manner, and Timing of Quality Data Submission

a. Background

Section 1814(i)(5)(C) of the Act requires that each hospice submit data to the Secretary on quality measures specified by the Secretary. Such data must be submitted in a form and manner, and at a time specified by the Secretary. Section 1814(i)(5)(A)(i) of the Act requires that beginning with the FY 2014 and for each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that FY.

b. Proposed Policy for New Facilities To Begin Submitting Quality Data

In the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50488) we finalized a policy stating that any hospice that receives its CCN notification letter on or after November 1 of the preceding year involved is excluded from any payment penalty for quality reporting purposes for the following FY. For example, if a hospice provider receives its CMS Certification Number (CCN) (also known as the Medicare Provider Number) notification letter on November 2, 2015 they would not be required to submit quality data for the current reporting period ending December 31, 2015 (which would affect the FY 2017 APU). In this instance, the hospice would begin with the next reporting period beginning January 1,

2016 and all subsequent years. However, if a hospice provider receives their CCN notification letter on October 31, 2015, they would be required to submit quality data for the current reporting period ending December 31, 2015 (which would affect the FY 2017 APU) and all subsequent years. This requirement was codified at § 418.312.

We proposed to modify our policies for the timing of new providers to begin reporting to CMS. Beginning with the FY 2018 payment determination and for each subsequent payment determination, we proposed that a new hospice be responsible for HQRP quality data reporting beginning on the date they receive their CCN notification letter from CMS. Under this proposal, hospices would be responsible for reporting quality data on patient admissions beginning on the date they receive their CCN notification.

Currently, new hospices may experience a lag between Medicare certification and receipt of their actual CCN Number. Since hospices cannot submit data to the Quality Improvement and Evaluation System (QIES) Assessment Submission and Processing (ASAP) system without a valid CCN Number, CMS proposed that new hospices begin collecting HIS quality data beginning on the date they receive their CCN notification letter by CMS. We believe this policy will provide sufficient time for new hospices to establish appropriate collection and reporting mechanisms to submit the required quality data to CMS. We invited public comment on this proposal that a new hospice be required to begin reporting quality data under HQRP beginning on the date they receive their CCN notification letter from CMS.

Summaries of the public comments and our responses to comments that a new hospice be required to begin reporting quality data under HQRP beginning on the date they receive their CCN notification from CMS are provided below:

Comment: CMS received several comments regarding the proposal for new hospices to begin reporting quality data under the HQRP beginning on the date they receive their CCN notification letter from CMS. The vast majority of commenters expressed support for this proposal since it provides a clear start date for HIS reporting, and allows sufficient time for hospices to establish processes for collection and submission of HIS data.

Response: CMS appreciates commenters support for this proposal.

Comment: Two commenters suggested alternative policies for new facilities to begin reporting quality data to CMS. One commenter recommended that the submission policy require facilities to collect data during the period leading up to Medicare certification and begin submitting their data as soon as they receive their CCN. Another commenter suggested that, to minimize the risk of penalties due to issues such as opening the CCN notification letter a day after it is received, the submission policy should require facilities to begin data collection at the start of the month following the CCN notification.

Response: In response to the commenter's suggestion to begin report data during the period leading up to Medicare certification and as soon as they receive their CCN, CMS would like to clarify the reasoning for our proposal for new providers to begin reporting HIS data on the date they receive their CCN notification letter. CMS proposed that providers begin reporting HIS data on the date they receive their CCN notification letter since hospices cannot register for the relevant QIES ASAP accounts needed to submit HIS data without a valid CCN. Thus, requiring quality data reporting beginning on the date the hospice receives their CCN notification letter aligns CMS policy for requirements for new providers with the functionality of the HIS data submission system (QIES ASAP). CMS would like to further clarify our proposal for new providers, including how our proposal in this year's proposed rule intersects with prior policies for new hospices. There are two considerations for providers to keep in mind with respect to HIS reporting; the first is when providers should begin reporting HIS data, the second is when providers will be subject to the potential two (2) percentage point APU reduction for failure to comply with HQRP requirements. CMS would like to clarify that, as stated in our proposal, providers are required to begin reporting data on the date that they receive their CCN notification letter. However, if the CCN notification letter were received on or after November 1st, they would not be subject to any financial penalty for failure to comply with HQRP requirements for the relevant reporting year. For example, if a provider receives their CCN notification letter on November 5th, 2015, that provider should begin submitting HIS data for patient admissions occurring on or after November 5th, 2015. However, since the hospice received their CCN notification letter after November 1st, they would not be evaluated for, or subject to any payment penalties for the relevant FY APU update (which in this instance is the FY 2017 APU, which is associated with patient admissions occurring 1/1/15–12/31/15). This proposed policy allows CMS to receive HIS data on all patient admissions on or after the date a hospice receives their CCN notification letter, while at the same time allowing hospices flexibility and time to establish the necessary accounts for data submission, before they are subject to the potential APU reduction for a given reporting year. Finally, to address the commenter's concern about providers being subject to payment penalties if they open the CCN notification letter the day after it is received, CMS believes our proposed policy grants providers ample time to establish the necessary accounts and operating systems for HIS data collection and submission, since there is often a significant lag time between the Medicare CCN application process and receipt of a provider's CCN Notification letter.

Comment: Finally, one commenter requested clarification on how the date the CCN notification letter was received would be verified by CMS.

Response: CMS would like to clarify that the ''date CCN notification letter is received'' would be the date listed in the letterhead of the CCN Notification Letter. This date is tracked by the Medicare Administrative Contractors (MACs) and is verifiable in MAC records.

Final Action: After consideration of the comments, we are finalizing our proposal that new providers be required to begin reporting quality data under for the HQRP beginning on the date they receive their CCN Notification Letter from CMS.

c. Previously Finalized Data Submission Mechanism, Collection Timelines and Submission Deadlines for the FY 2017 Payment Determination

In the FY 2015 Hospice Wage Index final rule (79 FR 50486) we finalized our policy requiring that, for the FY 2017 reporting requirements, hospices must complete and submit HIS records for all patient admissions to hospice on or after July 1, 2014. Electronic submission is required for all HIS records. Although electronic submission of HIS records is required, hospices do not need to have an electronic medical record to complete or submit HIS data. In the FY 2014 Hospice Wage Index (78 FR 48258) we finalized that, to complete HIS records, providers can use either the Hospice Abstraction Reporting Tool (HART) software, which is free to download and use, or a vendor-designed software. HART provides an alternative option for hospice providers to collect

and maintain facility, patient, and HIS Record information for subsequent submission to the QIES ASAP system. Once HIS records are complete, electronic HIS files must be submitted to CMS via the QIES ASAP system. Electronic data submission via the QIES ASAP system is required for all HIS submissions; there are no other data submission methods available. Hospices have 30 days from a patient admission or discharge to submit the appropriate HIS record for that patient through the QIES ASAP system. CMS will continue to make HIS completion and submission software available to hospices at no cost. We provided details on data collection and submission timing at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Hospice-Item-Set-HIS.html*.

The QIES ASAP system provides reports upon successful submission and processing of the HIS records. The final validation report may serve as evidence of submission. This is the same data submission system used by nursing homes, inpatient rehabilitation facilities, home health agencies, and long-term care hospitals for the submission of Minimum Data Set Version 3.0 (MDS 3.0), Inpatient Rehabilitation Facility—Patient Assessment Instrument (IRF–PAI), Outcome Assessment Information Set (OASIS), and Long-Term Care Hospital Continuity Assessment Record & Evaluation Data Set (LTCH CARE), respectively. We have provided hospices with information and details about use of the HIS through postings on the HQRP Web page, Open Door Forums, announcements in the CMS MLN Connects Provider e-News (E-News), and provider training.

d. Proposed Data Submission Timelines and Requirements for FY 2018 Payment Determination and Subsequent Years

Hospices are evaluated for purposes of the quality reporting program based on whether or not they submit data, not on their substantive performance level with respect to the required quality measures. In order for CMS to appropriately evaluate the quality reporting data received by hospice providers, it is essential HIS data be received in a timely manner.

The submission date for any given HIS record is defined as the date on which a provider submits the completed record. The submission date is the date on which the completed record is submitted and accepted by the QIES ASAP system. Beginning with the FY 2018 payment determination, we proposed that hospices must submit all HIS records within 30 days of the Event Date, which is the patient's admission date for HIS-Admission records or discharge date for HIS-Discharge records.

- For HIS-Admission records, the submission date should be no later than the admission date plus 30 calendar days. The submission date can be equal to the admission date, or no greater than 30 days later. The QIES ASAP system will issue a warning on the Final Validation Report if the submission date is more than 30 days after the patient's admission date.
- For HIS-Discharge records, the submission date should be no later than the discharge date plus 30 calendar days. The submission date can be equal to the discharge date, or no greater than 30 days later. The QIES ASAP system will issue a warning on the Final Validation Report if the submission date is more than 30 days after the patient's discharge date.

The QIES ASAP system validation edits are designed to monitor the timeliness and ensure that providers submitted records conform to the HIS data submission specifications. Providers are notified when timing criteria have not been met by warnings that appear on their Final Validation Reports. A standardized data collection approach that coincides with timely submission of data is essential in order to establish a robust quality reporting program and ensure the scientific reliability of the data received. We invited comments on the proposal that hospices must submit all HIS records within 30 days of the Event Date, which is the patient's admission date for HIS-Admission records or discharge date for HIS-Discharge records.

Summaries of the public comments and our responses to comments on the proposed data submission timelines and requirements for FY 2018 payment determination and subsequent years are provided below:

Comment: CMS received several comments regarding our proposal that hospices must submit all HIS records within 30 days of the Event Date. All commenters were supportive of this proposed submission timeline. One commenter agreed that timely submission of HIS data is necessary to facilitate CMS evaluation of HIS data and hospices' performance on quality measures.

Response: CMS appreciates commenters' support for our proposal that hospices must submit all HIS records within 30 days of the event date.

Comment: Another commenter addressed what they felt were inconsistencies between the CMS billing practices and some of the requirements for HIS reporting. The commenter also noted the burden created by these discrepancies for providers. This commenter urges CMS to consider minimizing differences across various CMS systems when developing new policies.

Response: CMS thanks the commenter for their concern regarding discrepancies between HIS reporting requirements and billing requirements. We believe that the provider is referring to HIS reporting requirements that are established and communicated to the provider community via sub-regulatory channels. This would include policies and guidelines regarding defining an ''admission'' and ''discharge'' for the purposes of HIS reporting, and reporting HIS data in the case of special circumstances, such as traveling patients. These policies and guidelines are released by CMS through sub-regulatory mechanisms, including the HIS Manual and HIS trainings. CMS would like to clarify that the process for updating sub-regulatory guidance is based on questions received through the Help Desk and feedback from the provider community received through other communication channels, such as ODFs and listening sessions. CMS takes these considerations into account when updating guidance in the HIS Manual, HIS trainings, and other documents such as FAQs and Fact Sheets.

Comment: Two commenters requested that CMS consider changing or removing the completion timelines for HIS records. One commenter noted that completion deadlines add to hospices' administrative burden for HIS data collection and do not facilitate compliance with submission deadline requirements.

Response: CMS appreciates commenters input on the value of the completion deadlines. Current sub-regulatory guidance produced by CMS (for example, HIS Manual, HIS trainings) state that the completion deadlines for HIS records are 14 days from the Event Date for HIS-Admission records and 7 days from the Event Date for HIS-Discharge records. Based on commenter input, CMS would like to clarify that the completion deadlines continue to reflect CMS guidance only; these guidelines are not statutorily specified and are not designated through regulation. These guidelines are intended to offer clear direction to hospice agencies in regards to the timely submission of HIS-Admission and HIS-Discharge records. The completion deadlines define only the latest possible date on which a hospice *should* complete each HIS record. This

guidance is meant to better align HIS completion processes with clinical workflow processes however, hospices may develop alternative internal policies to complete HIS records. Although it is at the discretion of the hospice to develop internal policies for completing HIS records, CMS continues to recommend that providers complete and attempt to submit HIS records early, prior to the proposed submission deadline of 30 days. Completing and attempting to submit records early allows providers ample time to address any technical issues encountered in the QIES ASAP submission process, such as correcting fatal error messages. Completing and attempting to submit records early will ensure that providers are able to comply with the proposed 30 day submission deadline. HQRP guidance documents, including the CMS HQRP Web site, HIS Manual, HIS trainings, Frequently Asked Questions (FAQs), and Fact Sheets continue to offer the most up-to-date CMS guidance to assist providers in the successful completion and submission of HIS records. Availability of updated guidance will be communicated to providers through the usual HQRP communication channels.

Final Action: After consideration of the comments, we are finalizing our proposal that hospices must submit all records within 30 days of the Event Date as proposed.

e. Proposed HQRP Data Submission and Compliance Thresholds for the FY 2018 Payment Determination and Subsequent Years

In order to accurately analyze quality reporting data received by hospice providers, it is imperative we receive ongoing and timely submission of all HIS-Admission and HIS-Discharge records. To date, the timeliness criteria for submission of HIS-Admission and HIS-Discharge records has never been proposed and finalized through rulemaking process. We believe this matter should be addressed by defining a clear standard for timeliness and compliance at this time. In response to input from our stakeholders seeking additional specificity related to HQRP compliance affecting FY payment determinations and, due to the importance of ensuring the integrity of quality data submitted to CMS, we proposed to set specific HQRP thresholds for timeliness of submission of hospice quality data beginning with data affecting the FY 2018 payment determination and subsequent years.

Beginning with the FY 2018 payment determination and subsequent FY payment determinations, we proposed that all HIS records must be submitted within 30 days of the Event Date, which is the patient's admission date or discharge date. To coincide with this requirement, we proposed to establish an incremental threshold for compliance with this timeliness requirement; the proposed threshold would be implemented over a 3 year period. To be compliant with timeliness requirements, we proposed that hospices would have to submit no less than 70 percent of their total number of HIS-Admission and HIS-Discharge records by no later than 30 days from the Event Date for the FY 2018 APU determination. The timeliness threshold would be set at 80 percent for the FY 2019 APU determination and at 90 percent for the FY 2020 APU determination and subsequent years. The threshold corresponds with the overall amount of HIS records received from each provider that fall within the established 30 day submission timeframes. Our ultimate goal is to require all hospices to achieve a timeliness requirement compliance rate of 90 percent or more.

To summarize, we proposed to implement the timeliness threshold requirement beginning with all HIS admission and discharge records that occur on or after January 1, 2016, in accordance with the following schedule.

- Beginning on or after January 1, 2016 to December 31, 2016, hospices must submit at least 70 percent of all required HIS records within the 30 day submission timeframe for the year or be subject to a 2 percentage point reduction to their market basket update for FY 2018.
- Beginning on or after January 1, 2017 to December 31, 2017, hospices must score at least 80 percent for all HIS records received within the 30 day submission timeframe for the year or be subject to a 2 percentage point reduction to their market basket update for FY 2019.
- Beginning on or after January 1, 2018 to December 31, 2018, hospices must score at least 90 percent for all HIS records received within the 30 day submission timeframe for the year or be subject to a 2 percentage point reduction to their market basket update for FY 2020.

We invited public comment on our proposal to implement the new data submission and compliance threshold requirement, as described previously, for the HQRP. Summaries of the public comments and our responses to comments are provided below:

Comment: CMS received many comments regarding the proposed establishment of data submission and compliance thresholds for FY2018 payment determinations and for subsequent years. All commenters but one were supportive of CMS's proposal. Commenters noted that the proposed thresholds seemed reasonable and achievable given current experience with HIS submission and agreed with the incremental nature of the threshold.

Response: CMS appreciates commenters' support of our proposed compliance thresholds. As stated in the proposed rule, we agree that timely submission of data is necessary to accurately analyze quality data received by providers. CMS is pleased that commenters find the proposed thresholds feasible given their current experience. To support feasibility of achieving these proposed compliance thresholds, CMS's measure development contractor conducted some preliminary analysis of Quarter 3 and Quarter 4 HIS data from 2014. According to preliminary analysis, the vast majority of hospices (92 percent) would have met the compliance thresholds at 70 percent. Moreover, 88 percent and 78 percent of hospices would have met the compliance thresholds at 80 percent and 90 percent, respectively. CMS believes this analysis is further evidence that these proposed compliance thresholds are reasonable and achievable by hospice providers.

Comment: One commenter recommended that CMS not implement the proposed timeliness criteria and data submission and compliance threshold until CMS develops appropriate reporting tools to allow hospice providers to determine their compliance statistics in CMS's system of records. This provider stated that, at the present time, CMS systems do now allow providers to monitor their performance with respect to timely submission of records. Another commenter supported CMS's proposal, but recommended a performance report be made available to hospices before the data submission and compliance thresholds are implemented.

Response: CMS agrees with commenters that having a reporting system that allows providers to monitor the timeliness of HIS record submission is important. However, CMS would like to clarify that the current reports available to providers in the CASPER system do allow providers to track the number of HIS records that are submitted within the 30 day submission timeframe. Currently, submitting an HIS record past the 30 day submission timeframe results in a non-fatal (warning) error. In April 2015, CMS made available three (3) new Hospice Reports in CASPER, which include

reports that can list HIS Record Errors by Field by Provider and HIS records with a specific error number. CMS will consider expanding this functionality in the future to tailor reporting functions to the exact data submission and compliance thresholds.

Comment: CMS received two comments related to the calculation of the compliance thresholds. One commenter appreciated that CMS is proposing an extension and exemptions process that would afford hospices an opportunity to request an extension or exemption from the 30 day submission timeframe for extenuating circumstances. Another commenter requested that CMS clarify the definition of a ''successful'' submission in the case of modification and inactivation requests.

Response: CMS appreciates commenters' requests for clarification. CMS would like to clarify the methodology that would be used for calculating the proposed 70 percent/80 percent/90 percent compliance thresholds. In general, CMS would include HIS records (HIS-Admission and HIS-Discharge) submitted for patient admissions and discharges occurring during the reporting period in the denominator of the compliance threshold calculation. The numerator of the compliance threshold calculation would include any records from the denominator that were submitted within the 30 day submission deadline. In response to commenters' concerns about extension and exemptions and modification and inactivation requests, CMS would like to clarify that the aforementioned methodology would be appropriately adjusted for cases where hospices were granted extensions/exemptions, and instances of modification/inactivation requests so that these instances did not ''count against'' providers in the proposed compliance threshold calculation.

Comment: Finally, CMS received one comment requesting CMS provide education about the proposed data submission and compliance thresholds.

Response: CMS appreciates the commenters' request for education and outreach about new requirements. CMS would like to reiterate that rulemaking is the official process through which new requirements are proposed, finalized, and communicated to the provider community. In addition, as further details of the data submission and compliance threshold are determined by CMS, we anticipate communicating these details through the regular HQRP communication channels, including Open Door Forums, webinars, listening sessions, memos, email notification, and web postings.

Final Action: After consideration of comments, and given the clarification above, CMS is finalizing our proposal to implement the new data submission and compliance thresholds for the FY 2018 payment determination and subsequent FY payment determinations.

7. HQRP Submission Exemption and Extension Requirements for the FY 2017 Payment Determination and Subsequent Years

In the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79, FR 50488), we finalized our proposal to allow hospices to request and for CMS to grant exemptions/extensions with respect to the reporting of required quality data when there are extraordinary circumstances beyond the control of the provider. When an extension/exemption is granted, a hospice will not incur payment reduction penalties for failure to comply with the requirements of the HQRP. For the FY 2016 payment determination and subsequent payment determinations, a hospice may request an extension/exemption of the requirement to submit quality data for a specified time period. In the event that a hospice requests an extension/exemption for quality reporting purposes, the hospice would submit a written request to CMS. In general, exemptions and extensions will not be granted for hospice vendor issues, fatal error messages preventing record submission, or staff error.

In the event that a hospice seeks to request an exemptions or extension for quality reporting purposes, the hospice must request an exemption or extension within 30 days of the date that the extraordinary circumstances occurred by submitting the request to CMS via email to the HQRP mailbox at *HQRPReconsiderations@cms.hhs.gov*. Exception or extension requests sent to CMS through any other channel would not be considered as a valid request for an exception or extension from the HQRP's reporting requirements for any payment determination. In order to be considered, a request for an exemption or extension must contain all of the finalized requirements as outlined on our Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospiceQuality-Reporting/index.html*.

If a provider is granted an exemption or extension, timeframes for which an exemption or extension is granted will be applied to the new timeliness requirement so providers are not penalized. If a hospice is granted an exemption, we will not require that the hospice submit any quality data for a given period of time. If we grant an extension to a hospice, the hospice will still remain responsible for submitting quality data collected during the timeframe in question, although we will specify a revised deadline by which the hospice must submit this quality data.

This process does not preclude us from granting extensions/exemptions to hospices that have not requested them when we determine that an extraordinary circumstance, such as an act of nature, affects an entire region or locale. We may grant an extension/exemption to a hospice if we determine that a systemic problem with our data collection systems directly affected the ability of the hospice to submit data. If we make the determination to grant an extension/exemption to hospices in a region or locale, we will communicate this decision through routine communication channels to hospices and vendors, including, but not limited to, Open Door Forums, ENews and notices on *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/*. We proposed to codify the HQRP Submission Exemption and Extension Requirements at § 418.312.

Summaries of public comments and our responses to comments on our proposal to codify the HQRP submission exemption and extension requirements are provided below:

Comment: CMS received several comments related to our previously finalized policy for extensions and exemptions. A few commenters had concerns about the process for requesting an extension or exemption, especially in the case of a widespread natural disaster. These commenters requested that CMS be able to accept requests for extensions and exemptions via means other than email. These commenters noted that in instances of certain widespread natural disasters, such as Hurricane Sandy or Hurricane Katrina, providers would not have been able to email CMS within 30 days of the event date. Commenters requested that CMS accept mail and verbal extension or exemption requests from providers, or that CMS extend the submission timeframe for requesting extensions or exemptions from 30 days to 90 days.

Response: CMS appreciates the commenters' concern about the process for requesting an extension or exemption in the circumstance of an extreme natural disaster. We refer readers to the extension and exemption policy that was finalized in the FY 2015 Hospice Wage Index and Payment Rate Update final rule. Additionally, we re-

iterate our policy that in case of an extraordinary circumstance, such as an act of natural disaster similar to Hurricanes Sandy and Katrina, CMS may grant extensions/exemptions to an entire region or locale without the need for providers to request an extension/exemption. As stated in our policy, if CMS makes a determination to grant an extension/exemption to an entire locale, we will communicate this decision through routine communication channels, such as through ODFs, email notification, and web postings.

Comment: CMS received two other comments about our previously finalized policy for extensions and exemptions. These two commenters requested that CMS consider revision of the criteria for granting an extension or exemptions to hospices that experience technological problems. These commenters noted that in some rare circumstances, a hospice may have collected and attempted to submit HIS data, but HIS record submissions were unsuccessful. One of the commenters also noted situations where an entire hospice's EHR is nonfunctional for a time due to issues with the vendor's cloud.

Response: CMS appreciates the commenters' concern about our policy for extensions and exemption in the case of technological difficulty. We refer readers to the extension and exemption policy that was finalized in the FY 2015 Hospice Wage Index and Payment Rate Update final rule. In addition, we would like to re-iterate the availability of other reporting and submission systems that are accessible to providers who may be experiencing technological difficulties. First, CMS would like to highlight the availability of final validation reports that are provided upon submission of records to the QIES ASAP system. These final validation reports indicate whether attempted HIS record submissions were successful. CMS highly recommends providers review the final validation report for all HIS submissions to ensure that attempted record submissions are successful. If providers are experiencing issues with record rejections and fatal errors, they can contact the appropriate Help Desk for assistance. Help Desk contact information can be found on the CMS HQRP Web site: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Help-Desks.html*. Second, CMS would like to re-iterate the availability of the HART software. The HART software is free software made available by CMS that all providers can use as an alternative to vendor-designed software to maintain facility, patient, and HIS record information for subsequent submission to QIES ASAP. All providers can download and use HART, and CMS recommends that all providers download HART so that the software is available to use as an alternative, should a provider experience issues with vendor-designed software. More information on HART can be found on the CMS HQRP Web site: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/HIS-Technical-Information.html*. Finally, CMS re-iterates our policy to grant an extension/exemptions to hospices that have not requested them in the case of systemic problems with CMS data collection systems that directly affect the ability of hospices to submit data.

Final Action: After consideration of comments, and given the clarification above, CMS is finalizing our proposal to codify the HQRP Submission Extension and Exemption Requirements at § 418.312.

8. Hospice CAHPS Participation Requirements for the 2018 APU and 2019 APU

In the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50452), we stated that CMS would start national implementation of the CAHPS® Hospice Survey as of January 1, 2015. We started national implementation of this survey as planned. The CAHPS® Hospice Survey is a component of CMS' Hospice Quality Reporting Program that emphasizes the experiences of hospice patients and their primary caregivers listed in the hospice patients' records. Measures from the survey will be submitted to the National Quality Forum (NQF) for endorsement as hospice quality measures. We referred readers to our extensive discussion of the Hospice Experience of Care Survey in the Hospice Wage Index FY 2015 final rule for a description of the measurements involved and their relationship to the statutory requirement for hospice quality reporting (79 FR 50450 also refer to 78 FR 48261).

a. Background and Description of the Survey

The CAHPS® Hospice Survey is the first national hospice experience of care survey that includes standard survey administration protocols that allow for fair comparisons across hospices.

CMS developed the CAHPS® Hospice Survey with input from many stakeholders, including other government agencies, industry stakeholders, consumer groups and other key individuals and organizations involved in hospice care. The Survey was designed to measure and assess the experiences of hospice patients and their informal caregivers (family or friends). The goals of the survey are to:

- Produce comparable data on patients' and caregivers' perspectives of care that allow objective and meaningful comparisons between hospices on domains that are important to consumers;
- Create incentives for hospices to improve their quality of care through public reporting of survey results; and
- Hold hospice care providers accountable by informing the public about the providers' quality of care.

The development process for the survey began in 2012 and included a public request for information about publicly available measures and important topics to measure (*78 FR 5458*); a review of the existing literature on tools that measure experiences with end-of-life care; exploratory interviews with caregivers of hospice patients; a technical expert panel attended by survey development and hospice care quality experts; cognitive interviews to test draft survey content; incorporation of public responses to **Federal Register** notices (*78 FR 48234*) and a field test conducted by CMS in November and December 2013.

The CAHPS® Hospice Survey treats the dying patient and his or her informal caregivers (family members or friends) as the unit of care. The Survey seeks information from the informal caregivers of patients who died while enrolled in hospices. Survey-eligible patients and caregivers are identified using hospice records. Fielding timelines give the respondent some recovery time (2 to 3 months), while simultaneously not delaying so long that the respondent is likely to forget details of the hospice experience. The survey focuses on topics that are important to hospice users and for which informal caregivers are the best source for gathering this information. Caregivers are presented with a set of standardized questions about their own experiences and the experiences of the patient in hospice care. During national implementation of this survey, hospices are required to conduct the survey to meet the Hospice Quality Reporting requirements, but individual caregivers will respond only if they voluntarily choose to do so. A survey Web site is the primary information resource for hospices and vendors (*www.hospicecahpssurvey.org*). The CAHPS® Hospice Survey is currently available in English, Spanish, Traditional Chinese, and Simplified Chinese. CMS will provide additional

translations of the survey over time in response to suggestions for any additional language translations. Requests for additional language translations should be made to the CMS Hospice CAHPS® Project Team at *hospicesurvey@cms.hhs.gov*.

In general, hospice patients and their caregivers are eligible for inclusion in the survey sample with the exception of the following ineligible groups: Patients who are under the age of 18 at the time of their death; patients who died fewer than 48 hours after last admission to hospice care; patients for whom no caregiver is listed or available, or for whom caregiver contact information is not known; patients whose primary caregiver is a legal guardian unlikely to be familiar with care experiences; patients for whom the primary caregiver has a foreign (Non-US or US Territory address) home address; decedents or caregivers of decedents who voluntarily requested that they not be contacted (those who sign ''no publicity'' requests while under the care of hospice or otherwise directly request not to be contacted). Patients whose last admission to hospice resulted in a live discharge will also be excluded. Identification of patients and caregivers for exclusion will be based on hospice administrative data. Additionally, caregivers under the age of 18 are excluded.

Hospices with fewer than 50 survey-eligible decedents/caregivers during the prior calendar year are exempt from the CAHPS® Hospice Survey data collection and reporting requirements for payment determination. Hospices with 50 to 699 survey-eligible decedents/caregivers in the prior year will be required to survey all cases. For hospices with 700 or more survey-eligible decedents/caregivers in the prior year, a sample of 700 will be drawn under an equal-probability design. Survey-eligible decedents/caregivers are defined as that group of decedent and caregiver pairs that meet all the criteria for inclusion in the survey sample.

We moved forward with a model of national survey implementation, which is similar to that of other CMS patient experience of care surveys. Medicare-certified hospices are required to contract with a third-party vendor that is CMS-trained and approved to administer the survey on their behalf. A list of approved vendors can be found at this Web site: *www.hospicecahpssurvey.org*. Hospices are required to contract with independent survey vendors to ensure that the data are unbiased and collected by an organization that is trained to collect this type of data. It is important that survey respondents feel comfortable sharing their experiences with an interviewer not directly involved in providing the care. We have successfully used this mode of data collection in other settings, including for Medicare-certified home health agencies. The goal is to ensure that we have comparable data across all hospices.

Consistent with many other CMS CAHPS® surveys that are publicly reported on CMS Web sites, CMS will publicly report hospice data when at least 12 months of data are available, so that valid comparisons can be made across hospice providers in the United States, to help patients, family and friends choose a hospice program for themselves or their loved ones.

b. Participation Requirements To Meet Quality Reporting Requirements for the FY 2018 APU

In section 3004(c) of the Affordable Care Act, the Secretary is directed to establish quality reporting requirements for Hospice Programs. The CAHPS® Hospice Survey is a component of the CMS Hospice Quality Reporting Requirements for the FY 2018 APU and subsequent years.

The CAHPS® Hospice Survey includes the measures detailed in Table 24. The individual survey questions that comprise each measure are listed under the measure. These measures are in the process of being submitted to the National Quality Forum (NQF).

TABLE 27—HOSPICE EXPERIENCE OF CARE SURVEY QUALITY MEASURES AND CONSTITUENT ITEMS

Composite measures
Hospice team communication
• While your family member was in hospice care, how often did the hospice team keep you informed about when they would arrive to care for your family member?
• While your family member was in hospice care, how often did the hospice team explain things in a way that was easy to understand?
• How often did the hospice team listen carefully to you when you talked with them about problems with your family member's hospice care?
• While your family member was in hospice care, how often did the hospice team keep you informed about your family member's condition?
• While your family member was in hospice care, how often did the hospice team listen carefully to you?
Getting timely care
• While your family member was in hospice care, when you or your family member asked for help from the hospice team, how often did you get help as soon as you needed it?
• How often did you get the help you needed from the hospice team during evenings, weekends, or holidays?
Treating family member with respect
• While your family member was in hospice care, how often did the hospice team treat your family member with dignity and respect?
• While your family member was in hospice care, how often did you feel that the hospice team really cared about your family member?
Providing emotional support
• While your family member was in hospice care, how much emotional support did you get from the hospice team?
• In the weeks after your family member died, how much emotional support did you get from the hospice team?
Getting help for symptoms
• Did your family member get as much help with pain as he or she needed?
• How often did your family member get the help he or she needed for trouble breathing?
• How often did your family member get the help he or she needed for trouble with constipation?
• How often did your family member get the help he or she needed from the hospice team for feelings of anxiety or sadness?
Getting hospice care training
• Did the hospice team give you the training you needed about what side effects to watch for from pain medicine?
• Did the hospice team give you the training you needed about if and when to give more pain medicine to your family member?
• Did the hospice team give you the training you needed about how to help your family member if he or she had trouble breathing?
• Did the hospice team give you the training you needed about what to do if your family member became restless or agitated?
Single Item Measures
Providing support for religious and spiritual beliefs

TABLE 27—HOSPICE EXPERIENCE OF CARE SURVEY QUALITY MEASURES AND CONSTITUENT ITEMS—Continued

Composite measures
• (Support for religious or spiritual beliefs includes talking, praying, quiet time, or other ways of meeting your religious or spiritual needs.) While your family member was in hospice care, how much support for your religious and spiritual beliefs did you get from the hospice team?
Information continuity
• While your family member was in hospice care, how often did anyone from the hospice team give you confusing or contradictory information about your family member's condition or care?
Understanding the side effects of pain medication
• Side effects of pain medicine include things like sleepiness. Did any member of the hospice team discuss side effects of pain medicine with you or your family member?
Global Measures
Overall rating of hospice
• Using any number from 0 to 10, where 0 is the worst hospice care possible and 10 is the best hospice care possible, what number would you use to rate your family member's hospice care?
Recommend hospice
• Would you recommend this hospice to your friends and family?

To comply with CMS's quality reporting requirements for the FY 2018 APU, hospices will be required to collect data using the CAHPS® Hospice Survey. Hospices would be able to comply by utilizing only CMS-approved third party vendors that are in compliance with the provisions at § 418.312(e). Ongoing monthly participation in the survey is required January 1, 2016 through December 31, 2016 for compliance with the FY 2018 APU.

Approved CAHPS® Hospice Survey vendors will submit data on the hospice's behalf to the CAHPS® Hospice Survey Data Center. The deadlines for data submission occur quarterly and are shown in Table 25 below. Deadlines are the second Wednesday of the submission months, which are August, November, February, and May. Deadlines are final; no late submissions will be accepted. However, in the event of extraordinary circumstances beyond the control of the provider, the provider will be able to request an exemption as previously noted in the Quality Measures for Hospice Quality Reporting Program and Data Submission Requirements for Payment Year FY 2016 and Beyond section. Hospice providers are responsible for making sure that their vendors are submitting Hospice CAHPS Survey data in a timely manner.

TABLE 28—CAHPS® HOSPICE SURVEY DATA SUBMISSION DATES FY2017 APU, FY2018 APU, AND FY2019 APU

Sample months (that is, month of death) [1]	Quarterly data submission deadlines [2]
FY2017 APU	
Dry Run January–March 2015 (Q1)	August 12, 2015.
April–June 2015 (Q2)	November 11, 2015.[3]
July–September 2015 (Q3)	February 10, 2016.
October–December 2015 (Q4)	May 11, 2016.
FY2018 APU	
January–March 2016 (Q1)	August 10, 2016.
April–June 2016 (Q2)	November 9, 2016.
July–September 2016 (Q3)	February 8, 2017.
October–December 2016 (Q4)	May 10, 2017.
FY2019 APU	
January–March 2017 (Q1)	August 9, 2017.
April–June 2017 (Q2)	November 8, 2017.
July–September 2017 (Q3)	February, 14, 2018.
October–December 2017 (Q4)	May 9, 2018.

[1] Data collection for each sample month initiates two months following the month of patient death (for example, in April for deaths occurring in January).
[2] Data submission deadlines are the second Wednesday of the submission month.
[3] Correction Notice published 80 FR 24222.

In the FY 2014 Hospice Wage Index and Rate Update final rule, we stated that we would exempt very small hospices from CAHPS® Hospice Survey requirements. We propose to continue that exemption: Hospices that have fewer than 50 survey-eligible decedents/caregivers in the period from January 1, 2015 through December 31, 2015 are exempt from CAHPS® Hospice Survey data collection and reporting requirements for the 2018 APU. To qualify for the survey exemption for the FY 2018 APU, hospices must submit an exemption request form. This form will be available on the CAHPS® Hospice Survey Web site *http://www.hospicecahpssurvey.org*. Hospices are required to submit to CMS their total unique patient count for the period of January 1, 2015 through December 31, 2015. The

previously finalized due date for submitting the exemption request form for the FY 2018 APU is August 10, 2016 (79 FR 50493).

c. Participation Requirements To Meet Quality Reporting Requirements for the FY 2019 APU

To meet participation requirements for the FY 2019 APU, we proposed that hospices collect data on an ongoing monthly basis from January 2017 through December 2017 (inclusive). Data submission deadlines for the 2019 APU will be announced in future rulemaking.

Hospices that have fewer than 50 survey-eligible decedents/caregivers in the period from January 1, 2016 through December 31, 2016 are exempt from CAHPS® Hospice Survey data collection and reporting requirements for the FY 2019 payment determination. To qualify, hospices must submit an exemption request form. This form will be available in first quarter 2017 on the CAHPS® Hospice Survey Web site *http://www.hospicecahpssurvey.org.*

Hospices are required to submit to CMS their total unique patient count for the period of January 1, 2016 through December 31, 2016. The due date for submitting the exemption request form for the FY 2018 APU is August 10, 2016 (Finalized 79 FR 50493).

d. Annual Payment Update

The Affordable Care Act requires that beginning with FY 2014 and each subsequent fiscal year, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that fiscal year, unless covered by specific exemptions. Any such reduction will not be cumulative and will not be taken into account in computing the payment amount for subsequent fiscal years. In the FY 2015 Hospice Wage Index, we added the CAHPS® Hospice Survey to the Hospice Quality Reporting Program requirements for the FY 2017 payment determination and determinations for subsequent years.

- To meet the HQRP requirements for the FY 2018 payment determination, hospices would collect survey data on a monthly basis for the months of January 1, 2016 through December 31, 2016 to qualify for the full APU.
- To meet the HQRP requirements for the FY 2019 payment determination, hospices would collect survey data on a monthly basis for the months of January 1, 2017 through December 31, 2017 to qualify for the full APU.

e. CAHPS® Hospice Survey Oversight Activities

We proposed to continue a requirement that vendors and hospice providers participate in CAHPS® Hospice Survey oversight activities to ensure compliance with Hospice CAHPS® technical specifications and survey requirements. The purpose of the oversight activities is to ensure that hospices and approved survey vendors follow the CAHPS® Hospice Survey technical specifications and thereby ensure the comparability of CAHPS® Hospice Survey data across hospices.

We proposed that the reconsiderations and appeals process for hospices failing to meet the Hospice CAHPS® data collection requirements would be part of the Reconsideration and Appeals process already developed for the Hospice Quality Reporting program. We encourage hospices interested in learning more about the CAHPS® Hospice Survey to visit the CAHPS® Hospice Survey Web site: *http://www.hospicecahpssurvey.org.*

Comment: A commenter encouraged CMS to compare scores on claims data to Hospice CAHPS® data to verify whether any of these are correlated with caregiver perception of quality care.

Response: CMS plans to do a variety of analyses after we have accumulated at least four quarters of Hospice CAHPS® data. We will consider conducting an analysis of the relationship of Hospice CAHPS® data to other types of scores.

Comment: A commenter supports the proposal related to the Hospice CAHPS® Survey oversight activities.

Response: CMS thanks the commenter for their support.

Comment: One commenter expressed the belief that the hospice CAHPS® survey was a mandate that placed an unfunded burden on hospices. The commenter requested that CMS consider including an administrative reimbursement mechanism in the final rule to help cover these costs.

Response: The Hospice CAHPS® survey follows the model that we implement for other quality reporting programs where CMS pays for the federal implementation of the program, the vendor training, monitoring, direct oversight with site visits, technical assistance to participating facilities, new facilities with signing up assistance, technical assistance to vendors, creation and maintenance of the official Web site with all survey materials, and the hospice facilities pay for vendor services. We have approved numerous Hospice CAHPS® vendors and we strongly recommend that hospices shop around and check out multiple vendors to find the vendor that best meets their needs and provides a good value to them.

Comment: A commenter asks that CMS clarify the role of the hospice facility in meeting performance standards for the Annual Payment Update. The commenter asked if hospices are responsible for making sure that their vendors are submitting data in a timely manner.

Response: In the FY 2015 Final Rule (79 FR 50493), CMS stated: ''Hospice providers are responsible for making sure that their vendors are submitting data in a timely manner. CMS intends that hospice providers are responsible for making sure that their vendors submit their Hospice CAHPS® Survey data in a timely manner and in compliance with the Hospice CAHPS® data submission deadlines. The CAHPS® Data Warehouse will provide hospices with data submission reports on the next business day after the submission. Hospices will receive email from the Warehouse each time a new report is placed in their warehouse folders letting them know that reports are available. However, we encourage hospices to work closely with their vendors to ensure their data is submitted in a timely manner. Please note that the survey vendors are acting on behalf of the hospice providers. This is the same policy for other CAHPS® surveys such as Hospital CAHPS® and Home Health CAHPS®.

Comment: A commenter reminded CMS of how challenging it is to capture patient-reported data from our patient population, which includes patients who are incapacitated or near death. They also reminded CMS of the importance of selecting future measures that matter to patients and reflect whole person needs, including social, cultural, and emotional dimensions.

Response: Currently CMS is not considering a patient experience of care survey where hospice patients are the respondents. CMS agrees that interviewing patients in the hospice setting is extraordinarily difficult, for both the interviewer and the patients. Some difficulties in surveying patients in this setting could include identifying those who are cognitively able to answer the survey questions and the patient's potential fear of retribution. It would therefore be more feasible to collect information from patients who are not close to death. A sample composed only of such patients is likely to reflect only a portion of the entire hospice experience. The CAHPS® Hospice Survey considers the patient and caregiver as a single unit of care. The

Survey interviews caregivers of patients who died while under hospice care. The interviews occur 2–3 months after the patient's death. This allows the caregiver to reflect upon and report upon the entire hospice experience.

Final Action: After consideration of comments, CMS is finalizing our proposal as proposed.

9. HQRP Reconsideration and Appeals Procedures for the FY 2016 Payment Determination and Subsequent Years

In the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50496), we notified hospice providers on how to seek reconsideration if they received a noncompliance decision for the FY 2016 payment determination and subsequent years. A hospice may request reconsideration of a decision by CMS that the hospice has not met the requirements of the Hospice Quality Reporting Program for a particular period. Reporting compliance is determined by successfully fulfilling both the Hospice CAHPS® Survey requirements and the HIS data submission requirements.

We clarified that any hospice that wishes to submit a reconsideration request must do so by submitting an email to CMS containing all of the requirements listed on the HQRP Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Reconsideration-Requests.html*. Electronic email sent to *HQRPReconsiderations@cms.hhs.gov* is the only form of submission that will be accepted. Any reconsideration requests received through any other channel including U.S. postal service or phone will not be considered as a valid reconsideration request. We codified this process at § 418.312. In addition, we codified at § 418.306 that beginning with FY 2014 and each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that FY and solicited comments on all of the proposals and the associated regulations text at § 418.312 and in § 418.306 in section VI.

In the past, only hospices found to be non-compliant with the reporting requirements set forth for a given payment determination received a notification of this finding along with instructions for requesting reconsideration in the form of a certified United States Postal Service (USPS) letter. In an effort to communicate as quickly, efficiently, and broadly as possible with hospices regarding annual compliance, we proposed additions to our communications method regarding annual notification of reporting compliance in the HQRP. In addition to sending a letter via regular USPS mail, beginning with the FY 2017 payment determination and for subsequent fiscal years, we proposed to use the QIES National System for Certification and Survey Provider Enhanced Reports (CASPER) Reporting as an additional mechanism to communicate to hospices regarding their compliance with the reporting requirements for the given reporting cycle. The electronic APU letters would be accessed using the CASPER Reporting Application. Requesting access to the CMS systems is performed in two steps. Details are provided on the QIES Technical Support Office Web site (direct link), *https://www.qtso.com/hospice.html*. Once successfully registered, access the CMS QIES to Success Welcome page *https://web.qiesnet.org/qiestosuccess/index.html* and select the ''CASPER Reporting'' link. Additional information about how to access the letters will be provided prior to the release of the letters.

We proposed to disseminate communications regarding the availability of hospice compliance reports in CASPER files through routine channels to hospices and vendors, including, but not limited to issuing memos, emails, Medicare Learning Network (MLN) announcements, and notices on *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Reconsideration-Requests.html*.

We further proposed to publish a list of hospices who successfully meet the reporting requirements for the applicable payment determination on the HQRP Web site *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting.html*. We proposed updating the list after reconsideration requests are processed on an annual basis.

We invited comments on the proposals to add CASPER Reporting as an additional communication mechanism for the dissemination of compliance notifications and to publish a list of compliant hospices on the HQRP Web site. Public comments and our response to comments are summarized below.

Comment: CMS received three comments regarding our proposal to add CASPER Reporting as an additional communication mechanism for dissemination of compliance notifications. All commenters were supportive of this proposal. One commenter noted that adding CASPER as a communication mechanism will facilitate timely reconsideration requests, when appropriate.

Response: CMS appreciates commenters' support of our proposal to add CASPER reporting as an additional communication mechanism for disseminating notifications of compliance. CMS agrees that adding CASPER as an additional reporting mechanism would expedite communication with providers and facilitate the reconsideration process for providers who wish to request reconsideration.

Comment: CMS also received three comments on our proposal to publish a list of compliant hospices on the HQRP Web site. All commenters were supportive of this proposal; however, one commenter did request clarification from CMS on what information would be posted on the list of compliant providers. This commenter was also concerned that CMS was proposing to update the list after reconsideration requests were processed on an annual basis.

Response: CMS appreciates commenters' support of our proposal and commenters' requests for clarification. CMS anticipates that the proposed published list of compliant hospices on the HQRP Web site would include limited organizational data, such as the name and location of the hospice. With respect to the commenters' concern about updating the list of compliant hospices after the reconsideration period, CMS feels that finalizing the list of compliant providers for any given year is most appropriately done after the final determination of compliance is made. It is CMS's intent for the proposed published list of compliant hospices to be as complete and accurate as possible, giving recognition to all providers who were compliant with HQRP requirements for that year. Finalizing the list after requests for reconsideration are reviewed and a final determination of compliance is made allows for a more complete and accurate listing of compliant providers than developing any such list prior to reconsideration. Developing the list after the final determination of compliance has been made allows providers whose initial determination of noncompliance was reversed to be included in the list of compliant hospices for that year. Thus, CMS believes that finalizing the list of compliant hospices annually, after the reconsideration period will provide the

most accurate listing of hospices compliant with HQRP requirements.

Final Action: After consideration of comments, we are finalizing our proposal to add CASPER as an additional communication mechanism for disseminating notifications of noncompliance, as well as our proposal to publish a list of compliant hospices on the HQRP Web site.

10. Public Display of Quality Measures and Other Hospice Data for the HQRP

Under section 1814(i)(5)(E) of the Act, the Secretary is required to establish procedures for making any quality data submitted by hospices available to the public. The procedures must ensure that a hospice would have the opportunity to review the data regarding the hospice's respective program before it is made public.

We recognize that public reporting of quality data is a vital component of a robust quality reporting program and are fully committed to developing the necessary systems for public reporting of hospice quality data. We also recognize that it is essential that the data made available to the public be meaningful and that comparing performance between hospices requires that measures be constructed from data collected in a standardized and uniform manner. Hospices have been required to use a standardized data collection approach (HIS) since July 1, 2014. Data from July 1, 2014 onward is currently being used to establish the scientific soundness of the quality measures prior to the onset of public reporting of the seven quality measures implemented in the HQRP. We believe it is critical to establish the reliability and validity of the quality measures prior to public reporting in order to demonstrate the ability of the quality measures to distinguish the quality of services provided. To establish reliability and validity of the quality measures, at least four quarters of data will be analyzed. Typically, the first one or two quarters of data reflect the learning curve of the facilities as they adopt standardized data collection procedures; these data often are not used to establish reliability and validity. We began data collection in CY 2014; the data from CY 2014 for Quarter 3 (Q3) will not be used for assessing validity and reliability of the quality measures. We are analyzing data collected by hospices during Quarter 4 (Q4) CY 2014 and Q1–Q3 CY 2015. Decisions about whether to report some or all of the quality measures publicly will be based on the findings of analysis of the CY 2015 data.

In addition, the Affordable Care Act requires that reporting be made public on a CMS Web site and that providers have an opportunity to review their data prior to public reporting. CMS will develop the infrastructure for public reporting, and provide hospices an opportunity to review their quality measure data prior to publicly reporting information about the quality of care provided by ''Medicare-certified'' hospice agencies throughout the nation. CMS also plans to make available provider-level feedback reports in the CASPER system. These provider-level feedback reports or ''quality reports'' will be separate from public reporting and will be for provider viewing only, for the purposes of internal provider quality improvement. As is common in other quality reporting programs, quality reports would contain feedback on facility-level performance on quality metrics, as well as benchmarks and thresholds. For the CY 2014 Reporting Cycle, there were no quality reports available in CASPER; however, CMS anticipates that provider-level quality reports will begin to be available sometime in CY 2015. CMS anticipates that providers would use the quality reports as part of their Quality Assessment and Performance Improvement (QAPI) efforts.

As part of our ongoing efforts to make healthcare more transparent, affordable, and accountable, the HQRP is prepared to post hospice data on a public data set, the Medicare Provider Utilization and Payment Data: Physician and Other Supplier Public Use File located at *https://data.cms.hhs.gov*. This site includes information on services and procedures provided to Medicare beneficiaries by physicians and other healthcare professionals and serves as a helpful resource to the healthcare community. A timeline for posting hospice data on a public data set has not been determined by CMS. Should a timeline become available prior to the next annual rulemaking cycle, details would be announced via regular HQRP communication channels, including listening sessions, memos, email notification, and Web postings.

Furthermore, to meet the requirement for making such data public, we will develop a CMS Compare Web site for hospice, which will list hospice providers geographically. Consumers can search for all Medicare approved hospice providers that serve their city or zip code (which would include the quality measures and CAHPS® Hospice Survey results) and then find the agencies offering the types of services they need. Like other CMS Compare Web sites, the Hospice Compare Web site will feature a quality rating system that gives each hospice a rating of between one (1) and five (5) stars. Hospices will have prepublication access to their own agency's quality data, which enables each agency to know how it is performing before public posting of data on the Compare Web site. Decisions regarding how the rating system will determine a providers star rating and methods used for calculations, as well as a proposed timeline for implementation will be announced via regular HQRP communication channels, including listening sessions, memos, email notification, provider association calls, Open Door Forums, and Web postings. We will announce the timeline for public reporting of quality measure data in future rulemaking.

Summaries of public comments and our responses to comments regarding the public display of quality measures and other hospice data for the HQRP are provided below:

Comment: CMS received several comments that were generally supportive of public reporting of quality measure data. Commenters noted that they were in favor of CMS's continued efforts to assess quality and have transparent reporting of results. Commenters were also in favor of the availability of provider-level quality reports in CASPER, noting that the availability of such reports is a way for hospices to engage in benchmarking to inform their QAPI efforts. Commenters supported CMS's movement towards quality benchmarking and public reporting since it supports a hospice's ability to identify and resolve performance gaps while increasing transparency and accountability in the health care sector. While no commenters were unsupportive of public reporting or provider-level feedback reports in general, several commenters did have suggestions, recommendations, and concerns about specific aspects of public availability of data.

Response: CMS appreciates commenters' support of public reporting of quality measure data and the availability of provider-level feedback reports in CASPER. We address commenters' specific concerns with respect to public reporting and provider-level quality reports below.

Comment: CMS received a few comments about the timing for public reporting of quality data. One commenter noted that although continued measure development for new measures is important, measure development should not slow efforts to provide timely feedback to hospices on existing measures and public reporting of any existing measures. Another

commenter had concerns about the unintended consequences of releasing data too hastily. This commenter suggested that public reporting of hospice performance data occur gradually and carefully to ensure the data is accurate and presented in a format that is meaningful and actionable for both patients and physicians. The commenter appreciated CMS's efforts to evaluate at least four quarters of data to establish reliability and validity of the quality measures prior to public reporting. However, the commenter noted their opinion that four quarters worth of data is an insufficient foundation on which to draw conclusions about the accuracy of these measures, especially given the newness of these reporting requirements. Another commenter supported CMS's plan to analyze four (4) quarters worth of data to establish reliability and validity of quality measures and ensure accuracy of data before public reporting begins.

Response: CMS appreciates commenters' concerns about the timeline for public reporting of quality data. CMS agrees with the one commenter's sentiment that, while important, development of quality measures for future use in the HQRP should not delay public reporting or provider-level feedback reports. CMS is committed to ensuring the availability of public and provider-level data as soon as feasible, while ensuring that data is analyzed for scientific soundness and appropriateness for public reporting. CMS understands the unintended consequences of making data available to the public before comprehensive analyses have been conducted. CMS assures commenters that establishing the scientific soundness of data is of the utmost importance. In response to the commenter's concern about whether four (4) quarters of data is sufficient to establish reliability and validity of quality measures, we agree with the commenter that having sufficient evidence to support the reliability and validity of the measures is important prior to public reporting. We also agree that the data collected during the initial phase of the required reporting may reflect hospices' learning curve. To take this into account, as stated in the proposed rule, the reliability and validity testing will not use the data collected during the first reporting quarter (Q3, 2014). As stated in the proposed rule, CMS will use the four subsequent quarters of data (Q4 2014 and Q1–Q3 2015) for testing. Only measures that show sufficient reliability and validity will be identified as appropriate for public reporting. Furthermore, reliability and validity testing will be ongoing for all measures implemented in the HQRP as more quarters of data become available.

Comment: Another commenter recommended that CMS delay public reporting until results from measures derived from the HIS and the CAHPS® hospice survey is available. This commenter felt that although the concept of hospice has fairly wide public recognition, knowledge about hospice practice is minimal among the public. The commenter noted that the public may not be familiar with the processes behind the measures derived from HIS data, nor might the public be able to understand the relationship of those processes to quality of care. Additionally, the commenter noted that the HIS measures are limited in scope and, presented alone, HIS data might fall short of presenting a comprehensive picture of hospice services. The commenter recommended that CMS delay public posting of data until analysis of HIS and CAHPS® data has been completed.

Response: CMS appreciates the commenter's feedback on public reporting of HIS and CAHPS® data. CMS plans to use an approach for public reporting of these two data sources that mirrors approaches used in public reporting of quality data in other quality reporting programs, such as what is currently publicly displayed on Nursing Home Compare, Physician Compare, the Medicare Advantage Plan Finder, Dialysis Facility Compare, and Home Health Compare.

Comment: Two commenters suggested that CMS take steps to understand and develop the form, manner, and context in which data would be presented to the public. One commenter urged CMS that prior to sharing these data with the public, CMS should take time to carefully analyze quality data to better understand what types, and formats of data are most valuable to patients and providers. Another commenter requested that CMS develop educational material that explains hospice practice to aid in interpretation of publicly reported data.

Response: CMS agrees that any publicly reported data should be presented in a manner that is meaningful and understandable by the general public. CMS will take steps to ensure that any publicly reported data is displayed in an appropriate and meaningful manner. CMS will again mirror approaches used in other quality reporting programs and will solicit input from key stakeholders and technical experts in the development of the presentation of publicly available data, which includes a transparent process that will contain multiple opportunities for stakeholder input.

Comment: One commenter requested clarification from CMS about the process for providers to review quality measure data prior to public reporting, specifically, what the purpose of this process was.

Response: As stated in the proposed rule, CMS will develop the infrastructure for public reporting and method for hospices to preview their quality data prior to publicly reporting any such information. Exact details and reports will be forthcoming in future rules.

Comment: CMS received several comments regarding the availability of provider-level quality reports in CASPER. As noted above, commenters were supportive of the availability of these reports, though a few commenters did have suggestions for CMS regarding quality reports. CMS received three comments about the timing of quality reports in CASPER. One commenter stated that CMS did not plan to make quality reports available in CASPER until 2020 or later. Another commenter requested that CMS provide non-public quarterly performance reports to hospices that include benchmarking data for at least one year before publishing the results publicly on a compare Web site. The commenter stated that this one year period would give hospices the chance to make improvements in their performance before data is publicly reported. Another commenter urged CMS to provide feedback reports as frequently as possible and on a timely basis so that hospices have sufficient opportunity to learn from the data and make adjustments to practice before incurring penalties. This commenter also encouraged CMS to ensure that the data in these reports is presented in a user-friendly and actionable format.

Response: CMS thanks commenters for their feedback on the availability of provider-level quality reports in CASPER. First, we would like to clarify our timeline for the availability of quality reports. CMS agrees that providing feedback to hospice providers as soon as is feasible is a critical step in the process of quality improvement, since providers need data about their performance to inform QAPI and other performance improvement efforts. As stated in the proposed rule, CMS anticipates that quality reports will be available sometime in calendar year 2015; thus, we respectfully correct the commenter's misunderstanding that

provider-level quality reports would not be available until 2020. Given our anticipated timeline for the release of provider-level quality reports in 2015 and our timeline for public reporting, which we have stated in prior rules may occur in 2017, hospice providers would have all of 2016 to review their quality reports in CASPER and continue to develop performance improvement projects to improve quality measure scores prior to public reporting. We would also like to clarify that the intent of the provider-level feedback reports in CASPER would provide hospices with the ''benchmarking'' data mentioned by one commenter since, as stated in the proposed rule, the purpose of quality reports is to provide feedback on facility-level performance on quality metrics, including benchmarks and thresholds. CMS appreciates the commenter's request to make quality reports available quarterly; CMS will take this suggested quarterly timeframe under consideration as we consider how often quality data should be ''refreshed'' in CASPER quality reports. Finally, CMS agrees with the commenter that quality reports should provide user-friendly, actionable information. CMS will ensure that provider-level quality reports are meaningful and provide actionable information for providers to improve their care.

Comment: Though commenters were generally supportive of public reporting of quality data, several commenters expressed concerns over the methodology for the 5-star rating that CMS proposes to use as part of the Hospice Compare Web site. Two commenters were concerned about the development of a 5-star methodology where the majority of providers would be placed in the ''average'' star range. These commenters were concerned about the consumer perception of an ''average'' rating and encouraged CMS to develop a 5-star rating system that allows all hospices to aim for and achieve a 5-star rating. Commenters also encouraged CMS to involve providers and stakeholders in the development of the methodology for the 5-star rating system. Commenters also encouraged CMS to ensure any 5-star methodology is based on accurate data and evidence-based methodologies, and to allow ample opportunity for feedback on any proposed methodology. Commenters encouraged CMS to carefully consider the structure and presentation of a the 5-star rating system, including a consumer-friendly explanation of quality measures so that the public can easily interpret the data and use it for meaningful health care decision-making. Finally, one commenter cautioned CMS to ensure the accuracy of information, including basic demographic data such as addresses and practice affiliations, in any Compare databases prior to their launch.

Response: CMS appreciates commenters' input on the development of a Hospice Compare Web site and 5-star rating system for hospices. CMS would like to assure commenters that it is of paramount concern to develop a 5-star methodology that is tested and evidence-based, and can meaningfully distinguish between quality of care offered by providers. CMS agrees that presenting any 5-star rating in a manner that is meaningful and consumer-friendly is important, and CMS will ensure that publicly available data is displayed in a manner that is useful to the public. As with the development of 5-star methodology in other quality reporting programs, CMS will allow continued opportunities for the provider community and other stakeholders to comment on and provide input to the proposed rating system. In addition to regular HQRP communication channels, CMS will solicit input from the public regarding 5-star methodology through special listening sessions, invitation to submit comments via a Help Desk mailbox, Open Door Forums, and other opportunities.

F. Clarification Regarding Diagnosis Reporting on Hospice Claims

To ensure hospices are aware of the issues and requirements when providing compassionate end-of-life care to Medicare beneficiaries, we provided extensive background regarding program vulnerabilities; hospice eligibility requirements; and the hospice assessment of conditions and comorbidities required by regulation in the proposed rule (80 FR 25877—25880). The International Classification of Diseases, Tenth Revision, Clinical Modification (ICD–10–CM) Coding Guidelines state the following regarding the selection of the principal diagnosis: The principal diagnosis is defined in the Uniform Hospital Discharge Data Set (UHDDS) as that condition established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care. In the case of selection of a principal diagnosis for hospice care, this would mean the diagnosis most contributory to the terminal prognosis of the individual. In the instance where two or more diagnoses equally meet the criteria for principal diagnosis, ICD–10–CM coding guidelines do not provide sequencing direction, and thus, any one of the diagnoses may be sequenced first, meaning to report all of those diagnoses meeting the criteria as a principal diagnosis. Per ICD–10–CM Coding Guidelines, for diagnosis reporting purposes, the definition for ''other diagnoses'' is interpreted as additional conditions that affect patient care in terms of requiring:

- clinical evaluation; or
- therapeutic treatment; or
- diagnostic procedures; or
- extended length of hospital stay; or
- increased nursing care and/or monitoring.

The UHDDS item #11-b defines Other Diagnoses as all conditions that coexist at the time of admission, that develop subsequently, or that affect the treatment received and/or the length of stay. ICD–10–CM coding guidelines are clear that all diagnoses affecting the management and treatment of the individual within the healthcare setting are requirement to be reported. This has been longstanding existing policy. Adherence to coding guidelines when assigning ICD–9–CM diagnosis and procedure codes through September 30, 2015 or ICD–10–CM diagnosis and procedure codes on and after October 1, 2015 is required under HHS regulations at 45 CFR 162.1002(b) and (c), respectively, as well as our regulations at 45 CFR 162.1002.

However, though established coding guidelines are required, it does not appear that all hospices are coding per coding guidelines on hospice claims. In 2010, over 77 percent of hospice claims reported only one diagnosis. Previous rules have discussed requirements for hospice diagnosis reporting on claims and the importance of complete and accurate coding. Preliminary analysis of FY 2014 claims data demonstrates that hospice diagnosis coding is improving; however, challenges remain. Analysis of FY 2014 claims data indicates that 49 percent of hospice claims listed only one diagnosis.[52] We conducted additional analysis on instances where only one diagnosis was reported on the FY 2014 hospice claim and found that 50 percent of these beneficiaries had, on average, eight or more chronic conditions and 75 percent had, on average, five or more chronic conditions.[53] These chronic, comorbid conditions include: hypertension, anemia, congestive heart failure, chronic obstructive pulmonary disease, ischemic heart disease, depression,

[52] Preliminary FY 2014 hospice claims data from the Chronic Conditions Data Warehouse (CCW), accessed on January 13, 2015.

[53] Preliminary FY 2014 hospice claims data from the Chronic Conditions Data Warehouse (CCW), accessed on January 21, 2015.

diabetes and atrial fibrillation, to name a few.

In the Medicare Program; Hospice Wage Index for Fiscal Year 2013 Notice (77 FR 44248) we stated that hospices should report, on hospice claims, all coexisting or additional diagnoses that are related to the terminal illness; they should not report coexisting or additional diagnoses that are unrelated to the terminal illness, even though coding guidelines required the reporting of all diagnoses that affect patient assessment and planning. However, as discussed earlier in this section, there is widely varying interpretation as to what factors influence the terminal prognosis of the individual (that is, what conditions render the individual terminally ill and which conditions are related). Furthermore, based on the numerous comments received in previous rulemaking, and anecdotal reports from hospices, hospice beneficiaries, and non-hospice providers discussed above, we are concerned that hospices may not be conducting a comprehensive assessment nor updating the plan of care as articulated by the CoPs to recognize the conditions that affect an individual's terminal prognosis.

Therefore, we are clarifying that hospices will report all diagnoses identified in the initial and comprehensive assessments on hospice claims, whether related or unrelated to the terminal prognosis of the individual effective October 1, 2015. This is in keeping with the requirements of determining whether an individual is terminally ill. This will also include the reporting of any mental health disorders and conditions that would affect the plan of care as hospices are to assess and provide care for identified psychosocial and emotional needs, as well as, for the physical and spiritual needs. Our regulations at § 418.25(b) state, ''in reaching a decision to certify that the patient is terminally ill, the hospice medical director must consider at least the following information:

- Diagnosis of the terminal condition of the patient.
- Other health conditions, whether related or unrelated to the terminal condition.
- Current clinically relevant information supporting all diagnoses.

ICD–10–CM Coding Guidelines state that diagnoses should be reported that develop subsequently, coexist, or affect the treatment of the individual. Furthermore, having these diagnoses reported on claims falls under the authority of the Affordable Care Act for the collection of data to inform hospice payment reform. Section 3132 a(1)(C) of the Affordable Care Act states that the Secretary may collect the additional data and information on cost reports, claims, or other mechanisms as the Secretary determines to be appropriate.

We did not propose any new regulations nor solicit comments with this coding clarification as these clarifications are based on existing ICD–9–CM and ICD–10–CM coding guidelines, but received several comments.

Most commenters asked whether hospices would have to identify diagnoses as related or unrelated on hospice claims and if there would be a modifier created for that identification. Some commenters stated it would be burdensome to identify and report all diagnoses, while others expressed concern that this would mean that hospices would be financially responsible for all reported diagnoses. Some commenters asked what the purpose is for collecting this information and felt that there is no value added by collecting all diagnoses. Several commenters stated that CMS should provide further clarification as to the scope of diagnoses hospices are expected to cover and more clear criteria as to what are unrelated conditions. One industry commenter felt that CMS should define ''terminal illness'' and ''related conditions'' to provide more clear criteria for the expectation as to what hospices are required to cover. One commenter stated the CMS has changed its interpretation of the hospice regulations and that this is a requirement without a purpose. Several commenters felt that the phrase ''virtually all'' is a very ambiguous standard and CMS should provide greater clarity as to its meaning. And, as in previous years' rules, some commenters provided specific clinical scenarios as to why a condition was related or unrelated.

We appreciate the varying interpretations of what hospices' view as holistic and comprehensive end of life care. However, as articulated in section II of this rule, since the implementation of the Medicare hospice benefit in 1983, we have stated that it is our general view that hospices are required to provide virtually all the care that is needed by terminally ill individuals and we would expect to see little being provided outside of the benefit. Admission to hospice must be based on the recommendation of the medical director in consultation with, or with input from, the patient's attending physician (if any). Therefore, we expect that the hospice medical director follow the requirements articulated at 42 CFR 418.25. In a separate section at 42 CFR 418.54(c), hospice's are expected to uphold the responsibilities articulated in regulations regarding the requirements of the initial and comprehensive assessments which becomes part of the patient's hospice medical record and should not require an extensive historical review of previous healthcare records. Modifiers for the hospice claim form are not necessary at this time to identify related or unrelated conditions.

The American Health Information Management Association (AHIMA) provides procedure instructions for diagnosis reporting using coding guidance for coding certification.[54] These coding procedures are used for determining which diagnoses to report for those in the inpatient setting. Hospices follow coding guidelines for the inpatient setting. The guidelines state to sequence those diagnoses that are listed in the medical record with the principal diagnosis listed first. Additionally, these guidelines state to code other diagnoses that coexist at the time of admission, that develop subsequently, or that affect the treatment received and/or the length of stay. These represent additional conditions that affect patient care in terms of requiring clinical evaluation, therapeutic treatment, diagnostic procedures, extended length of hospital stay, or increased nursing care and/or monitoring. These additional diagnoses include those that require active intervention during hospitalization and those that require active management of chronic disease during hospitalization, which is defined as a patient who is continued on chronic management at time of hospitalization. These coding guidelines instruct to code diagnoses of chronic systemic or generalized conditions that are not under active management when a physician documents them in the record and that may have a bearing on the management of the patient. Specifically, all diagnoses affecting the plan of care for the individual, which is in line with the hospice coverage requirements which state that hospices are to provide services for the palliation and management of the terminal illness and related conditions, are to be reported on the hospice claim.

The purpose of collecting this data, which is required in every other healthcare setting as per coding guidelines, is to have adequate data on hospice patient characteristics. This data will help to inform thoughtful,

[54] *http://www.ahima.org/~/media/AHIMA/Files/Certification/CCS%20Coding%20Instructions.ashx?la=en.*

appropriate, and clinically relevant policy for future rulemaking. In order to consider any future refinements, such as a case mix system which utilizes diagnosis information as a few commenters suggested, it is imperative that detailed patient characteristics are available to determine whether a case mix payment system could be achieved. One industry association felt that we should consider a risk-adjusted payment system based on patient characteristics including comorbidities, which would also require more detailed information regarding the patient.

IV. Collection of Information Requirements

This document does not impose additional information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. All information collection discussed in this final rule have been approved by the Office of Management and Budget. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

V. Regulatory Impact Analysis

A. Statement of Need

This final rule meets the requirements of our regulations at § 418.306(c), which requires annual issuance, in the **Federal Register,** of the hospice wage index based on the most current available CMS hospital wage data, including any changes to the definitions of CBSAs, or previously used MSAs. This final rule will also update payment rates for each of the categories of hospice care described in § 418.302(b) for FY 2016 as required under section 1814(i)(1)(C)(ii)(VII) of the Act. The payment rate updates are subject to changes in economy-wide productivity as specified in section 1886(b)(3)(B)(xi)(II) of the Act. In addition, the payment rate updates may be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions specified in section 1814(i)(1)(C)(v) of the Act). In 2010, the Congress amended section 1814(i)(6) of the Act with section 3132(a) of the Affordable Care Act. The amendment authorized the Secretary to collect additional data and information determined appropriate to revise payments for hospice care and for other purposes. The data collected may be used to revise the methodology for determining the payment rates for routine home care and other services included in hospice care, no earlier than October 1, 2013. In accordance with section 1814(i)(6)(D) of the Act, this final rule will provide an update on hospice payment reform research and analyses and implement an SIA payment in accordance with the requirement to revise the methodology for determining hospice payments in a budget-neutral manner. Finally, section 3004 of the Affordable Care Act amended the Act to authorize a quality reporting program for hospices and this rule discusses changes in the requirements for the hospice quality reporting program in accordance with section 1814(i)(5) of the Act.

B. Introduction

We have examined the impacts of this final 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 Act, section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA, March 22, 1995; Pub. L. 104–4), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule has been designated as economically significant under section 3(f)(1) of Executive Order 12866 and thus a major rule under the Congressional Review Act. Accordingly, we have prepared a regulatory impact analysis (RIA) that, to the best of our ability, presents the costs and benefits of the rulemaking. This final rule was also reviewed by OMB.

C. Overall Impact

The overall impact of this final rule is an estimated net increase in Federal Medicare payments to hospices of $160 million, or 1.1 percent, for FY 2016. The $160 million increase in estimated payments for FY 2016 reflects the distributional effects of the 1.6 percent FY 2016 hospice payment update percentage ($250 million increase), the use of updated wage index data and the phase-out of the wage index budget neutrality adjustment factor (−0.7 percent/$120 million decrease) and the implementation of the new OMB CBSA delineations for the FY 2016 hospice wage index with a 1-year transition (0.2 percent/$30 million increase). The elimination of the wage index budget neutrality adjustment factor (BNAF) was part of a 7-year phase-out that was finalized in the FY 2010 Hospice Wage Index final rule (74 FR 39384), and is not a policy change. The RHC rates and the SIA payment, outlined in section III.B, will be implemented in a budget neutral manner in the first year of implementation, as required per section 1814(i)(6)(D)(ii) of the Act. In section III.B, we are also finalizing our proposal make the SIA payments budget neutral annually. The RHC rate budget neutrality factors and the SBNF used to reduce the overall RHC rate are outlined in section III.C.3. Therefore, the RHC rates and the SIA payment will not result in an overall payment impact for the Medicare program or hospices.

D. Detailed Economic Analysis

Table H1, Column 3 shows the combined effects of the use of updated wage data (the FY 2015 pre-floor, pre-reclassified hospital wage index) and the phase-out of the BNAF (for a total BNAF reduction of 100 percent), resulting in an estimated decrease in FY 2016 payments of 0.7 percent ($ −120 million). Column 4 of Table 29, shows the effects of the 50/50 blend of the FY 2016 hospice wage index values (based on the use of FY 2015 pre-floor, pre-reclassified hospital wage index data) under the old and the new CBSA delineations, resulting in an estimated increase in FY 2016 payments of 0.2 percent ($30 million). Column 5 displays the estimated effects of the RHC rates, resulting in no overall change in FY 2016 payments for hospices as this will be implemented in a budget neutral manner. Column 6 shows the estimated effects of the SIA payment, resulting in no change in FY 2016 payments for hospices as this will be implemented in a budget neutral manner through a reduction to the overall RHC rate for FY 2016. Column 7 shows the effects of the FY 2016 hospice payment update percentage. The 1.6 percent hospice payment update percentage is based on a 2.4 percent inpatient hospital market basket update for FY 2016 reduced by a 0.5 percentage point productivity adjustment and by 0.3 percentage point

as mandated by the Affordable Care Act. The estimated effects of the 1.6 percent hospice payment update percentage will result in an increase in payments to hospices of approximately $250 million. Taking into account the 1.6 percent hospice payment update percentage ($250 million increase), the use of updated wage data and the phase-out of the BNAF (−$120 million), and the adoption of the new OMB CBSA delineations with a 1-year transition for the FY 2016 hospice wage index ($30 million), Column 8 shows that hospice payments are estimated to increase by $160 million ($250 million − $120 million + $30 million = $160 million), or 1.1 percent, in FY 2016. For the purposes of our impact analysis, we use the utilization observed in the most complete hospice claims data available at the time of rulemaking (FY 2014 hospice claims submitted as of March 31, 2015). Presenting these data gives the hospice industry a more complete picture of the effects on their total revenue based on the use of updated hospital wage index data and the BNAF phase-out, the adoption of the new OMB CBSA delineations with a 1-year transition, the SIA payment, and the FY 2016 hospice payment update percentage as discussed in this final rule. Certain events may limit the scope or accuracy of our impact analysis, because such an analysis is susceptible to forecasting errors due to other changes in the forecasted impact time period. The nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon hospices. As illustrated in Table 29, the combined effects of all of the changes vary by specific types of providers and by location. We note that some individual hospices within the same group may experience different impacts on payments than others due to: the distributional impact of the FY 2016 wage index and phase-out of the BNAF; the extent to which hospices had varying volume in the number of RHC days in days 1–60 of the hospice episode versus days 61 and beyond; the number, length and type (discipline) of visits provided to patients during the last 7 days of life; and the degree of Medicare utilization.

TABLE 29—ESTIMATED HOSPICE IMPACTS BY FACILITY TYPE AND AREA OF THE COUNTRY, FY 2016

	Providers	Updated FY 2016 wage index data and phase-out of BNAF (% change)	50/50 Blend of FY 2016 wage index values under old and new CBSA delineations (% change)	Routine home care rates (days 1 thru 60 and days 61+)	FY 2016 SIA payment (% change)	FY 2016 Hospice payment update percentage (% change)	Total FY 2016 policies (% change)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
All Hospices	4,067	−0.7	0.2	0.0	0.0	1.6	1.1
Urban Hospices	3,060	−0.7	0.3	0.0	0.0	1.6	1.2
Rural Hospices	1,007	−0.3	−0.2	0.3	0.0	1.6	1.4
Urban Hospices—New England	140	0.0	0.1	0.9	0.0	1.6	2.6
Urban Hospices—Middle Atlantic	253	−0.7	−0.2	0.6	0.0	1.6	1.3
Urban Hospices—South Atlantic	416	−1.1	0.3	−0.5	−0.1	1.6	0.2
Urban Hospices—East North Central	392	−0.8	0.7	−0.2	0.1	1.6	1.4
Urban Hospices—East South Central	166	−0.7	0.5	−0.2	0.0	1.6	1.2
Urban Hospices—West North Central	222	−0.7	0.6	0.6	0.2	1.6	2.3
Urban Hospices—West South Central	602	−1.1	0.6	−0.9	−0.1	1.6	0.1
Urban Hospices—Mountain	305	−0.6	0.2	−0.2	−0.1	1.6	0.9
Urban Hospices—Pacific	527	−0.1	0.0	0.8	0.0	1.6	2.3
Urban Hospices—Outlying	37	0.0	0.3	−0.7	−0.3	1.6	0.9
Rural Hospices—New England	24	−0.3	0.0	2.4	0.2	1.6	3.9
Rural Hospices—Middle Atlantic	42	0.3	−0.1	1.3	0.4	1.6	3.5
Rural Hospices—South Atlantic	142	−0.6	0.0	−0.1	−0.1	1.6	0.8
Rural Hospices—East North Central	137	−0.7	−0.4	0.6	0.2	1.6	1.3
Rural Hospices—East South Central	137	−0.1	−0.1	−0.6	−0.2	1.6	0.6
Rural Hospices—West North Central	186	−0.3	−0.1	1.7	0.2	1.6	3.1
Rural Hospices—West South Central	185	−0.1	−0.1	−0.6	−0.1	1.6	0.7
Rural Hospices—Mountain	104	−1.4	−0.6	0.3	0.0	1.6	−0.1
Rural Hospices—Pacific	47	2.1	0.1	2.5	0.1	1.6	6.4

TABLE 29—ESTIMATED HOSPICE IMPACTS BY FACILITY TYPE AND AREA OF THE COUNTRY, FY 2016—Continued

	Providers	Updated FY 2016 wage index data and phase-out of BNAF (% change)	50/50 Blend of FY 2016 wage index values under old and new CBSA delineations (% change)	Routine home care rates (days 1 thru 60 and days 61+)	FY 2016 SIA payment (% change)	FY 2016 Hospice payment update percentage (% change)	Total FY 2016 policies (% change)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Rural Hospices—Outlying	3	−0.8	−0.2	1.4	−0.2	1.6	1.8
0–3,499 RHC Days (Small)	886	−0.5	0.1	2.6	0.0	1.6	3.8
3,500–19,999 RHC Days (Medium)	1,923	−0.6	0.2	0.5	0.0	1.6	1.7
20,000+ RHC Days (Large)	1,258	−0.7	0.3	−0.1	0.0	1.6	1.1
Non-Profit Ownership	1,073	−0.6	0.2	1.0	0.1	1.6	2.3
For Profit Ownership	2,449	−0.7	0.3	−0.7	−0.1	1.6	0.4
Govt/Other Ownership	545	−0.6	0.2	0.5	0.1	1.6	1.8
Freestanding Facility Type	3,070	−0.7	0.2	−0.2	0.0	1.6	0.9
HHA/Facility-Based Facility Type	997	−0.4	0.2	1.4	0.1	1.6	2.9
Rate of RHC NF/SNF Days is in Lowest Quartile (Less than or equal to 3.1)	1,016	−0.5	0.1	0.5	−0.1	1.6	1.6
Rate of RHC NF/SNF Days is in 2nd Quartile (Greater than 3.1 and Less than or equal to 16.7)	1,017	−0.6	0.1	0.3	0.0	1.6	1.4
Rate of RHC NF/SNF Days is in 3rd Quartile (Greater than 16.7 and less than or equal to 35.5)	1,017	−0.8	0.3	0.0	0.0	1.6	1.1
Rate of RHC NF/SNF Days is in Highest Quartile (Greater than 35.5)	1,017	−0.7	0.4	−0.4	0.0	1.6	0.9

Source: FY 2014 hospice claims data from the Standard Analytic Files for CY 2013 (as of June 30, 2014) and CY 2014 (as of March 31, 2015).

Note(s): The 1.6 percent hospice payment update percentage for FY 2016 is based on an estimated 2.4 percent inpatient hospital market basket update, reduced by a 0.5 percentage point productivity adjustment and by 0.3 percentage point. Starting with FY 2013 (and in subsequent fiscal years), the market basket percentage update under the hospice payment system as described in section 1814(i)(1)(C)(ii)(VII) or section 1814(i)(1)(C)(iii) of the Act will be annually reduced by changes in economy-wide productivity as set out at section 1886(b)(3)(B)(xi)(II) of the Act. In FY 2013 through FY 2019, the market basket percentage update under the hospice payment system will be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions set out under section 1814(i)(1)(C)(v) of the Act).

Region Key:

New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; **Middle Atlantic =** Pennsylvania, New Jersey, New York; **South Atlantic =** Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; **East North Central =** Illinois, Indiana, Michigan, Ohio, Wisconsin; **East South Central =** Alabama, Kentucky, Mississippi, Tennessee; **West North Central =** Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; **West South Central =** Arkansas, Louisiana, Oklahoma, Texas; **Mountain =** Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; **Pacific =** Alaska, California, Hawaii, Oregon, Washington; **Outlying =** Guam, Puerto Rico, Virgin Islands

E. Accounting Statement and Table

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 30 below, we have prepared an accounting statement showing the classification of the expenditures associated with this final rule. Table H2 provides our best estimate of the increase in Medicare payments under the hospice benefit as a result of the changes presented in this final rule for 4,067 hospices in our impact analysis file constructed using FY 2014 claims as of March 31, 2015.

TABLE 30—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS, FROM FY 2015 TO FY 2016

[In $millions]

Category	Transfers
FY 2015 Hospice Wage Index and Payment Rate Update	
Annualized Monetized Transfers	$160.
From Whom to Whom?	Federal Government to Hospices.

F. Conclusion

In conclusion, the overall effect of this final rule is an estimated $160 million increase in Medicare payments to hospices. The $160 million increase in estimated payments for FY 2016 reflects the distributional effects of the 1.6 percent FY 2016 hospice payment update percentage ($250 million increase), the use of updated wage index data and the phase-out of the wage index budget neutrality adjustment factor (−0.7 percent/$120 million decrease) and the implementation of the new OMB CBSA delineations for FY 2016 hospice wage index with a 1-year transition (0.2 percent/$30 million increase). The SIA payment does not result in aggregate changes to estimate hospice payments for FY 2016 as this will be implemented in a budget neutral manner through an overall reduction to the RHC payment rate for all hospices.

2. Regulatory Flexibility Act Analysis

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The great majority of hospitals and most other health care providers and suppliers are small entities by meeting the Small Business Administration (SBA) definition of a small business (in the service sector, having revenues of less than $7.5 million to $38.5 million in any 1 year), or being nonprofit organizations. For purposes of the RFA, we consider all hospices as small entities as that term is used in the RFA. HHS's practice in interpreting the RFA is to consider effects economically ''significant'' only if they reach a threshold of 3 to 5 percent or more of total revenue or total costs. As noted above, the combined effect of the updated wage data and the BNAF phase-out (−0.7 percent decrease or −$120 million) the implementation of the new OMB CBSA delineations for FY 2016 hospice wage index with a 1-year transition (0.2 percent increase or $30 million), the SIA payment (no estimated aggregate impact on payments), and the FY 2016 hospice payment update percentage (1.6 percent increase or $250 million) results in an overall increase in estimated hospice payments of 1.1 percent, or $160 million, for FY 2016. Therefore, the Secretary has determined that this final rule will not create a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 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. This final rule only affects hospices. Therefore, the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

3. Unfunded Mandates Reform Act Analysis

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2015, that threshold is approximately $144 million. This final rule is not anticipated to have an effect on State, local, or tribal governments, in the aggregate, or on the private sector of $144 million or more.

VI. Federalism Analysis and Regulations Text

Executive Order 13132, Federalism (August 4, 1999) requires an agency to provide federalism summary impact statement when it promulgates a proposed rule (and subsequent final rule) that has federalism implications and which imposes substantial direct requirement costs on State and local governments which are not required by statute. We have reviewed this final rule under these criteria of Executive Order 13132, and have determined that it will not impose substantial direct costs on State or local governments.

List of Subjects

42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare and Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 418—HOSPICE CARE

■ 1. The authority citation for part 418 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh)

Subpart G—Payment for Hospice Care

■ 2. Section 418.302 is amended by—

■ a. Adding paragraph (b)(1)(i) and (ii).

■ b. Amending paragraphs (d)(1), (d)(2), (e) introductory text, (f)(2) and (f)(5)(ii) by removing the word ''intermediary'' and adding in its place the words ''Medicare Administrative Contractor''.

■ c. Revising paragraph (e)(1).

The revisions and additions read as follows:

§ 418.302 Payment procedures for hospice care.

* * * * *

(b)

(1) * * *

(i) *Service intensity add-on.* Routine home care days that occur during the last 7 days of a hospice election ending with a patient discharged due to death are eligible for a service intensity add-on payment.

(ii) The service intensity add-on payment shall be equal to the continuous home care hourly payment rate, as described in paragraph (e)(4) of this section, multiplied by the amount of direct patient care actually provided by a RN and/or social worker, up to 4 hours total per day.

* * * * *

(e) * * *

(1) Payment is made to the hospice for each day during which the beneficiary is eligible and under the care of the hospice, regardless of the amount of services furnished on any given day

(except as set out in paragraph (b)(1)(i) of this section).

* * * * *

■ 3. Section 418.306 is amended by revising the section heading and paragraphs (a), (b) and (c) to read as follows.

§ 418.306 Annual update of the payment rates and adjustment for area wage differences.

(a) *Applicability.* CMS establishes payment rates for each of the categories of hospice care described in § 418.302(b). The rates are established using the methodology described in section 1814(i)(1)(C) of the Act and in accordance with section 1814(i)(6)(D) of the Act.

(b) *Annual update of the payment rates.* The payment rates for routine home care and other services included in hospice care are the payment rates in effect under this paragraph during the previous fiscal year increased by the hospice payment update percentage increase (as defined in sections1814(i)(1)(C) of the Act), applicable to discharges occurring in the fiscal year.

(1) For fiscal year 2014 and subsequent fiscal years, in accordance with section 1814(i)(5)(A)(i) of the Act, in the case of a Medicare-certified hospice that submits hospice quality data, as specified by the Secretary, the payment rates are equal to the rates for the previous fiscal year increased by the applicable hospice payment update percentage increase.

(2) For fiscal year 2014 and subsequent fiscal years, in accordance with section 1814(i)(5)(A)(i) of the Act, in the case of a Medicare-certified hospice that does not submit hospice quality data, as specified by the Secretary, the payment rates are equal to the rates for the previous fiscal year increased by the applicable hospice payment update percentage increase, minus 2 percentage points. Any reduction of the percentage change will apply only to the fiscal year involved and will not be taken into account in computing the payment amounts for a subsequent fiscal year.

(c) *Adjustment for wage differences.* Each hospice's labor market is determined based on definitions of Metropolitan Statistical Areas (MSAs) issued by OMB. CMS will issue annually, in the **Federal Register,** a hospice wage index based on the most current available CMS hospital wage data, including changes to the definition of MSAs. The urban and rural area geographic classifications are defined in § 412.64(b)(1)(ii)(A) through (C) of this chapter. The payment rates established by CMS are adjusted by the Medicare contractor to reflect local differences in wages according to the revised wage data.

* * * * *

§ 418.308 [Amended]

■ 4. Section 418.308(c) is amended by removing the phrase ''(that is, by March 31st)''.

■ 5. Section 418.309 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 418.309 Hospice aggregate cap.

A hospice's aggregate cap is calculated by multiplying the adjusted cap amount (determined in paragraph (a) of this section) by the number of Medicare beneficiaries, as determined by one of two methodologies for determining the number of Medicare beneficiaries for a given cap year described in paragraphs (b) and (c) of this section.

(a) *Cap Amount.* The cap amount was set at $6,500 in 1983 and is updated using one of two methodologies described in paragraphs (a)(1) and (a)(2) of this section.

(1) For accounting years that end on or before September 30, 2016 and end on or after October 1, 2025, the cap amount is adjusted for inflation by using the percentage change in the medical care expenditure category of the Consumer Price Index (CPI) for urban consumers that is published by the Bureau of Labor Statistics. This adjustment is made using the change in the CPI from March 1984 to the fifth month of the cap year.

(2) For accounting years that end after September 30, 2016, and before October 1, 2025, the cap amount is the cap amount for the preceding accounting year updated by the percentage update to payment rates for hospice care for services furnished during the fiscal year beginning on the October 1 preceding the beginning of the accounting year as determined pursuant to section 1814(i)(1)(C) of the Act (including the application of any productivity or other adjustments to the hospice percentage update).

* * * * *

Dated: July 27, 2015

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: July 28, 2015

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2015–19033 Filed 7–31–15; 4:15 pm]

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Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1051

Milk in California; Notice of Hearing on a Proposal To Establish a Federal Milk Marketing Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1051

[Doc. No. AO–15–0071; AMS–DA–14–0095]

Milk in California; Notice of Hearing on a Proposal To Establish a Federal Milk Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: A public hearing is being held to consider and take evidence on a proposal that would establish a Federal milk marketing order to regulate the handling of milk in California. The proposed marketing area would incorporate the entire state of California. USDA received four proposals from interested parties, some that include certain milk pricing and pooling provisions not found in current Federal milk orders. The proposals incorporate the same dairy product classification system used throughout the Federal milk marketing order system. Additional features would recognize California quota premium and fluid milk fortification values. The proposals noticed herein would not modify any existing Federal milk marketing orders.

DATES: The hearing will convene at 9:00 a.m. on Tuesday, September 22, 2015.

ADDRESSES: The hearing will be held at the Clovis Veterans Memorial District Building, 808 Fourth Street, Clovis, California 93612; telephone (559) 299–0471. If still ongoing, the hearing will be held on October 22 and 23, 2015, at the Piccadilly Inn Airport Hotel, 5115 E. McKinley Avenue, Fresno, California 93727; telephone (559) 375–7760.

FOR FURTHER INFORMATION CONTACT: William Francis, Director, Order Formulation and Enforcement Division, USDA/AMS/Dairy Program, Stop 0231—Room 2969–S, 1400 Independence Avenue SW., Washington, DC 20250–0231; (202) 720–6274; email address: *william.francis@ams.usda.gov.*

Persons requiring a sign language interpreter or other special accommodations should contact Diane Hirsch, AMS Dairy Program, at (425) 487–5601, email: *dhirsch@fnmaseattle.com,* before the hearing begins.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Notice is hereby given of a public hearing to be held at the Clovis Veterans Memorial District, Clovis, California, beginning at 9:00 a.m. on Tuesday, September 22, 2015, with respect to the proposed establishment of a marketing agreement and order (order) regulating the handling of milk in the State of California.

The hearing is called pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (Act), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The purpose of the hearing is to:

(a) Receive evidence with respect to the economic and marketing conditions which relate to the proposed marketing agreement and order, hereinafter set forth, and any appropriate modifications thereof;

(b) Determine whether the handling of milk in the area proposed for regulation is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce;

(c) Determine whether there is need for a marketing agreement or order regulating the handling of milk in the area;

(d) Determine the economic impact of the proposed order on the industry in the proposed marketing area and on the public affected by such program; and

(e) Determine whether the proposed marketing agreement and order or appropriate modifications thereof would tend to effectuate the declared policy of the Act.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA). The RFA seeks to ensure that, within the statutory authority of a program, the regulatory and information collection requirements are tailored to the size and nature of small businesses. For the purpose of the RFA, a dairy farm is a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees (13 CFR 121.201). Most parties subject to a milk order are considered small businesses. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may offer modifications of these proposals for the purpose of tailoring their applicability to small businesses.

Executive Order 12988, Civil Justice Reform

The marketing order proposed herein has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. If adopted, operation of state law is such that the state law may be suspended, in part or in whole, if a Federal order is implemented.

Preliminary Economic Analysis and Detailed Analysis Information

A preliminary economic analysis as well as additional detailed analysis, data and information used in developing the preliminary economic analysis are presented at the AMS Dairy Programs Web site, *www.ams.usda.gov/dairy.*

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 8c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the United States Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principle place of business, has jurisdiction to review USDA's decision on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Interested parties who wish to introduce exhibits should provide the Administrative Law Judge at the hearing with four (4) copies of such exhibits for the official record. Additional copies should be made available for the use of other hearing participants. Any party that has submitted a proposal noticed herein, when participating as a witness, is required to make their testimony—if prepared as an exhibit—and any other exhibits, available to USDA officials prior to the start of the hearing on the day of their appearance. Individual dairy farmers are not subject to this requirement.

The hearing will continue until such time as determined to have ended by the presiding Administrative Law Judge. The schedule for the next session will be announced at the time of adjournment. Such reconvening date and time will also be posted on the

AMS-Dairy Programs Web site at *http://www.ams.usda.gov/dairy.*

The provisions of the proposed marketing order designated 7 CFR part 1051, as set forth below, have not received the approval of USDA.

List of Subjects in 7 CFR Part 1051

Milk marketing orders.

■ 1. The authority citation for 7 CFR part 1051 reads as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 2. Testimony is invited on the following proposals or appropriate modifications to such proposals.

Proposal Number 1

Submitted by California Dairies, Inc.; Dairy Farmers of America, Inc.; and Land O' Lakes, Inc.

■ 3. This proposal seeks to add a new part 1051 to read as follows:

PART 1051—MILK IN THE CALIFORNIA MARKETING AREA

Sec.

Subpart A—Order Regulating Handling

General Provisions

1051.1 General Provisions.

Definitions

1051.2 California marketing area.
1051.3 Route disposition.
1051.4 Plant.
1051.5 Distributing plant.
1051.6 Supply plant.
1051.7 Pool plant.
1051.8 Nonpool plant.
1051.9 Handler.
1051.10 Producer-handler.
1051.11 [Reserved]
1051.12 Producer.
1051.13 Producer milk.
1051.14 Other source milk.
1051.15 Fluid milk product.
1051.16 Fluid cream product.
1051.17 CDFA, quota premium, quota nonfat solids, and non-quota milk.
1051.18 Cooperative association.
1051.19 Commercial food processing establishment.

Market Administrator

1051.25 Market administrator.

Administrative Provisions

1051.26 Continuity and separability of provisions.

Handlers

1051.27 Handler responsibility for records and facilities.
1051.28 Termination of obligations.

Reports

1051.30 Reports of receipts and utilization.
1051.31 Producer delivery and payroll reports.
1051.32 Other reports.

Subpart B—Milk Pricing

Classification of Milk

1051.40 Classes of utilization.
1051.41 [Reserved]
1051.42 Classification of transfers and diversions.
1051.43 General classification rules.
1051.44 Classification of producer milk.
1051.45 Market administrator's reports and announcements concerning classification.

Class Prices

1051.50 Class prices, component prices, and advanced pricing factors.
1051.51 Class I differential and price.
1051.52 Adjusted Class I differentials.
1051.53 Announcement of class prices, component prices, and advanced pricing factors.
1051.54 Equivalent price.

Marketwide Service Payments

1051.55 Transportation credits.
1051.56 Mileage rate for transportation credits.

Producer Prices

1051.60 Handler's value of milk.
1051.61 Computation of producer component prices and producer price differential.
1051.62 Announcement of producer prices.

Subpart C—Payments for Milk

Producer Payments

1051.70 Producer-settlement fund.
1051.71 Payments to the producer-settlement fund.
1051.72 Payments from the producer-settlement fund.
1051.73 Payments to producers and cooperative associations.
1051.74 [Reserved]
1051.75 Plant location adjustments for nonpool milk.
1051.76 Payments by a handler operating a partially regulated distributing plant.
1051.77 Adjustment of accounts.
1051.78 Charges on overdue accounts.

Administrative Assessment and Marketing Service Deduction

1051.85 Assessment for order administration.
1051.86 Deduction for marketing services.

Subpart D—Miscellaneous Provisions

1051.90 Dates.

Authority: 7 U.S.C. 601—674

Subpart A—Order Regulating Handling

General Provisions

§ 1051.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1051. In this part 1051, all references to sections in part 1000 refer to part 1000 of this chapter.

Definitions

§ 1051.2 California marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions: All of the State of California.

§ 1051.3 Route disposition.

See § 1000.3.

§ 1051.4 Plant.

See § 1000.4.

§ 1051.5 Distributing plant.

See § 1000.5.

§ 1051.6 Supply plant.

See § 1000.6.

§ 1051.7 Pool plant.

Pool plant means a plant as specified in paragraphs (a) through (d) of this section, but excluding a plant specified in paragraph (f) of this section. The pooling standards described in paragraphs (d) of this section are subject to modification pursuant to paragraph (e) of this section:

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or § _____ .7(b) of any other Federal milk order, from which during the month 25 percent or more of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent of such route disposition and transfers must be to outlets in the marketing area.

(b) Any distributing plant located in the marketing area which during the month processed at least 15 percent of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) into ultra-pasteurized or aseptically-processed fluid milk products.

(c) A plant that is located in the marketing area which during the month receives milk from a producer located in the marketing area or from a cooperative marketing the milk of a producer

located in the marketing area pursuant to § 1051.9(c).

(1) A plant located in Churchill county Nevada that receives milk from producers located in Churchill County or in the marketing area or from a cooperative marketing the milk of a producer located in the marketing area or in Churchill County pursuant to § 1051.9(c).

(d) A supply plant located outside the marketing area (except a plant described in § 1051.7(c)(1)) from which the quantity of bulk fluid milk products shipped to (and physically unloaded into) plants described in paragraph (a) and (b) of this section is not less than 50 percent of the Grade A milk received from dairy farmers and handlers described in § 1000.9(c), including milk diverted pursuant to § 1051.13, subject to the following conditions:

(1) If milk is delivered directly from producers' farms that are located outside of the marketing area such producers must be grouped by state into reporting units and each reporting unit must independently meet the shipping requirements of this paragraph; and

(2) Concentrated milk transferred from the supply plant located outside the marketing area to a distributing plant shall be excluded from the supply plant's shipments in computing the percentages in paragraphs (d)(1).

(e) The applicable shipping percentages of paragraphs (d) of this section and § 1051.13(d)(2), and (d)(3) may be increased or decreased, for all or part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for adjustment either on the market administrator's own initiative or at the request of interested parties if the request is made in writing at least 15 days prior to the month for which the requested revision is desired effective. If the investigation shows that an adjustment of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that an adjustment is being considered and invite data, views and arguments. Any decision to revise an applicable shipping or diversion percentage must be issued in writing at least one day before the effective date.

(f) The term pool plant shall not apply to the following plants:

(1) A producer-handler as defined under any Federal order;

(2) An exempt plant as defined in § 1000.8(e);

(3) A plant located within the marketing area and qualified pursuant to paragraph (a) of this section which meets the pooling requirements of another Federal order, and from which more than 50 percent of its route disposition has been in the other Federal order marketing area for 3 consecutive months;

(4) A plant located outside any Federal order marketing area and qualified pursuant to paragraph (a) of this section that meets the pooling requirements of another Federal order and has had greater route disposition in such other Federal order's marketing area for 3 consecutive months;

(5) A plant located in another Federal order marketing area and qualified pursuant to paragraph (a) of this section that meets the pooling requirements of such other Federal order and does not have a majority of its route distribution in this marketing area for 3 consecutive months or if the plant is required to be regulated under such other Federal order without regard to its route disposition in any other Federal order marketing area;

(6) A plant qualified pursuant to paragraph (c) of this section which also meets the pooling requirements of another Federal order and from which greater qualifying shipments are made to plants regulated under the other Federal order than are made to plants regulated under the order in this part, or the plant has automatic pooling status under the other Federal order; and

(g) Any plant that qualifies as a pool plant in each of the immediately preceding 3 months pursuant to paragraph (a) of this section or the shipping percentages in paragraph (c) of this section that is unable to meet such performance standards for the current month because of unavoidable circumstances determined by the market administrator to be beyond the control of the handler operating the plant, such as a natural disaster (ice storm, wind storm, flood), fire, breakdown of equipment, or work stoppage, shall be considered to have met the minimum performance standards during the period of such unavoidable circumstances, but such relief shall not be granted for more than 2 consecutive months.

§ 1051.8 Nonpool plant.

See § 1000.8.

§ 1051.9 Handler.

See § 1000.9.

§ 1051.10 Producer-handler.

Producer-handler means a person who:

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition and packaged sales of fluid milk products to other plants during the month does not exceed 3 million pounds;

(b) Receives fluid milk from own farm production or milk that is fully subject to the pricing and pooling provisions of the order in this part or any other Federal order;

(c) Receives at its plant or acquires for route disposition no more than 150,000 pounds of fluid milk products from handlers fully regulated under any Federal order. This limitation shall not apply if the producer-handler's own farm production is less than 150,000 pounds during the month;

(d) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products;

(e) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) and the processing and packaging operations are the producer-handler's own enterprise and at its own risk; and

(f) Any producer-handler with Class I route dispositions and/or transfers of packaged fluid milk products in the marketing area described in § 1131.2 of this chapter shall be subject to payments into the Order 1131 producer settlement fund on such dispositions pursuant to § 1000.76(a) and payments into the Order 1131 administrative fund provided such dispositions are less than three million pounds in the current month and such producer-handler had total Class I route dispositions and/or transfers of packaged fluid milk products from own farm production of three million pounds or more the previous month. If the producer-handler has Class I route dispositions and/or transfers of packaged fluid milk products into the marketing area described in § 1131.2 of this chapter of three million pounds or more during the current month, such producer-handler shall be subject to the provisions described in § 1131.7 of this chapter or § 1000.76(a).

§ 1051.11 [Reserved]

§ 1051.12 Producer.

(a) Except as provided in paragraph (b) of this section, *producer* means any person who produces milk approved by a duly constituted regulatory agency for

fluid consumption as Grade A milk and whose milk is:

(1) Received at a pool plant directly from the producer or diverted by the plant operator in accordance with § 1051.13; or

(2) Received by a handler described in § 1000.9(c).

(b) *Producer* shall not include a dairy farmer described in paragraphs (b)(1) through (5) of this section. A dairy farmer described in paragraph (b)(5) of this section shall be known as a *dairy farmer for other markets.*

(1) A producer-handler as defined in any Federal order;

(2) A dairy farmer whose milk is received at an exempt plant, excluding producer milk diverted to the exempt plant pursuant to § 1051.13(d);

(3) A dairy farmer whose milk is received by diversion at a pool plant from a handler regulated under another Federal order if the other Federal order designates the dairy farmer as a producer under that order and that milk is allocated by request to a utilization other than Class I;

(4) A dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order with respect to that portion of the milk so diverted that is assigned to Class I under the provisions of such other order; and

(5) A dairy farmer who having had a Grade A permit has marketed milk as other than Grade A milk for more than 30 consecutive days shall not be a producer until 12 consecutive months have passed from the time non-Grade A status started.

§ 1051.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

(a) Received by the operator of a pool plant directly from a producer or a handler described in § 1000.9(c). All milk received pursuant to this paragraph shall be priced at the location of the plant where it is first physically received;

(b) Received by a handler described in § 1000.9(c) in excess of the quantity delivered to pool plants;

(c) Diverted by a pool plant operator to another pool plant. Milk so diverted shall be priced at the location of the plant to which diverted; or

(d) Diverted by the operator of a pool plant or a cooperative association described in § 1000.9(c) to a nonpool plant subject to the following conditions:

(1) Milk of a dairy farmer shall not be eligible for diversion until at least five days' production of such dairy farmer is physically received as producer milk at a pool plant during the first month the dairy farmer is a producer. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval or as a result of the handler of the dairy farmer's milk failing to pool the milk under any order), the dairy farmer's milk shall not be eligible for diversion until at least five days' production of the dairy farmer has been physically received as producer milk at a pool plant during the first month the dairy farmer is re-associated with the market;

(2) The quantity of milk diverted by a handler described in § 1000.9(c) may not exceed 50 percent of the producer milk receipts reported by the handler pursuant to § 1051.30(c), provided that not less than 50 percent of such receipts are delivered to plants described in § 1051.7(a) or (b). These percentages are subject to any adjustments that may be made pursuant to § 1051.7(e); and

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in § 1051.7(a) or (b) may not exceed 50 percent of the Grade A milk received from dairy farmers (except dairy farmers described in § 1051.12(b)), including milk diverted pursuant to § 1051.13; and further, such milk is subject to the pooling requirements of § 1051.7(d)(1); and

(4) Diverted milk shall be priced at the location of the plant to which diverted.

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

(f) The quantity of milk reported by a handler pursuant to either § 1051.30(a)(1) or § 1051.30(c)(1) may not exceed 115 percent of the producer milk receipts pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool. Milk in excess of this limit received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information, the market administrator will make the determination. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants in excess of the previous month's pooled volume shall not be subject to the 115 percent limitation;

(2) The market administrator may waive the 115 percent limitation:

(i) For a new handler on the order, subject to the provisions of § 1051.13(f)(3), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(3) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

§ 1051.14 Other source milk.

See § 1000.14.

§ 1051.15 Fluid milk product.

See § 1000.15.

§ 1051.16 Fluid cream product.

See § 1000.16.

§ 1051.17 CDFA, quota premium, quota nonfat solids, and non-quota milk.

(a) *CDFA* refers to the California Department of Food and Agriculture, which is the agency of the State of California responsible for administration of the California dairy producer milk quota program as established in the California Food and Agriculture Code.

(b) *Quota premium* means the value established pursuant to the California Food and Agriculture Code. *Quota premium* and *quota premium value* mean the value per pound of nonfat solids, as adjusted by the regional quota adjusters, where and as applicable.

(c) *Quota nonfat solids* means the pounds of nonfat solids of a producer, as determined and reported by CDFA, which qualify for the quota premium.

(d) *Non-quota milk* means pool milk not eligible for the quota premium.

§ 1051.18 Cooperative association.

See § 1000.18.

§ 1051.19 Commercial food processing establishment.

See § 1000.19.

Market Administrator

§ 1051.25 Market administrator.

See § 1000.25.

Administrative Provisions

§ 1051.26 Continuity and separability of provisions.

See § 1000.26.

Handlers

§ 1051.27 Handler responsibility for records and facilities.

See § 1000.27.

§ 1051.28 Termination of obligations.

See § 1000.28.

Reports

§ 1051.30 Reports of receipts and utilization.

Each handler shall report monthly so that the market administrator's office receives the report on or before the 6th day after the end of the month, in the detail and on the prescribed forms, as follows:

(a) Each handler that operates a pool plant shall report for each of its operations the following information:

(1) Product pounds, pounds of butterfat, pounds of protein, and pounds of solids-not-fat other than protein (other solids) contained in or represented by:

(i) Receipts of producer milk, including producer milk diverted by the reporting handler, from sources other than handlers described in § 1000.9(c) [qualified cooperative associations]; and

(ii) Receipts of milk from handlers described in § 1000.9(c);

(2) Product pounds and pounds of butterfat contained in:

(i) Receipts of fluid milk products and bulk fluid cream products from other pool plants;

(ii) Receipts of other source milk;

(iii) Receipts of all condensed skim and dry powder; and

(iv) Inventories at the beginning and end of the month of fluid milk products, bulk fluid cream products, condensed milk, and dry powder;

(3) The utilization or disposition of all milk and milk products required to be reported pursuant to this paragraph;

(4) Such other information with respect to the receipts and utilization of skim milk, butterfat, milk protein, other nonfat solids, as the market administrator may prescribe, including the use of condensed skim or dry powder in fortification or reconstitution of Class I products.

(b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. The report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1000.9(c) shall report:

(1) The product pounds, pounds of butterfat, pounds of protein, and pounds of solids-not-fat other than protein (other solids) contained in receipts of milk from producers; and

(2) The utilization or disposition of such receipts.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to its receipts and utilization of milk and milk products in such manner as the market administrator may prescribe.

(e) Each handler shall report such additional information as deemed necessary by the market administrator.

§ 1051.31 Producer delivery and payroll reports.

(a) On or before the 6th day after the end of each month, each handler that operates a pool plant pursuant to § 1051.7 and each handler described in § 1000.9(c) shall report to the market administrator its producer deliveries for the month, in the detail prescribed by the market administrator, showing for each producer the information described in § 1051.73(f); and any other information deemed necessary by the Market Administrator.

(b) On or before the 20th day after the end of each month, each handler that operates a pool plant pursuant to § 1051.7 and each handler described in § 1000.9(c) shall report to the market administrator its producer payroll for the month, in the detail prescribed by the market administrator, showing for each producer the information described in § 1051.73(f) and any other information deemed necessary by the Market Administrator.

(c) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1000.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

§ 1051.32 Other reports.

In addition to the reports required pursuant to §§ 1051.30 and 1051.31, each handler shall report any information the market administrator deems necessary to verify or establish each handler's obligation under the order.

Subpart B—Milk Pricing

Classification of Milk

§ 1051.40 Classes of utilization.

See § 1000.40.

§ 1051.41 [Reserved]

§ 1051.42 Classification of transfers and diversions.

See § 1000.42.

§ 1051.43 General classification rules.

See § 1000.43.

§ 1051.44 Classification of producer milk.

See § 1000.44.

§ 1051.45 Market administrator's reports and announcements concerning classification.

See § 1000.45.

Class Prices

§ 1051.50 Class prices, component prices, and advanced pricing factors.

See § 1000.50.

§ 1051.51 Class I differential and price.

The Class I differential shall be the differential established for Los Angeles County, California, which is reported in § 1000.52. The Class I price shall be the price computed pursuant to § 1000.50(a) for Los Angeles County, California.

§ 1051.52 Adjusted Class I differentials.

See § 1000.52.

§ 1051.53 Announcement of class prices, component prices, and advanced pricing factors.

See § 1000.53.

§ 1051.54 Equivalent price.

See § 1000.54.

Marketwide Service Payments

§ 1051.55 Transportation credits.

(a) Payments for transportation credits to handlers and cooperative associations shall be made as follows:

(1) On or before the 13th day (except as provided in § 1000.90) after the end of each month the market administrator shall pay to each handler, including cooperative associations acting as handlers that delivered and reported pursuant to § 1051.30 (c), milk directly from producers' farms as specified in paragraph (b)(1) to plants as specified in (b)(1) and (2) of this section, an amount determined pursuant to paragraph (c) of this section.

(2) Transportation credits paid pursuant to this section shall be subject to final verification by the market administrator pursuant to § 1000.77; and

(b) Transportation credits shall apply to the following:

(1) Bulk milk delivered directly from dairy farms to pool plants described in (b)(2) in the following Transportation Zones:

(i) Transportation Zone 1—deliveries to plants located in the counties of Los

Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura originating from dairy farms located in the counties of Riverside, San Diego, or San Bernardino;

(ii) Transportation Zone 2—deliveries to plants located in the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura originating from dairy farms located in all counties within the marketing area except Riverside, San Diego, and San Bernardino;

(iii) Transportation Zone 3—deliveries to plants located in the counties of Alameda, Contra Costa, Marin, Napa, Santa Clara, San Francisco, Santa Cruz, San Mateo, Sacramento, Solano and Sonoma Counties originating from dairy farms located in all counties within the marketing area;

(2) Pool plant(s) which for the month have utilization of greater than 50 percent in Classes I and/or II. The utilization requirement may be met for the current month or it may be met on the basis of utilization during the preceding 12-month period ending with the current month.

(c) Transportation credits shall be calculated at the following rates:

(1) With respect to each delivery described in paragraph (b)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway mileage between the shipping farm and the receiving plant. The mileage determined by this calculation shall not be greater than 225;

(ii) Multiply the pounds determined in § 1051.55(b)(1) by the rate for the month computed pursuant to § 1051.56(a)(6) for each Transportation Zone.

§ 1051.56 Mileage rate for transportation credits.

(a) The market administrator shall compute the fuel adjustor rate and the hundredweight rate each moth as follows:

(1) For the fuel adjustor rate compute the simple average rounded to three decimal places for the most recent 8 weeks of the Diesel (on Highway)—All Types Price per gallon as reported by the Energy Information Administration of the United States Department of Energy for the series California Number 2 Diesel Retail Prices;

(2) From the result in paragraph (a)(1) in this section subtract $4.099 per gallon;

(3) Divide the result in paragraph (a)(2) of this section by 5.8, and round to three decimal places to compute the fuel cost adjustment factor;

(4) Divide the result in paragraph (a)(3) of this section by 520;

(5) Round the result in paragraph (a)(4) of this section to five decimal places to compute the fuel adjustor rate.

(6) Compute the per hundredweight rate as follows:

(i) For Transportation Zone 1 the sum of $0.04497 plus the product of the miles determined in § 1051.55(c)(1)(i) times the sum of $0.00318 plus the amount determined in § 1051.56(a)(5);

(ii) For Transportation Zone 2 the sum of $0.00485 plus the product of the miles determined in § 1051.55(c)(1)(i) times the sum of $0.00546 plus the amount determined in § 1051.56(a)(5);

(iii) For Transportation Zone 3 the sum of $0.05441 plus the product of the miles determined in § 1051.55(c)(1)(i) times the sum of $0.00571 plus the amount determined in § 1051.56(a)(5);

(b) The market administrator shall announce publicly on or before the 23rd day of the month (except as provided in § 1000.90 of this chapter) the fuel adjustor rate pursuant to paragraph (a) of this section for the following month.

Producer Prices

§ 1051.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (i) of this section and subtracting from that total amount the values computed in paragraphs (i) and (j) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c), respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) shall be excluded from pricing under this section.

(a) Class I value.

(1) Multiply the pounds of skim milk in Class I by the Class I skim milk price; and

(2) Add an amount obtained by multiplying the pounds of butterfat in Class I by the Class I butterfat price;

(3) Deduct for each pound of milk solids-not-fat in nonfat dry milk used for fortifying Class I products during the current month a maximum charge equal to the current Class I solids not fat price [the Class I skim milk price in the $2.10 zone divided by 9], less the current Class IV solids not fat price established in § 1051.53. In no case shall the deduction be less than zero cents ($0.00) nor more than nineteen and eighty-five hundredths cents ($0.1985); and

(4) Deduct for each pound of milk solids-not-fat in condensed skim milk used for fortifying Class I products during the current month a maximum charge equal to the current Class I solids not fat price [the Class I skim milk price in the $2.10 zone divided by 9], less the current Class II solids not fat price established in § 1051.53. In no case shall the deduction be less than zero cents ($0.00) nor more than nine and eighty-seven hundredths cents ($0.0987).

(b) Class II value.

(1) Multiply the pounds of nonfat solids in Class II skim milk by the Class II nonfat solids price; and

(2) Add an amount obtained by multiplying the pounds of butterfat in Class II times the Class II butterfat price.

(c) Class III value.

(1) Multiply the pounds of protein in Class III skim milk by the protein price;

(2) Add an amount obtained by multiplying the pounds of other solids in Class III skim milk by the other solids price; and

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) Class IV value.

(1) Multiply the pounds of nonfat solids in Class IV skim milk by the nonfat solids price; and

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

(e) Multiply the pounds of skim milk and butterfat overage assigned to each class pursuant to § 1000.44(a)(11) and the corresponding step of § 1000.44(b) by the skim milk prices and butterfat prices applicable to each class.

(f) Multiply the difference between the current month's Class I, II, or III price, as the case may be, and the Class IV price for the preceding month and by the hundredweight of skim milk and butterfat subtracted from Class I, II, or III, respectively, pursuant to § 1000.44(a)(7) and the corresponding step of § 1000.44(b).

(g) Multiply the difference between the Class I price applicable at the location of the pool plant and the Class IV price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1000.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I

pursuant to § 1000.44(a)(3)(i) through (vi) and the corresponding step of § 1000.44(b), excluding receipts of bulk fluid cream products from plants regulated under other Federal orders and bulk concentrated fluid milk products from pool plants, plants regulated under other Federal orders, and unregulated supply plants.

(h) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

(i) For reconstituted milk made from receipts of nonfluid milk products, multiply $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class IV price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1000.43(d).

(j) Compute the amount of credits applicable pursuant to § 1051.55.

§ 1051.61 Computation of producer component prices and producer price differential.

For each month the market administrator shall compute producer component prices per pound for butterfat, protein, and other solids. The report of any handler who has not made payments required pursuant to § 1051.71 for the preceding month shall not be included in the computation of the producer component prices, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer component prices in the following manner:

(a) Combine into one total the values computed pursuant to § 1051.60 for all handlers required to file reports prescribed § 1051.50;

(1) Subtract the value of quota premium for the month as reported to the Market Administrator by CDFA;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1051.60 by the protein price, other solids price, and the butterfat price, respectively;

(c) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(d) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1051.60(g); and,

(e) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month (applicable in § 1000.76(a)(2)).

(f) The producer butterfat protein, and other solids, prices shall be the result of the following computations.

(1) The percentage contribution that the value of butterfat, protein, and other solids make to the Class III price shall be computed and announced by the Market Administrator on or before January 1 of the year for which the percentages will be applicable. The percentages will be computed as an average based on the prior fiscal year of December 1st through November 30th.

(2) The producer butterfat price shall be the result of adding the price computed in § 1000.50(l) to the result of multiplying the percentage butterfat contribution announced in paragraph (f)(1) by the producer price differential value and dividing the result by the handler's total pounds of butterfat contained in the milk for which an obligation was computed pursuant to § 1051.60, and rounded to the fourth decimal place.

(3) The producer protein price shall be the result of adding the price computed in § 1000.50(n) to the result of multiplying the percentage protein contribution announced in paragraph (f)(1) by the producer price differential value and dividing the result by the handler's total pounds of protein contained in the milk for which an obligation was computed pursuant to § 1051.60, and rounded to the fourth decimal place.

(4) The producer other solids price shall be the result of adding the price computed in § 1000.50(o) to the result of multiplying the percentage other solids contribution announced in paragraph (f)(1) by the producer price differential value and dividing the result by the handler's total pounds of other solids contained in the milk for which an obligation was computed pursuant to § 1051.60, and rounded to the fourth decimal place.

§ 1051.62 Announcement of producer prices.

On or before the 11th day after the end of each month, the market administrator shall announce publicly the following prices and information:

(a) The producer protein price;

(1) The quota premium for nonfat solids;

(b) The producer other solids price;

(c) The producer butterfat price; and

(d) The statistical uniform price for non-quota milk containing 3.5 percent butterfat, shall be the sum of the producer protein price multiplied by 2.9915, the producer other solids price multiplied by 5.6935, and the producer butterfat price multiplied by 3.5.

Subpart C—Payments for Milk

Producer Payments

§ 1051.70 Producer-settlement fund.

See § 1000.70.

§ 1051.71 Payments to the producer-settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 13th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk to the handler for the month as determined pursuant to § 1051.60.

(b) The sum of:

(1) An amount equal to the quota premium value of producer milk of the handler as reported by CDFA;

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the producer protein, producer other solids, and producer butterfat prices respectively; and

(3) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1051.60(i) by the producer price differential as

adjusted pursuant to § 1051.75 for the location of the plant from which received.

§ 1051.72 Payments from the producer-settlement fund.

No later than the 14th day after the end of each month (except as provided in § 1000.90), the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1051.71(b) exceeds the amount computed pursuant to § 1051.71(a); and to each cooperative 9(c) handler the quota premium value of its producer milk as reported by CDFA. If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

§ 1051.73 Payments to producers and to cooperative associations.

(a) Each handler shall pay each producer for producer milk for which payment is not made to a cooperative association pursuant to paragraph (b) of this section, as follows:

(1) *Partial payment.* For each producer who has not discontinued shipments as of the date of this partial payment, payment shall be made so that it is received by each producer on or before the 30th day of the month (except as provided in § 1000.90) for milk received during the first 15 days of the month from the producer at not less than the lowest announced class price for the preceding month, less proper deductions authorized in writing by the producer.

(2) *Final payment.* For milk received during the month, payment shall be made so that it is received by each producer no later than the 15th day after the end of the month (except as provided in § 1000.90) in an amount equal to not less than the sum of:

(i) The pounds of butterfat received times the producer butterfat price for the month;

(ii) The value of quota premium for nonfat solids of producer milk of the producer as reported to the Market Administrator by CDFA [net of any deductions if applicable for degraded volumes of nonfat solids otherwise entitled to a quota premium];

(iii) The pounds of protein received times the producer protein price for the month;

(iv) The pounds of other solids received times the producer other solids price for the month;

(v) Less any payment made pursuant to paragraph (a)(1) of this section;

(vi) Less proper deductions authorized in writing by such producer, and plus or minus adjustments for errors in previous payments to such producer subject to approval by the market administrator; and

(vii) Less deductions for marketing services pursuant to § 1000.86.

(b) Payments for milk received from cooperative association members. On or before the day prior to the dates specified in paragraphs (a)(1) and (a)(2) of this section (except as provided in § 1000.90), each handler shall pay to a cooperative association for milk from producers who market their milk through the cooperative association and who have authorized the cooperative to collect such payments on their behalf an amount equal to the sum of the individual payments otherwise payable for such producer milk pursuant to paragraphs (a)(1) and (a)(2) of this section.

(c) Payment for milk received from cooperative association pool plants or from cooperatives as handlers pursuant to § 1000.9(c). On or before the day prior to the dates specified in paragraphs (a)(1) and (a)(2) of this section (except as provided in § 1000.90), each handler who receives fluid milk products at its plant from a cooperative association in its capacity as the operator of a pool plant or who receives milk from a cooperative association in its capacity as a handler pursuant to § 1000.9(c), including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk, shall pay the cooperative for such milk as follows:

(1) For bulk fluid milk products and bulk fluid cream products received from a cooperative association in its capacity as the operator of a pool plant and for milk received from a cooperative association in its capacity as a handler pursuant to § 1000.9(c) during the first 15 days of the month, at not less than the lowest announced class prices per hundredweight for the preceding month;

(2) For the total quantity of bulk fluid milk products and bulk fluid cream products received from a cooperative association in its capacity as the operator of a pool plant, at not less than the total value of such products received from the association's pool plants, as determined by multiplying the respective quantities assigned to each class under § 1000.44, as follows:

(i) The hundredweight of Class I skim milk times the Class I skim milk price for the month plus the pounds of Class I butterfat times the Class I butterfat price for the month. The Class I price to be used shall be that price effective at the location of the receiving plant;

(ii) The pounds of nonfat solids in Class II skim milk by the Class II nonfat solids price;

(iii) The pounds of butterfat in Class II times the Class II butterfat price;

(iv) The pounds of nonfat solids in Class IV times the nonfat solids price;

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;

(vi) The pounds of protein in Class III milk time the protein price;

(vii) The pounds of other solids in Class III milk times the other solids price; and

(viii) Add together the amounts computed in paragraphs (c)(2)(i) through (vii) of this section and from that sum deduct any payment made pursuant to paragraph (c)(1) of this section;

(3) For the total quantity of milk received during the month from a cooperative association in its capacity as a handler under § 1000.9(c) as follows:

(i) The pounds of butterfat received times the producer butterfat price for the month;

(ii) The pounds of protein received times the producer protein price for the month;

(iii) The pounds of other solids received times the producer other solids price for the month; and

(iv) Add together the amounts computed in paragraphs (c)(3)(i) through (iii) of this section and from that sum deduct any payment made pursuant to paragraph (c)(1) of this section.

(d) If a handler has not received full payment from the market administrator pursuant to § 1051.72 by the payment date specified in paragraph (a), (b) or (c) of this section, the handler may reduce pro rata its payments to producers or to the cooperative association (with respect to receipts described in paragraph (b) of this section, prorating the underpayment to the volume of milk received from the cooperative association in proportion to the total milk received from producers by the handler), but not by more than the amount of the underpayment. The payments shall be completed on the next scheduled payment date after receipt of the balance due from the market administrator.

(e) If a handler claims that a required payment to a producer cannot be made because the producer is deceased or cannot be located, or because the cooperative association or its lawful successor or assignee is no longer in existence, the payment shall be made to

the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the market administrator shall make the required payment from the producer- settlement fund to the handler or to the lawful claimant, as the case may be.

(f) In making payments to producers pursuant to this section, each handler shall furnish each producer, except a producer whose milk was received from a cooperative association handler described in § 1000.9(a) or (c), a supporting statement in a form that may be retained by the recipient which shall show:

(1) The name, address, Grade A identifier assigned by a duly constituted regulatory agency, and payroll number of the producer;

(2) The daily and total pounds, and the month and dates such milk was received from that producer;

(3) The total pounds of butterfat, protein, and other solids contained in the producer's milk;

(4) The pounds of quota nonfat solids in the producer's milk;

(5) The minimum rate or rates at which payment to the producer is required pursuant to the order in this part;

(6) The rate used in making payment if the rate is other than the applicable minimum rate;

(7) The amount, or rate per hundredweight, or rate per pound of component, and the nature of each deduction claimed by the handler; and

(8) The net amount of payment to the producer or cooperative association.

§ 1051.74 [Reserved]

§ 1051.75 Plant location adjustments for nonpool milk.

For purposes of making payments for nonpool milk, a plant location adjustment shall be determined by subtracting the Class I price specified in § 1051.51 from the Class I price at the plant's location. The difference, plus or minus as the case may be, shall be used to adjust the payments required pursuant to § 1000.76.

§ 1051.76 Payments by a handler operating a partially regulated distributing plant.

See § 1000.76.

§ 1051.77 Adjustment of accounts.

See § 1000.77.

§ 1051.78 Charges on overdue accounts.

See § 1000.78.

Administrative Assessment and Marketing Service Deduction

§ 1051.85 Assessment for order administration.

On or before the payment receipt date specified under § 1051.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than 8 cents per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c);

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) and other source milk allocated to Class I pursuant to § 1000.44(a)(3) and (8) and the corresponding steps of § 1000.44(b), except other source milk that is excluded from the computations pursuant to § 1051.60(h) and (i); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a)(1)(i) and (ii).

§ 1051.86 Deduction for marketing services.

See § 1000.86.

Subpart D—Miscellaneous Provisions

§ 1051.90 Dates

See § 1000.90.

Proposal Number 2

Submitted by the Dairy Institute of California.

■ 4. This proposal seeks to add a new part 1051 to read as follows:

PART 1051—MILK IN THE CALIFORNIA MARKETING AREA

Subpart A—Order Regulating Handling

Sec.

General Provisions

1051.1 General Provisions.

Definitions

1051.2 California marketing area.
1051.3 Route disposition.
1051.4 Plant.
1051.5 Distributing plant.
1051.6 Supply plant.
1051.7 Pool plant.
1051.8 Nonpool plant.
1051.9 Handler.
1051.10 Producer-handler.
1051.11 California quota program and producer quota.
1051.12 Producer.
1051.13 Producer milk.
1051.14 Other source milk.
1051.15 Fluid milk product.
1051.16 Fluid cream product.
1051.17 [Reserved]
1051.18 Cooperative association.
1051.19 Commercial food processing establishment.

Market Administrator, Continuing Obligations, and Handler Responsibilities

1051.25 Market administrator.
1051.26 Continuity and separability of provisions.
1051.27 Handler responsibility for records and facilities.
1051.28 Termination of obligations.

Handler Reports

1051.30 Reports of receipts and utilization.
1051.31 Producer and payroll reports.
1051.32 Other reports.

Subpart B—Milk Pricing

Classification of Milk

1051.40 Classes of utilization.
1051.41 [Reserved]
1051.42 Classification of transfers and diversions.
1051.43 General classification rules.
1051.44 Classification of producer milk.
1051.45 Market administrator's reports and announcements concerning classification.

Class Prices

1051.50 Class prices, component prices, and advanced pricing factors.
1051.51 Class I differential and price.
1051.52 Adjusted Class I differentials.
1051.53 Announcement of class prices, component prices, and advanced pricing factors.
1051.54 Equivalent price.
1051.55 Transportation credits and transportation allowances.

Producer Price Differential

1051.60 Handler's value of milk.
1051.61 Computation of producer price differential.
1051.62 Announcement of producer prices.
1051.68 Payments to producers under the California Quota Program.

Subpart C—Payments for Milk

Producer Payments

1051.70 Producer-settlement fund.
1051.71 Payments to the producer-settlement fund.
1051.72 Payments from the producer-settlement fund.
1051.73 Partial payments to producers and to cooperative associations.
1051.74 [Reserved]
1051.75 Plant location adjustments for producer milk and nonpool milk.
1051.76 Payments by a handler operating a partially regulated distributing plant.
1051.77 Adjustment of accounts.
1051.78 Charges on overdue accounts.

Administrative Assessment and Marketing Service Deduction

1051.85 Assessment for order administration.
1051.86 Deduction for marketing services.

Subpart D—Miscellaneous Provisions

1051.90 Dates.

Authority: 7 U.S.C. 601—608

Subpart A—Order Regulating Handling

General Provisions

§ 1051.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1051 unless otherwise specified. In this part 1051, all references to sections in part 1000 refer to part 1000 of this chapter.

Definitions

§ 1051.2 California marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions: All of the State of California.

§ 1051.3 Route Distribution

See § 1000.3.

§ 1051.4 Plant

See § 1000.4.

§ 1051.5 Distributing plant.

See § 1000.5.

§ 1051.6 Supply plant.

See § 1000.6.

§ 1051.7 Pool plant.

Pool plant means a plant, unit of plants, or system of plants as specified in paragraphs (a) through (f) of this section, but excluding a plant specified in paragraph (h) of this section. The pooing standards described in paragraphs (c) and (f) of this section are subject to modification pursuant to paragraph (g) of this section:

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or § __ _.7(b) of any other Federal milk order, from which during the month 15 percent or more of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent of such route disposition and transfers must be to outlets in the marketing area.

(b) Any distributing plant located in the marketing area which during the month processed at least 15 percent of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) into ultra-pasteurized or aseptically-processed fluid milk products.

(c) A supply plant from which the quantity of bulk fluid milk products shipped to (and physically unloaded into) plants described in paragraph (c)(1) of this section is not less than 10 percent of the Grade A milk received from dairy farmers (except dairy farmers described in § 1051.12(b)) and handlers described in § 1051.9(c) or (d), including milk diverted pursuant to § 1051.13, subject to the following conditions:

(1) Qualifying shipments may be made to plants described in paragraphs (c)(1)(i) through (iv) of this section, except that whenever shipping requirements are increased pursuant to paragraph (f) of this section, only shipments to pool plants described in paragraphs (a), (b), and (d) of this section shall count as qualifying shipments for the purpose of meeting the increased shipments:

(i) Pool plants described in § 1051.7(a), (b), and (d);

(ii) Plants of producer-handlers;

(iii) Partially regulated distributing plants, except that credit for such shipments shall be limited to the amount of such milk classified as Class I at the transferee plant; and

(iv) Distributing plants fully regulated under other Federal orders, except that credit for shipments to such plants shall be limited to the quantity shipped to (and physically unloaded into) pool distributing plants during the month and credits for shipments to other order plants shall not include any such shipments made on the basis of agreed-upon Class II, Class III, or Class IV utilization.

(2) The percentage of Grade A milk received from dairy farmers by a supply plant described in paragraph (c) of this section that must be shipped to (and physically unloaded into) plants described in paragraph (c)(1)(i) through (iv) of this section shall be adjusted upward or downward based on the average Class I utilization percentage of all producer milk under the order for the three prior months for which such information is available, as described in paragraphs (c)(2)((i) through (viii) of this section. The market administrator shall announce any adjustment to the supply plant shipping percentages pursuant to this paragraph at least 15 days prior to the month that such adjustments shall be effective as follows:

(i) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 15 percent and 19.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 15 percent.

(ii) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 20 percent and 24.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 20 percent.

(iii) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 25 percent and 29.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 25 percent.

(iv) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 30 percent and 34.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 30 percent.

(v) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 35 percent and 39.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 35 percent.

(vi) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 40 percent and 44.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 40 percent.

(vii) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is between 45 percent and 49.9 percent, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 45 percent.

(viii) If the average Class I utilization percentage as described in paragraph (c)(2) of this section is 50 percent or greater, the required shipping percentage for a supply plant described in paragraph (c) of this section shall be 50 percent.

(3) A supply plant under this paragraph and handlers described in §§ 1051.9 (c) or 1051.9 (d) that receives quota milk from producers must make qualifying shipments of no less than 60 percent of such milk, or an equivalent

volume (including milk diverted pursuant to § 1051.13), to plants described in § 1051.7(a), (b), or (d).

(4) During the months of July through February, the operator of a supply plant under this paragraph shall make qualifying shipments of up to 85 percent of the quota milk, or an equivalent volume of non-quota milk it physically receives from producers in its own plants (including milk diverted pursuant to § 1051.13) to pool distributing plants for Class I uses if requested by the operator of such pool distributing plant or as directed by the market administrator, subject to the following conditions:

(i) The operator of such a supply plant is not obligated to ship milk in excess of Class I usage to the pool distributing plant.

(ii) The maximum percentage of quota milk that must be shipped to (and physically unloaded into) pool distributing plants and the month during which such milk must be shipped may be adjusted by the market administrator subject to market conditions.

(5) Concentrated milk transferred from the supply plant to a distributing plant for an agreed-upon use other than Class I shall be excluded from the supply plant's shipments in computing the supply plant's shipping percentage.

(d) Two or more plants operated by the same handler and located in the marketing area may qualify for pool status as a unit by meeting the total and in-area route disposition requirements of a pool distributing plant specified in paragraph (a) of the is section and subject to the following additional requirements:

(1) At least one of the plants in the unit must qualify as a pool plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process Class I or Class II products, using 50 percent or more of the total Grade A fluid milk products received in bulk from at such plant or diverted therefrom by the plant operator in Class I or Class II products; and

(3) The operator of the unit has filed a written request with the market administrator prior to the first day of the month for which such status is desired to be effective. The unit shall continue from month-to-month thereafter without further notification. The handler shall notify the market administrator in writing prior to the first day of any month for which termination or any change of the unit is desired.

(e) A system of 2 or more supply plants operated by one or more handlers may qualify for pooling by meeting the shipping requirements of paragraph (c) of this section in the same manner as a single plant subject to the following additional requirements:

(1) Each plant in the system is located within the marketing area. Cooperative associations or other handlers may not use shipments pursuant to § 1051.9(c) or § 1051.9(d) to qualify supply plants located outside the marketing area;

(2) The handler(s) establishing the system submits a written request to the market administrator on or before July 15 requesting that such plants qualify as a system for the period of August through July of the following year. Such request will contain a list of the plants participating in the system in the order, beginning with the last plant, in which the plants will be dropped from the system if the stem fails to qualify. Each plant that qualifies as a pool plant within a system shall continue each month as a plant in the system through the following July unless the handler(s) establishing the system submits a written request to the market administrator that the plant be deleted from the system or that the system be discontinued. Any plant that has been so deleted from a system, or that has failed to qualify in any month, will not be part of any system for the remaining months through July. The handler(s) that established a system may add a plant operated by such handler(s) to a system if such plant has been a pool plant each of the 6 prior months and would otherwise be eligible to be in a system, upon written request to the market administrator no later than the 15th day of the prior month. In the event of an ownership change or the business failure of a hander that is a participant in a system, the system may be reorganized to reflect such changes if a written request to file a new marketing agreement is submitted to the market administrator; and

(3) If a system fails to qualify under the requirements of this paragraph, the handler responsible for qualifying the system shall notify the market administrator which plant or plants will be deleted from the system so that the remaining plants may be pooled as a system. If the handler fails to do so, the market administrator shall exclude one or more plants, beginning at the bottom of the list of plants in the system and continuing up the list as necessary until the deliveries are sufficient to qualify the remaining plants in the system.

(f) The applicable shipping percentages of paragraphs (c) and (e) of this section and § 1051.13.(d)(2) and (d)(3) may be increased or decreased, for all of part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for adjustment either on the market administrator's own initiative or at the request of interested parties if the request is made in writing at least 15 days prior to the month for which the requested revision is desired effective. If the investigation shows that an adjustment of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that an adjustment is being considered and invited data, views, and arguments. Any decision to revise an applicable shipping or diversion percentage must be issued in writing at least one day before the effective date.

(g) The term pool plant shall not apply to the following plants:

(1) A producer-handler as defined under any Federal order;

(2) An exempt plant as defined in § 1000.8(e);

(3) A plant located within the marketing area and qualified pursuant to paragraph (a) of this section which meets the pooling requirements of another Federal order, and from which more than 50 percent of its route disposition has been in the other Federal order marketing area for 3 consecutive months;

(4) A plant located outside any Federal order marketing area and qualified pursuant to paragraph (a) of this section that meets the pooling requirements of another Federal order and has had greater route disposition in such other Federal order's marketing area for 3 consecutive months;

(5) A plant located in another Federal order marketing area and qualified pursuant to paragraph (a) of this section that meets the pooling requirements of such other Federal order and does not have a majority of its route distribution in this marketing area for 3 consecutive months, or if the plant is required to be regulated under such other Federal order without regard to its route disposition in any other Federal order marketing area;

(6) A plant qualified pursuant to paragraph (c) of this section which also meets the pooling requirements of another Federal order and from which greater qualifying shipments are made to plants regulated under the other Federal order than are made to plants regulated under the order in this part, or the plant has automatic pooling status under the other Federal order;

(7) That portion of a regulated plant designated as a nonpool plant that is physically separate and operated

separately from the pool portion of a regulated plant as a nonpool plant must be requested in advance and in writing by the handler and must be approved by the market administrator.

(h) Any plant that qualifies as a pool plant in each of the immediately preceding 3 months pursuant to paragraph (a) of this section or the shipping percentages in paragraph (c) of this section that is unable to meet such performance standards for the current month because of unavoidable circumstances determined by the market administrator to be beyond the control of the handler operating the plant, such as a natural disaster (ice storm, wind storm, flood, fire, breakdown of equipment, or work stoppage, shall be considered to have met the minimum performance standards during the period of such unavoidable circumstances, but such relief shall not be granted for more than 2 consecutive months.

§ 1051.8 Nonpool plant.

See § 1000.8.

§ 1051.9 Handler.

Handler means:

(a) Any person who operates a pool plant or a nonpool plant.

(b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products or fluid cream products from or to any pool or nonpool plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant. Persons who qualify as handlers only under this paragraph are not subject to the payment provisions of §§ 1051.70, 1051.71, 1051.72, 1051.73, 1051.76, and 1051.85.

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to § 1051.13. The operator of a pool plant receiving milk from a cooperative association may be the handler for such milk if both parties notify the market administrator of this agreement prior to the time that the milk is delivered to the pool plant and the plant operator purchases the milk on the basis of farm bulk tank weights and samples.

(d) Any person, except a cooperative association, who operates a pool plant or nonpool plant with respect to milk that it receives for its account from the farm of a producer in a tank truck owned and operated by, or under the control of, such person and which is delivered during the month for the account of such person to the pool plant of another handler or diverted pursuant to § 1051.13, subject to the following conditions:

(1) Such person (who, if qualified pursuant to this paragraph, shall be known as a ''proprietary bulk tank handler'') must operate a plant located in the marketing area at which milk is processed only into Class II, Class III, or Class IV products;

(2) Prior to operating as a handler pursuant to this paragraph, such person must submit to the market administrator a statement signed by the applicant and the operator of the pool plant to which the milk will be delivered specifying that the applicant will be the responsible handler for the milk.

§ 1051.10 Producer-handler.

Producer handler means a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, from which total route disposition and packaged sales of fluid milk products to other plants during the month does not exceed 3 million pounds, and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) Requirements for designation. Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month:

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership, and management of the producer-handler and are operated as the producer-handler's own enterprise and at its sole risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producer-handler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership, and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production);

(ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or

(iii) Nonfat milk solids which are used to fortify fluid milk products.

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or

(ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(b) *Designation of resources and facilities.* Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled pursuant to paragraph (c) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraph (a)(1) through (5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2), or (3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) *Public announcement.* The market administrator shall publicly announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers;

(2) The names of those persons whose designations have been cancelled; and

(3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

(f) Any producer-handler with Class I route dispositions and/or transfers of packaged fluid milk products in the marketing area described in § 1131.2 of this chapter shall be subject to payments into the Order 1131 producer settlement fund on such dispositions pursuant to § 1051.76(a) and payments into the Order 1131 administrative fund, provided such dispositions are less than three million pounds in the current month and such producer-handler had total Class I route dispositions and/or transfers of packaged fluid milk products from own farm production of three million pounds or more the previous month. If the producer-handler has Class I route dispositions and/or transfers of packaged fluid milk products into the marketing area described in § 1131.2 of this chapter of three million pounds or more during the current month, such producer-handler shall be subject to the provisions described in § 1131.7 of this chapter or § 1051.76(a).

(g) No handler operating a pool distributing plant shall be considered a producer-handler, unless it meets all of the conditions specified in § 1051.10(a) through (e), regardless of whether or not the handler owns producer quota pursuant to § 1051.11.

§ 1051.11 California quota program and producer quota.

(a) *California Quota Program* means the applicable provisions of the California Food and Agriculture Code, and related provisions of the pooling plan administered by the California Department of Food and Agriculture (CDFA).

(b) *Producer Quota* is an individual producer's quota holdings of butterfat and nonfat milk solids components as defined by CDFA.

(1) *Quota milk* means the producer's quota holdings of butterfat and the skim equivalent of the producer's holdings of nonfat milk solids components that qualify as producer milk under § 1051.13. The skim equivalent of a producer's nonfat solids components and butterfat that qualify as producer milk under the order, and which are in excess of the producer's quota holdings of these components are designated as overquota butterfat and overquota nonfat milk solids, respectively.

(2) The market administrator shall keep a record of each producer's quota holdings and shall obtain monthly updates from CDFA concerning any changes to each producer's quota holdings.

(3) The market administrator shall report monthly the amount of each California producer's milk fat and nonfat solids components that were qualified as producer milk under the order to CDFA.

(4) Each handler shall report monthly by 9 days after the end of the month the disposition of quota and overquota butterfat and nonfat milk solids components for that month.

§ 1051.12 Producer.

(a) Except as provided in paragraph (b) of this section, *producer* means any person who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk is:

(1) Received at a pool plant directly from the producer or diverted by the plant operator in accordance with § 1051.13; or

(2) Received by a handler described in § 1051.9(c) or (d).

(b) Producer shall not include:

(1) A producer-handler as defined in any Federal order;

(2) A dairy farmer whose milk is received at an exempt plant, excluding producer milk diverted to the exempt plant pursuant to § 1051.13(d);

(3) A dairy farmer whose milk is received by diversion at a pool plant from a handler regulated under another Federal order if the other Federal order designates the dairy farmer as a producer under that order and that milk is allocated by request to a utilization other than Class I; and

(4) A dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order with respect to that portion of the milk so diverted that is assigned to Class I under the provisions of such other order.

§ 1051.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

(a) Received by the operator of a pool plant directly from a producer or a handler described in § 1051.9(c) or (d). All milk received pursuant to this paragraph shall be priced at the location of the plant where it is first physically received;

(b) Received by a handler described in § 1051.9(c) or (d) in excess of the quantity delivered to pool plants;

(c) Diverted by a pool plant operator to another pool plant. Milk so diverted shall be priced at the location of the plant to which diverted; or

(d) Diverted by the operator of a pool plant or a cooperative association described in § 1051.9(c) or (d) to a nonpool plant located in the marketing area, subject to the following conditions:

(1) Milk of a dairy farmer shall not be eligible for diversion unless at least the lessor of one day's production or 48,000 pounds of milk of such dairy farmer is physically received as producer milk at a pool plant during the first month the dairy farmer is a producer. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval or as a result of the handler of the dairy farmer's milk failing to pool the milk under any order), the dairy farmer's milk shall not be eligible for diversion unless at least the lessor of one day's production, or 48,000 pounds of milk of the dairy farmer has been physically received as producer milk at a pool plant during the first month the dairy farmer is re-associated with the market;

(2) The quantity of milk diverted by a handler described in § 1051.9(c) and (d) may not exceed a percentage equal to 100 percent minus the supply plant shipping percentage specified in § 1051.7(c) (or as adjusted pursuant to § 1051.7(c)(2)) of the producer milk receipts reported by the handler pursuant to § 1051.30(c), provided that not less than 10 percent of such receipts are delivered to plants described in § 1051.7(c)(1)(i) through (iii). These percentages are subject to any adjustments that may be made pursuant to § 1051.7(c)(2)(i) through (viii) or any additional adjustments made pursuant to § 1051.7 (f); and

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in § 1051.7(a) or (b) may not exceed a percentage equal to 100 percent minus the supply plant shipping percentage specified in § 1051.7(c) (or as adjusted pursuant to § 1051.7 (c)(2)) of the Grade A milk received from dairy farmers (except dairy farmers described in § 1051.12(b)) including milk diverted pursuant to § 1051.13; and

(4) Diverted milk shall be priced at the location of the plant to which diverted.

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

(f) The quantity of milk reported by a handler pursuant to either § 1051.30(a)(1) or § 1051.30(c)(1) for April through February may not exceed 125 percent, and for March may not exceed 135 percent, of the producer milk receipts pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool. Milk in excess of this limit received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1051.44(a)(3)(v) and § 1051.44(b). The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information, the market administrator will make the determination. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants in excess of the previous month's pooled volume shall not be subject to the 125 or 135 percent limitation;

(2) Producer milk qualified pursuant to §13 of any other Federal Order and continuously pooled in any Federal Order for the previous six months shall not be included in the computation of the 125 or 135 percent limitation;

(3) The market administrator may waive the 125 or 135 percent limitation:

(i) For a new handler on the order, subject to the provisions of § 1051.13(f)(4), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(4) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

§ 1051.14 Other source milk.

Other source milk means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk fluid cream products from any source other than producers, handlers described in § 1051.9(c) and (d), or pool plants;

(b) Products (other than fluid milk products, fluid cream products, and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(c) Receipts of any milk product (other than a fluid milk product or a fluid cream product) for which the handler fails to establish a disposition.

§ 1051.15 Fluid milk products.

See § 1000.15.

§ 1051.16 Fluid cream product.

See § 1000.16.

§ 1051.17 [Reserved]

§ 1051.18 Cooperative association.

See § 1000.18.

§ 1051.19 Commercial food processing establishment.

See § 1000.19.

Market Administrator, Continuing Obligations, and Handler Responsibilities

§ 1051.25 Market administrator.

See § 1000.25.

§ 1051.26 Continuity and separability of provisions.

See § 1000.26.

§ 1051.27 Handler responsibility for records and facilities.

See § 1000.27.

§ 1051.28 Termination of obligations.

See § 1000.28.

Handler Reports

§ 1051.30 Reports of receipts and utilization.

Each handler shall report monthly so that the market administrator's office receives the report on or before the 9th day after the end of the month, in the detail and on the prescribed forms, as follows:

(a) Each handler that operates a pool plant shall report for each of its operations the following information:

(1) Product pounds, pounds of butterfat, pounds of protein, pounds of solids-not-fat other than protein (other solids), and the value of the somatic cell adjustment pursuant to § 1051.50(r), contained in or represented by:

(i) Receipts of producer milk, including producer milk diverted by the reporting handler, from sources other than handlers described in § 1051.9(c) or (d); and

(ii) Receipts of milk from handlers described in § 1051.9(c) or (d);

(2) Product pounds and pounds of butterfat contained in:

(i) Receipts of fluid milk products and bulk fluid cream products from other pool plants;

(ii) Receipts of other source milk; and

(iii) Inventories at the beginning and end of the month of fluid milk products and bulk fluid cream products;

(3) The utilization or disposition of all milk and milk products required to be reported pursuant to this paragraph; and

(4) Such other information with respect to the receipts and utilization of skim milk, butterfat, milk protein, other nonfat solids, and somatic cell information, as the market administrator may prescribe.

(b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. The report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1000.9(c) or (d) shall report:

(1) The product pounds, pounds of butterfat, pounds of protein, pounds of solids-not-fat other than protein (other solids), and the value of the somatic cell adjustment pursuant to § 1051.50(r), contained in receipts of milk from producers; and

(2) The utilization or disposition of such receipts.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to its receipts and utilization of milk and milk products in such manner as the market administrator may prescribe.

§ 1051.31 Producer and payroll reports.

(a) On or before the 6th day after the end of each month, each handler that operates a pool plant pursuant to § 1051.7 and each handler described in § 1051.9 (c) or (d) shall report to the market administrator its producer deliveries for the month, in the detail prescribed by the market administrator, showing for each producer the information described in § 1051.73(e)(1) through (4).

(b) On or before the 20th day after the end of each month, each handler that operates a pool plant pursuant to § 1051.7 and each handler described in § 1051.9 (c) and (d) shall report to the market administrator its producer payroll for the month, in the detail prescribed by the market administrator, showing for each producer the information described in § 1051.73(e).

(c) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1051.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

§ 1051.32 Other reports.

In addition to the reports required pursuant to §§ 1051.30 and 1051.31, each handler shall report any information the market administrator deems necessary to verify or establish each handler's obligation under the order.

Subpart B—Milk Pricing

Classification of Milk

§ 1051.40 Classes of utilization.

Except as provided in § 1051.42, all skim milk and butterfat required to be reported pursuant to § 1051.30 shall be classified as follows:

(a) *Class I milk* shall be all skim milk and butterfat:

(1) Disposed of in the form of fluid milk products, except as otherwise provided in this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) In shrinkage assigned pursuant to § 1051.43(b).

(b) *Class II milk* shall be all skim milk and butterfat:

(1) In fluid milk products in containers larger than 1 gallon and fluid cream products disposed of or diverted to a commercial food processing establishment if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(2) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in half-gallon containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream, sour half-and-half, sour cream mixtures containing non-milk items; yogurt, including yogurt containing beverages with 20 percent or more yogurt by weight and kefir, and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, coatings, batter, and similar products;

(v) Buttermilk biscuit mixes and other buttermilk for baking that contain food starch in excess of 2 percent of the total solids, provided that the product is labeled to indicate the food starch content;

(vi) Products especially prepared for infant feeding or dietary use (meal replacements) that are packaged in hermetically sealed containers and products that meet the compositional standards of § 1000.15(a) but contain no fluid milk products included in § 1000.15(a).

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products;

(viii) A fluid cream product or any product containing artificial fat or fat substitutes that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section; and

(ix) Any product not otherwise specified in this section; and

(3) In shrinkage assigned pursuant to § 1051.43(b).

(c) *Class III milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheese of types that may be shredded, grated, or crumbled;

(ii) Plastic cream, anhydrous milkfat, and butteroil; and

(2) In shrinkage assigned pursuant to § 1051.43(b).

(d) *Class IV milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Butter; and

(ii) Evaporated or sweetened condensed milk in a consumer-type package; and

(iii) Any milk product in dried form;

(2) In inventory at the end of the month of fluid milk products and fluid cream products in bulk form;

(3) In the skim milk equivalent of nonfat milk solids used to modify a fluid milk product that has not been accounted for in Class I and in the skim milk equivalent of nonfat milk solids used to modify a fluid milk product to meet the State of California's fluid milk standards as described in the California Food and Agricultural Code; and

(4) In shrinkage assigned pursuant to § 1051.43(b).

(e) *Other uses.* Other uses include skim milk and butterfat used in any product described in this section that is dumped, used for animal feed,

destroyed, or lost by a handler in a vehicular accident, flood, fire, or similar occurrence beyond the handler's control. Such uses of skim milk and butterfat shall be assigned to the lowest priced class for the month to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator.

§ 1051.41 [Reserved]

§ 1051.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or transferred in the form of a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the handlers both request the same classification in another class. In either case, the classification shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the receiving plant after the computations pursuant to § 1051.44(a)(9) and the corresponding step of § 1051.44(b);

(2) If the transferring plant received during the month other source milk to be allocated pursuant to § 1051.44(a)(3) or the corresponding step of § 1051.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferring handler received during the month other source milk to be allocated pursuant to § 1051.44(a)(8) or (9) or the corresponding steps of § 1051.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the receiving plant.

(b) *Transfers and diversions to a plant regulated under another Federal order.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or transferred in the form of a bulk fluid cream product from a pool plant to a plant regulated under another Federal order shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from a plant regulated under another Federal order of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1) or (2) of this section:

(1) As Class I milk, if transferred as packaged fluid milk products;

(2) If transferred or diverted in bulk form, classification shall be in the classes to which allocated under the other order:

(i) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers in bulk form shall be classified as other than Class I to the extent that such utilization is available for such classification pursuant to the allocation provisions of the other order;

(ii) If diverted, the diverting handler must request a classification other than Class I. If the plant receiving the diverted milk does not have sufficient utilization available for the requested classification and some of the diverted milk is consequently assigned to Class I use, the diverting handler shall be given the option of designating the entire load of diverted milk as producer milk at the plant physically receiving the milk. Alternatively, if the diverting handler so chooses, it may designate which dairy farmers whose milk was diverted during the month will be designated as producers under the order physically receiving the milk. If the diverting handler declines to accept either of these options, the market administrator will prorate the portion of diverted milk in excess of Class II, III, and IV use among all the dairy farmers whose milk was received from the diverting handler on the last day of the month, then the second-to-last day, and continuing in that fashion until the excess diverted milk has been assigned as producer milk under the receiving order; and

(iii) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be Class I, subject to adjustment when such information is available.

(c) *Transfers and diversions to producer-handlers and to exempt plants.* Skim milk or butterfat that is transferred or diverted from a pool plant to a producer-handler under any Federal order or to an exempt plant shall be classified:

(1) As Class I milk if transferred or diverted to a producer-handler;

(2) As Class I milk if transferred to an exempt plant in the form of a packaged fluid milk product; and

(3) In accordance with the utilization assigned to it by the market administrator if transferred or diverted in the form of a bulk fluid milk product or transferred in the form of a bulk fluid cream product to an exempt plant. For this purpose, the receiving handler's utilization of skim milk and butterfat in each class, in series beginning with Class IV, shall be assigned to the extent possible to its receipts of skim milk and butterfat, in bulk fluid cream products, and bulk fluid milk products, respectively, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not a plant regulated under another order, an exempt plant, or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or transferred in the form of a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization, excluding the milk equivalent of both nonfat milk solids and concentrated milk used in the plant during the month, to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferring handler or diverting handler claims such classification in such handler's report of receipts and utilization filed pursuant to § 1051.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant

from plants regulated under other Federal orders;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from plants regulated under other Federal orders;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and plants regulated under other Federal orders;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant regulated under any Federal order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the receiving plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from plants regulated under other Federal orders;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and plants regulated under other Federal orders shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization and then to all other utilization, in sequence beginning with Class IV at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and plants regulated under other Federal orders shall be assigned, pro rata among such plants, to the extent possible to any remaining utilization, in sequence beginning with Class IV at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in this paragraph.

§ 1051.43 General classification rules.

In determining the classification of producer milk pursuant to § 1051.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1051.30 and shall compute separately for each pool plant, for each handler described in § 1051.9(c) or (d), the pounds of skim milk and butter fat, respectively, in each class in accordance with §§ 1051.40 and 1051.42 and paragraph (b) of this section.

(b) *Shrinkage and Overage.* For purposes of classifying all milk reported by a handler pursuant to § 1051.30, the market administrator shall determine the shrinkage or overage of skim milk and butterfat for each pool plant and each handler described in § 1051.9(c) or (d) by subtracting total utilization from total receipts. Any positive difference shall be shrinkage, and any negative difference shall be overage.

(1) Shrinkage incurred by pool plants qualified pursuant to § 1051.7 shall be assigned to the lowest-priced class to the extent that such shrinkage does not exceed:

(i) Two percent, except for a pool plant qualified pursuant to § 1051.7(b)—two percent plus any additional percentage calculated pursuant to § 1051.43(b)(1)(v), of the total quantity of milk physically received at the plant directly from producers' farms on the basis of farm weights and tests;

(ii) Plus 1.5 percent, except for a pool plant qualified pursuant to § 1051.7(b)—1.5 percent plus any additional percentage calculated pursuant to § 1051.43(b)(1)(v), of the quantity of bulk milk physically received on a basis other than farm weights and tests, excluding concentrated milk received by agreement for other than Class I use;

(iii) Plus 0.5 percent, except for a pool plant qualified pursuant to § 1051.7(b)—0.5 percent plus any additional percentage calculated pursuant to § 1051.43(b)(1)(v), of the quantity of milk diverted by the plant operator to another plant on a basis other than farm weights and tests; and

(iv) Minus 1.5 percent of the quantity of bulk milk transferred to other plants, excluding concentrated milk transferred by agreement for other than Class I use.

(v) The additional percentage to be added pursuant to subparagraphs (i), (ii), and (iii) for a pool plant qualified pursuant to § 1051.7(b) is the percentage of ultra-pasteurized or aseptically processed fluid milk and cream products of the total fluid milk and cream products produced by the plant during the month times 0.03, rounded to the nearest tenth of a percent.

(2) A handler described in § 1051.9(c) or (d) that delivers milk to plants on a basis other than farm weights and tests shall receive a lowest-priced-class shrinkage allowance of 0.5 percent of the total quantity of such milk picked up at producers' farms.

(3) Shrinkage in excess of the amounts provided in paragraphs (b)(1) and (2) of this section shall be assigned to existing utilization in series starting with Class I. The shrinkage assigned pursuant to this paragraph shall be added to the handler's reported utilization and the result shall be known as the gross utilization in each class.

(c) If any of the water but none of the nonfat solids contained in the milk from which a product is made is removed before the product is utilized or disposed of by the handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids. If any of the nonfat solids contained in the milk from which a product is made are removed before the product is utilized or disposed of by the handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water and nonfat solids originally associated with such solids, determined on a protein equivalent basis.

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under§ 1051.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1051.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

§ 1051.44 Classification of producer milk.

For each month the market administrator shall determine for each handler described in § 1051.9(a) for each pool plant of the handler separately and for each handler described in § 1051.9(c) and (d) of this section the classification of producer milk by allocating the handler's receipts of skim milk and butterfat to the handler's gross utilization of such receipts pursuant to § 1051.43(b)(3) as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal order in the immediately preceding month;

(iii) Fluid milk products received in packaged form from plants regulated under other Federal orders; and

(iv) To the extent that the receipts described in paragraphs (a)(1)(i) through (iii) of this section exceed the gross Class I utilization of skim milk, the excess receipts shall be subtracted pursuant to paragraph (a)(3)(vi) of this section.

(2) Subtract from the pounds of skim milk in Class II the pounds of skim milk in the receipts of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product in Class II (excluding the quantity of such skim milk that was classified as Class IV milk pursuant to § 1051.40(d)(3)). To the extent that the receipts described in this paragraph exceed the gross Class II utilization of skim milk, the excess receipts shall be subtracted pursuant to paragraph (a)(3)(vi) of this section.

(3) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class IV, the pounds of skim milk in:

(i) Receipts of bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product);

(ii) Receipts of fluid milk products and bulk fluid cream products for which appropriate health approval is not established and from unidentified sources;

(iii) Receipts of fluid milk products and bulk fluid cream products from an exempt plant;

(iv) Fluid milk products and bulk fluid cream products received from a producer-handler as defined under the order in this part, or any other Federal order;

(v) Receipts of fluid milk products from dairy farmers for other markets; and

(vi) The excess receipts specified in paragraphs (a)(1)(iv) and (a)(2) of this section.

(4) Subtract from the pounds of skim milk remaining in all classes other than Class I, in sequence beginning with Class IV, the receipts of fluid milk products from an unregulated supply plant that were not previously subtracted in this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in these other classes combined.

(5) Subtract from the pounds of skim milk remaining in all classes other than Class I, in sequence beginning with Class IV, receipts of fluid milk products from an unregulated supply plant that were not previously subtracted in this section, and which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(5)(i) and (ii) of this section;

(i) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step; and

(ii) Subtract from the result in paragraph (a)(5)(i) the pounds of skim milk in receipts of producer milk and fluid milk products from other pool plants.

(6) Subtract from the pounds of skim milk remaining in all classes other than Class I, in sequence beginning with Class IV, the pounds of skim milk in receipts of bulk fluid milk products from a handler regulated under another Federal order that are in excess of bulk fluid milk products transferred or diverted to such handler, if other than Class I classification is requested, but not in excess of the pounds of skim milk remaining in these classes combined.

(7) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class IV, the pounds of skim milk in fluid milk products and bulk fluid cream products in inventory at the beginning of the month that were not previously subtracted in this section.

(8) Subtract from the pounds of skim milk remaining in each class at the plant receipts of skim milk in fluid milk products from an unregulated supply plant that were not previously subtracted in this section and that were not offset by transfers or diversions of fluid milk products to the unregulated supply plant from which fluid milk products to be allocated at this step were received. Such subtraction shall be pro rata to the pounds of skim milk in Class I and in Classes II, III, and IV combined, with the quantity prorated to Classes II, III, and IV combined being subtracted in sequence beginning with Class IV.

(9) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from a handler regulated under another Federal order that are in excess of bulk fluid milk products transferred or diverted to such handler that were not subtracted in paragraph (a)(6) of this section. Such subtraction shall be pro rata to the pounds of skim milk in Class I and in Classes II, III, and IV combined, with the quantity prorated to Classes II, III, and IV combined being subtracted in sequence beginning with Class IV, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(i) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1051.45(a); or

(ii) The total pounds of skim milk remaining in each class at this allocation step.

(10) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1051.42(a).

(11) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class IV.

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section.

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraphs (a) and (b) of this section.

§ 1051.45 Market administrator's reports and announcements concerning classification.

(a) Whenever required for the purpose of allocating receipts from plants regulated under other Federal orders pursuant to § 1051.44(a)(9) and the corresponding step of § 1051.44(b), the market administrator shall estimate and publicly announce the utilization (to the nearest whole percentage) in Class I during the month of skim milk and butterfat, respectively, in producer milk of all handlers. The estimate shall be based upon the most current available data and shall be final for such purpose.

(b) The market administrator shall report to the market administrators of other Federal orders as soon as possible after the handlers' reports of receipts and utilization are received, the class to which receipts from plants regulated under other Federal orders are allocated pursuant to §§ 1051.43(d) and 1051.44 (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter any change in allocation required to correct errors disclosed on the verification of such report.

(c) The market administrator shall furnish each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to a plant fully regulated under another Federal order the class to which the shipments were allocated by the market administrator of the other Federal order on the basis of the report by the receiving handler and, as necessary, any changes in the allocation arising from the verification of such report.

(d) The market administrator shall report to each cooperative association which so requests, the percentage of producer milk delivered by members of the association that was used in each class by each handler receiving the milk. For the purpose of this report, the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by the handler.

Class Prices

§ 1051.50 Class prices, component prices, and advanced pricing factors.

Class prices per hundredweight of milk containing 3.5 percent butterfat, component prices, and advanced pricing factors shall be as follows. The prices and pricing factors described in paragraphs (a), (b), (e), (g), (h), and (s) of this section shall be based on a weighted average of the most recent 2 weekly prices announced by the United States Department of Agriculture's Agricultural Marketing Service (AMS) in the National Dairy Product Sales Report (NDPSR) before the 24th day of the month. These prices shall be announced on or before the 23rd day of the month and shall apply to milk received during the following month. The prices described in paragraphs (i) through (r) of this section shall be based on a weighted average for the preceding month of Western Dairy Product weekly prices described in paragraphs (n) through (q) of this section as determined and announced by AMS in the NDPSR on or before the 5th day of the month and shall apply to milk received during the preceding month. The price described in paragraph (f) of this section shall be derived from the Class II skim milk price announced on or before the 23rd day of the month preceding the month to which it applies and the butterfat price announced on or before the 5th day of the month following the month to which it applies.

(a) *Class I price.* The Class I price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class I skim milk price plus 3.5 times the Class I butterfat price.

(b) *Class I skim milk price.* The Class I skim milk price per hundredweight shall be the adjusted Class I differential specified in § 1051.52, plus the adjustments to Class I prices specified in §§ 1005.51(b), 1006.51(b) and 1007.51(b) plus the higher of the advanced pricing factors computed in paragraph (s)(1) or (2) of this section.

(c) *Class I nonfat solids price.* The Class I nonfat solids price per pound shall be the Class I skim milk price per hundredweight multiplied by 0.76, with the resulting number divided by 9.

(d) *Class I fluid carrier price.* The Class I fluid carrier is that portion of Class I skim milk that is not nonfat milk solids. The Class I fluid carrier price per pound shall be the Class I skim milk price per hundredweight multiplied by 0.24, with the resulting number divided by 91.

(e) *Class I butterfat price.* The Class I butterfat price per pound shall be the adjusted Class I differential specified in § 1051.52 divided by 100, plus the adjustments to Class I prices specified in §§ 1005.51(b), 1006.51(b) and 1007.51(b) divided by 100 plus the advanced butterfat price computed in paragraph (s)(3) of this section.

(f) *The Class II price* per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class II skim milk price plus 3.5 times the Class II butterfat price.

(g) *Class II skim milk price.* The Class II skim milk price per hundredweight shall be the advanced Class IV skim milk price computed in paragraph (s)(2) of this section plus 70 cents.

(h) *Class II nonfat solids price.* The Class II nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the Class II skim milk price divided by 9.

(i) *Class II butterfat price.* The Class II butterfat price per pound shall be the butterfat price plus $0.007.

(j) *Class III price.* The Class III price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class III skim milk price plus 3.5 times the butterfat price.

(k) *Class III skim milk price.* The Class III skim milk price per hundredweight, rounded to the nearest cent, shall be the protein price per pound times 3.1 plus the other solids price per pound times 5.9.

(l) *Class IV price.* The Class IV price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class IV skim milk price plus 3.5 times the butterfat price.

(m) *Class IV skim milk price.* The Class IV skim milk price per hundredweight, rounded to the nearest cent, shall be the nonfat solids price per pound times 9.

(n) *Butterfat price.* The butterfat price per pound, rounded to the nearest one-hundredth cent, shall be the Western Dairy Product Price for butter survey price reported by the Department for the month, less the Western Butter Manufacturing Cost, with the result multiplied by 1.211.

(1) The Western Dairy Product Price for butter shall be computed at the weighted average of the Grade AA butter prices reported to AMS under the mandatory price reporting program by plants manufacturing butter that are located in the states of Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington. The weekly price described in this paragraph shall be reported in the National Dairy Product Sales Report (NDPSR). In the event that a Western Dairy Product Price for butter cannot be reported, then the price used in the calculations set forth in § 1051.50(n) shall be the national weighted average of the preceding month's weekly prices for Grade AA butter as determined and announced by AMS in the NDPSR on or before the 5th day of the month and shall apply to all milk received during the preceding month, less 2.08 cents per pound.

(2) The Western Butter Manufacturing Cost shall be the cost obtained from a survey of butter manufacturing plants in the western region described in § 1051.50(n)(1), which shall be conducted by AMS consistent with the methodology used by the California Department of Food and Agriculture in developing its manufacturing cost for

California butter plants, with the cost for California butter plants, with the further addition of butter marketing costs. In the event that a Western Butter Manufacturing Cost is not available, the butter manufacturing cost used in the calculation set forth in § 1051.50(n) shall be 17.24 cents.

(o) *Nonfat solids price.* The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the Western Dairy Product Price nonfat dry milk survey price reported by AMS under the mandatory reporting program, less the Western Nonfat Dry Milk Manufacturing Cost and multiplying the result by 0.99.

(1) The Western Dairy Product Price for nonfat dry milk shall be computed at the weighted average of the Grade A and Extra Grade nonfat dry milk prices reported to AMS under the mandatory price reporting program by plants manufacturing nonfat dry milk that are located in the states of Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington. The weekly price described in this paragraph shall be reported in the National Dairy Product Sales Report (NDPSR). In the event that a Western Dairy Product Price for nonfat dry milk cannot be reported, then the price used in the calculations set forth in § 1051.50(o) shall be the national weighted average of the preceding month's weekly prices for Grade A and Extra Grade nonfat dry milk as determined and announced by AMS in the NDPSR on or before the 5th day of the month and shall apply to all milk received during the preceding month, less 2.57 cents per pound.

(2) The Western Nonfat Dry Milk Manufacturing Cost shall be the cost obtained from a survey of nonfat dry milk manufacturing plants in the western region described in § 1051.50(o)(1), which shall be conducted by the Department consistent with the methodology used by the California Department of Food and Agriculture in developing its manufacturing cost for California nonfat dry milk plants, with the further addition of nonfat dry milk marketing costs. In the event that a Western Nonfat Dry Milk Manufacturing Cost is not available, the nonfat dry milk manufacturing cost used in the calculation set forth in § 1051.50(o) shall be 19.97 cents.

(p) *Protein price.* The protein price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:

(1) Compute the Western Dairy Product Price for Cheddar Cheese as the weighted average of the weekly 40-pound block cheddar cheese prices reported to AMS under the mandatory price reporting program by plants manufacturing cheddar cheese that are located in the states of Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington. The weekly price described in this paragraph shall be reported in the National Dairy Product Sales Report (NDPSR). In the event that a Western Dairy Product Price for 40-pound cheddar cheese blocks cannot be reported, then the price used in the calculations set forth in § 1051.50(p)(2) shall be the national weighted average of the preceding month's weekly prices for 40-pound cheddar cheese blocks as determined and announced by AMS in the NDPSR on or before the 5th day of the month and shall apply to all milk received during the preceding month, less 3.40 cents per pound.

(2) Subtract the Western States Cheese Manufacturing Cost from the price computed pursuant to paragraph (p)(1) of this section and multiply the result by 1.383;

(3) The Western Cheddar Cheese Manufacturing Cost shall be the per pound cost obtained from a survey of cheddar cheese manufacturing plants in the western region described in § 1051.50(p)(1), which shall be conducted by the Department consistent with the methodology used by the California Department of Food and Agriculture in developing its manufacturing cost for California cheddar cheese plants, with the further addition of 40-pound block cheddar cheese marketing costs. In the event that a Western Cheddar Cheese Manufacturing Cost is not available, the cheddar cheese manufacturing cost used in the calculations set forth in § 1051.50(p)(2) and § 1051.50(p)(4)(i) shall be 22.91 cents.

(4) Add to the amount computed pursuant to paragraph (p)(2) of this section an amount computed as follows:

(i) Subtract the Western States Cheese Manufacturing Cost from the price computed pursuant to paragraph (p)(1) of this section and multiply the result by 1.572; and

(ii) Subtract 0.9 times the butterfat price computed pursuant to paragraph (n) of this section from the amount computed pursuant to paragraph (p)(4)(i) of this section; and

(iii) Multiply the amount computed pursuant to paragraph (p)(4)(ii) of this section by 1.17.

(q) *Other solids price.* The other solids price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:

(1) Subtract the Western Dry Whey Manufacturing Cost per pound from the per pound Western Dairy Product Price for dry whey and multiply the result by 1.03

(2) The Western Dairy Product Price for dry whey shall be computed at the weighted average of the weekly dry whey prices reported to AMS under the mandatory price reporting program by plants manufacturing dry whey that are located in the states of Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington. The weekly price described in this paragraph shall be reported in the National Dairy Product Sales Report (NDPSR). In the event that a Western Dairy Product Price for dry whey cannot be reported, then the price used in the calculations set forth in § 1051.50(q)(1) shall be the national weighted average of the preceding month's weekly prices for dry whey as determined and announced by AMS in the NDPSR on or before the 5th day of the month and shall apply to all milk received during the preceding month, less 0.84 cents per pound.

(3) The Western Dry Whey Manufacturing Cost shall be the per pound cost obtained from a survey of dry whey manufacturing plants in the western region described in § 1051.50(q)(2), which shall be conducted by the Department consistent with the methodology used by the California Department of Food and Agriculture in developing its manufacturing cost for California dairy products, with the further addition of dry whey marketing costs. In the event that a Western Dry Whey Manufacturing Cost is not available, the dry whey manufacturing cost used in the calculation set forth in § 1051.50(q)(1) shall be 23.10 cents.

(r) Somatic cell adjustment. The somatic cell adjustment per hundredweight of milk shall be determined as follows:

(1) Multiply 0.0005 by the weighted average price computed pursuant to paragraph (p)(1) of this section and round to the 5th decimal place;

(2) Subtract the somatic cell count of the milk (reported in thousands) from 350; and

(3) Multiply the amount computed in paragraph (r)(1) of this section by the amount computed in paragraph (r)(2) of this section and round to the nearest full cent.

(s) Advanced pricing factors. For the purpose of computing the Class I skim milk price, the Class II skim milk price, the Class II nonfat solids price, and the Class I butterfat price for the following month, the following pricing factors shall be computed using the weighted average of the 2 most recent NDPSR U.S. average weekly survey prices

announced before the 24th day of the month:

(1) An advanced Class III skim milk price per hundredweight, rounded to the nearest cent, shall be computed as follows:

(i) Following the procedure set forth in paragraphs (p) and (q) of this section, but using the weighted average of the 2 most recent NDPSR U.S. average weekly survey prices announced before the 24th day of the month, compute a protein price and another solids price;

(ii) Multiply the protein price computed in paragraph (s)(1)(i) of this section by 3.1;

(iii) Multiply the other solids price per pound computed in paragraph (s)(1)(i) of this section by 5.9; and

(iv) Add the amounts computed in paragraphs (s)(1)(ii) and (iii) of this section.

(2) An advanced Class IV skim milk price per hundredweight, rounded to the nearest cent, shall be computed as follows:

(i) Following the procedure set forth in paragraph (o) of this section, but using the weighted average of the 2 most recent NDPSR U.S. average weekly survey prices announced before the 24th day of the month, compute a nonfat solids price; and

(ii) Multiply the nonfat solids price computed in paragraph (s)(2)(i) of this section by 9.

(3) An advanced butterfat price per pound, rounded to the nearest one-hundredth cent, shall be calculated by computing a weighted average of the 2 most recent U.S. average NDPSR AA Butter survey prices announced before the 24th day of the month, subtracting 17.15 cents from this average, and multiplying the result by 1.211.

§ 1051.51 Class I differential and price.

The Class I differential shall be the differential established for Los Angeles County, California, which is reported in § 1051.52. The Class I price shall be the price computed pursuant to § 1051.51(a) for Los Angeles County, California.

§ 1051.52 Adjusted Class I differentials.

See § 1000.52.

§ 1051.53 Announcement of class prices, component prices, and advanced pricing factors.

(a) On or before the 5th day of the month, the market administrator for each Federal milk marketing order shall announce the following prices (as applicable to that order) for the preceding month:

(1) The Class II price;

(2) The Class II butterfat price;

(3) The Class III price;

(4) The Class III skim milk price;

(5) The Class IV price;

(6) The Class IV skim milk price;

(7) The butterfat price;

(8) The nonfat solids price;

(9) The protein price;

(10) The other solids price; and

(11) The somatic cell adjustment rate.

(b) On or before the 23rd day of the month, the market administrator for each Federal milk marketing order shall announce the following prices and pricing factors for the following month:

(1) The Class I price;

(2) The Class I skim milk price;

(3) The Class I nonfat solids price;

(4) The Class I fluid carrier price;

(5) The Class I butterfat price;

(6) The Class II skim milk price;

(7) The Class II nonfat solids price; and

(8) The advanced pricing factors described in § 1051.50(s).

§ 1051.54 Equivalent price.

If for any reason a price or pricing constituent required for computing the prices described in § 1051.50 is not available, the market administrator shall use a price or pricing constituent determined by the Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to be equivalent to the price or pricing constituent that is required.

§ 1051.55 Transportation credits and transportation allowances.

(a) Each handler operating a pool distributing plant described in § 1051.7(a) or (b) or a pool distributing plant that is part of a unit described in § 1051.7(d) that physically receives bulk milk, skim milk, or condensed skim milk from another pool plant shall receive a transportation credit for such milk computed as follows:

(1) Determine the hundredweight of milk eligible for the credit as follows;

(i) The number of hundredweights of milk received from sources described in § 1051.55 (a)(2) or the number of hundredweights of milk utilized in the plant for the processing and packaging of fluid milk products, whichever is less.

(2) Determine the transportation credit rate for milk received at the pool distributing plants specified in § 1051.55 (a) as follows;

(i) For plants located in the counties of Orange, Riverside, San Bernardino, San Diego, or Ventura Counties receiving milk from plants located in Los Angeles County, $0.54 hundredweight,

(ii) For plants located in the counties of Los Angeles, Orange or Ventura receiving milk from plants located in Fresno, Kings, or Tulare Counties, $0.89 per hundredweight,

(iii) For plants located in the counties of Riverside, San Bernardino or San Diego receiving milk from plants located in Fresno, Kings or Tulare Counties, $0.97 per hundredweight,

(iv) For plants located in the counties of Alameda, San Francisco, Santa Clara, Solano, or Sonoma Counties from plants located in Merced or Stanislaus Counties, $0.75 per hundredweight,

(v) For plants located in the county of Sacramento from plants located in Merced or Stanislaus Counties, $0.68 per hundredweight.

(3) Multiply the applicable rate as specified in § 1051.55 (a)(2) by the number of hundredweights of eligible milk as specified in § 1051.55 (a)(1). The resulting transportation credit calculated under this section shall be deducted from the reporting handler's value of milk as specified in § 1051.60 (a)(4).

(b) Each handler operating an eligible pool plant, and handler that transfers or diverts bulk milk from a pool plant to an eligible pool plant, and each handler described in § 1051.9(c) or § 1051.9(d) that delivers producer milk to an eligible pool plant as described in § 1051.55 (b)(1) shall receive a transportation allowance on milk eligible for the allowance pursuant to paragraph (b)(2) of this section. The allowance shall be computed by multiplying the hundredweight of milk eligible for the allowance by the rates described below:

(1) Pool plants that are eligible to receive transportation allowances are those that are located in the deficit receiving areas specified in § 1051.55 (b)(2) and that have a combined Class I and Class II utilization percentage for the month that is 50 percent or greater.

(i) For a handler that transfers or diverts bulk milk from a pool plant to an eligible pool plant, only that milk which is shipped to (and physically unloaded into) an eligible pool plant shall qualify as eligible for transportation allowances.

(ii) For a handler described in § 1051.9(c) or § 1051.9(d) that delivers producer milk to an eligible pool plant, only that milk which is shipped to (and physically unloaded into) an eligible pool plant shall qualify as eligible for transportation allowances.

(2) The transportation allowance rates for milk shipped to (and physically unloaded into) eligible plants shall be as follows:

(i) For plants located in the Southern California Receiving Area, consisting of the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego,

and Ventura, receiving milk delivered from San Bernardino County; for shipments of more than 93 miles, $0.16 hundredweight.

(ii) For plants located in the Southern California Receiving Area, consisting of the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura, receiving milk delivered from Riverside County; for shipments of more than 93 miles, $0.36 hundredweight.

(iii) For plants located in the located in the Southern California Receiving Area, consisting of the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura Counties receiving milk delivered from counties other than Riverside or San Bernardino: For shipments of more than 79 miles but not greater than 99 miles, $0.16 hundredweight; for shipments of more than 99 but not greater than 119 miles, $0.37 per hundredweight; for shipments of more than 119 miles, $0.54 per hundredweight.

(iv) For plants located in the located in the Bay Area Receiving Area, consisting of the counties of Alameda, Contra Costa, Santa Clara, Santa Cruz, San Francisco and San Mateo, receiving milk delivered from any county: for shipments of 79 miles or less, $0.31 per hundredweight; for shipments of more than 79 miles but not greater than 199 miles, $0.37 hundredweight; for shipments of more than 199 miles, $0.45 per hundredweight.

(v) For plants located in the located in the North Bay Area Receiving Area, consisting of the counties of Marin, Napa, Solano and Sonoma, receiving milk delivered from any county: for shipments of 45 miles or less, $0.23 per hundredweight; for shipments of more than 45 miles but not greater than 96 miles, $0.27 hundredweight; for shipments of more than 96 miles, $0.36 per hundredweight.

(vi) For plants located in the located in the Sacramento Receiving Area, consisting of Sacramento County, receiving milk delivered from any county: for shipments of 59 miles or less, $0.17 per hundredweight; for shipments of more than 59, $0.23 hundredweight.

(c) The transportation allowances and credits rates shall be increased or decreased by the market administrator to reflect per hundredweight changes in the actual transportation costs as published by the California Department of Food and Agriculture in its Hauling Rate Survey.

(d) For purposes of this section, the distances to be computed shall be determined by the market administrator using the shortest available state and/or Federal highway mileage. Mileage determinations are subject to redetermination at all times. In the event a handler requests a redetermination of the mileage pertaining to any plant, the market administrator shall notify the handler of such redetermination within 30 days after the receipt of such request. Any financial obligations resulting from a change in mileage shall not be retroactive for any periods prior to the redetermination by the market administrator.

Producer Price Differential

§ 1051.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1051.9(c) and § 1051.9(d) with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (i) of this section and subtracting from that total amount the values computed in paragraphs (j) and (k) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1051.44(a), (b), and (c), respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1051.76(a)(4) or (d) shall be excluded from pricing under this section.

(a) Class I value.

(1) Multiply the pounds of nonfat solids in Class I by the Class I nonfat solids price; and

(2) Add an amount obtained by multiplying the pounds of fluid carrier in Class I by the Class I fluid carrier price; and

(3) Add an amount obtained by multiplying the pounds of butterfat in Class I by the Class I butterfat price; and

(4) Subtract the value of the handler's transportation credits as calculated in § 1051.55(a)(1) through (a)(3); and

(5) Deduct for each pound of milk nonfat solids in nonfat dry milk used for fortifying Class I products to meet the State of California's fluid milk standards as described in § 1051.40(d)(3) a fortification allowance to be computed as follows:

(i) Subtract the current Class IV nonfat solids price from the current Class I nonfat solids price

(ii) Subtract the value calculated in § 1051.60 (a)(5)(i) from zero cents ($0.00).

(iii) The fortification allowance for each pound of nonfat milk solids in the nonfat dry milk used in fortification as described in this section shall be zero cents ($0.00) or the value calculated in in § 1051.60 (a)(5)(ii), whichever is greater.

(6) Deduct for each pound of milk nonfat solids in condensed skim milk used for fortifying Class I products to meet the State of California's fluid milk standards as described in § 1051.40(d)(3) a fortification allowance to be computed as follows:

(i) Subtract the current Class IV nonfat solids price from the current Class I nonfat solids price

(ii) Subtract the value calculated in § 1051.60 (a)(6)(i) from 9.87 cents ($0.0987).

(iii) The fortification allowance for each pound of nonfat milk solids in condensed skim milk used in fortification as described in this section shall be zero cents ($0.00) or the value calculated in in § 1051.60 (a)(6)(ii), whichever is greater.

(b) Class II value.

(1) Multiply the pounds of nonfat solids in Class II skim milk by the Class II nonfat solids price; and

(2) Add an amount obtained by multiplying the pounds of butterfat in Class II times the Class II butterfat price.

(c) Class III value.

(1) Multiply the pounds of protein in Class III skim milk by the protein price;

(2) Add an amount obtained by multiplying the pounds of other solids in Class III skim milk by the other solids price; and

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) Class IV value.

(1) Multiply the pounds of nonfat solids in Class IV skim milk by the nonfat solids price; and

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

(e) Compute an adjustment for the somatic cell content of producer milk by multiplying the values reported pursuant to § 1051.30(a)(1) and (c)(1) by the percentage of total producer milk allocated to Class II, Class III, and Class IV pursuant to § 1051.44(c);

(f) Multiply the pounds of skim milk and butterfat overage assigned to each class pursuant to § 1051.44(a)(11) and the corresponding step of § 1051.44(b) by the skim milk prices and butterfat prices applicable to each class.

(g) Multiply the difference between the current month's Class I, II, or III price, as the case may be, and the Class IV price for the preceding month and by the hundredweight of skim milk and butterfat subtracted from Class I, II, or III, respectively, pursuant to § 1051.44(a)(7) and the corresponding step of § 1051.44(b);

(h) Multiply the difference between the Class I price applicable at the location of the pool plant and the Class IV price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1051.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1051.44(a)(3)(i) through (vi) and the corresponding step of § 1051.44(b), excluding receipts of bulk fluid cream products from plants regulated under other Federal orders and bulk concentrated fluid milk products from pool plants, plants regulated under other Federal orders, and unregulated supply plants.

(i) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1051.43(d) and § 1051.44(a)(3)(i) and the corresponding step of § 1051.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1051.44(a)(8) and the corresponding step of § 1051.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

(j) For reconstituted milk made from receipts of nonfluid milk products, multiply $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class IV price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1051.43(d).

(k) Subtract the value of the handler's transportation allowances calculated pursuant to § 1051.55(a)(i) and (a)(ii).

§ 1051.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1051.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1051.60 for all handlers required to file reports prescribed in § 1051.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1051.60 by the protein price, other solids price, and the butterfat price, respectively, and the total value of the somatic cell adjustment pursuant to § 1051.30(a)(1) and (c)(1);

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1051.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1051.60(i); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

§ 1051.62 Announcement of producer prices.

On or before the 13th day after the end of each month, the market administrator shall announce publicly the following prices and information:

(a) The producer price differential;

(b) The protein price;

(c) The nonfat solids price;

(d) The other solids price;

(e) The butterfat price;

(f) The somatic cell adjustment rate;

(g) The average butterfat, nonfat solids, protein and other solids content of producer milk; and

(h) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

§ 1051.68 Payments to producers under the California Quota Program.

Notification shall be given by the market administrator to producers of intent to make payment of producer returns attributable to producers who participate in the California Quota Program in accordance with § 1051.72. Producers who participate in the California Quota Program shall be identified as follows:

Any producer whose farm is located in California and whose milk is received at a plant located in California unless such producer irrevocably notifies the market administrator in writing before the first day of any month for which he first elects to receive payment at the applicable prices announced under § 1051.62(h).

Subpart C—Payments for Milk

Producer Payments

§ 1051.70 Producer-settlement fund.

See § 1000.70.

§ 1051.71 Payments to the producer-settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 15th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk to the handler for the month as determined pursuant to § 1051.60.

(b) The aggregate amount paid to producers and cooperative associations pursuant to § 1051.73.

§ 1051.72 Payments from the producer-settlement fund.

(a) The market administrator shall compute the amount due each producer for milk received during the month from such producer by a handler(s) who made payments for such month pursuant to § 1051.71 in an amount equal to not less than the sum of:

(1) The hundredweight of producer milk received times the producer price differential for the month as adjusted pursuant to § 1051.75;

(2) The pounds of butterfat received times the butterfat price for the month;

(3) The pounds of protein received times the protein price for the month;

(4) The pounds of other solids received times the other solids price for the month;

(5) The hundredweight of milk received times the somatic cell adjustment for the month;

(6) Less any payment made pursuant to § 1051.73;

(7) Less proper deductions authorized in writing by such producer, and plus or minus adjustments for errors in previous payments to such producer subject to approval by the market administrator; and

(8) Less deductions for marketing services pursuant to § 1000.86.

(b) On or before the 18th day after the end of each month, the market administrator shall pay direct to each producer who has not authorized a cooperative association to receive payment for such producer or for milk not subject to the California Quota Program pursuant to § 1051.68, the amount calculated for such producer pursuant to paragraph (a) of this section subject to the provisions of § 1051.86.

(c) On or before the 16th day after the end of each month, the market administrator, subject to the provisions of § 1051.86, shall pay:

(1) To each cooperative association authorized to receive payments due producers who market their milk through such cooperative association, and which is not subject to the California Quota Program pursuant to § 1051.68, an amount equal to the aggregate of the payments calculated pursuant to paragraph (a) of this section for all producers certified to the market administrator by such cooperative association to receive such payments; and

(2) To the California Department of Food & Agriculture's Milk Pooling Branch, for each producer and cooperative association for milk subject to the California Quota Program pursuant to § 1051.68, the aggregate of the payments otherwise due such individual producers and cooperative associations pursuant to paragraph (b) and subparagraph (c)(1) of this section.

(d) If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments under this section and shall complete the payments as soon as the funds are available.

§ 1051.73 Partial payments to producers and to cooperative associations.

(a) Each handler shall pay each producer for producer milk for which payment is not made to a cooperative association pursuant to paragraph (b) of this section and who has not discontinued shipments as of the date of this partial payment, for milk received during the first 15 days of the month from the producer at not less than the lowest announced class price for the preceding month, less proper deductions authorized in writing by the producer; payment shall be made so that it is received by each producer on or before the 26th day of the month (except as provided in § 1000.90).

(b) Payments for milk received from cooperative association members. On or before the day prior to the date specified in paragraph (a) of this section (except as provided in § 1000.90), each handler shall pay to a cooperative association for milk from producers who market their milk through the cooperative association and who have authorized the cooperative to collect such payments on their behalf an amount equal to the sum of the individual payments otherwise payable for such producer milk pursuant to paragraph (a) of this section.

(c) Payment for milk received from cooperative association pool plants, from cooperatives as handlers pursuant to § 1051.9(c), or from handlers pursuant to § 1051.9(d). On or before the day prior to the date specified in paragraph (a) of this section (except as provided in § 1000.90), each handler who receives fluid milk products at its plant from a cooperative association in its capacity as the operator of a pool plant or who receives milk from a cooperative association in its capacity as a handler pursuant to § 1051.9(c), including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk, or from a handler pursuant to § 1051.9(d) shall pay the cooperative or such handler for bulk fluid milk products and bulk fluid cream products received from a cooperative association in its capacity as the operator of a pool plant and for milk received from a handler pursuant to § 1051.9(c) or (d) during the first 15 days of the month, at not less than the lowest announced class prices per hundredweight for the preceding month.;

(d) If a handler claims that a required payment to a producer cannot be made because the producer is deceased or cannot be located, or because the cooperative association or its lawful successor or assignee is no longer in existence, the payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the market administrator shall make the required payment from the producer-settlement fund to the handler or to the lawful claimant, as the case may be.

(e) In making payments to producers pursuant to this section, each handler shall furnish each producer, except a producer whose milk was received from a cooperative association handler described in § 1051.9(a) or (c), a supporting statement in a form that may be retained by the recipient which shall show:

(1) The name, address, Grade A identifier assigned by a duly constituted regulatory agency, and payroll number of the producer;

(2) The daily and total pounds, and the month and dates such milk was received from that producer;

(3) The total pounds of butterfat, protein, and other solids contained in the producer's milk;

(4) The somatic cell count of the producer's milk;

(5) The minimum rate or rates at which payment to the producer is required pursuant to the order in this part;

(6) The rate used in making payment if the rate is other than the applicable minimum rate;

(7) The amount, or rate per hundredweight, or rate per pound of component, and the nature of each deduction claimed by the handler; and

(8) The net amount of payment to the producer, cooperative association, and producer settlement fund with respect to such producer.

§ 1051.74 [Reserved]

§ 1051.75 Plant location adjustments for producer milk and nonpool milk.

For purposes of making payments for producer milk and nonpool milk, a plant location adjustment shall be determined by subtracting the Class I price specified in § 1051.51 from the Class I price at the plant's location. The difference, plus or minus as the case may be, shall be used to adjust the payments required pursuant to §§ 1051.73 and 1051.76.

§ 1051.76 Payments by a handler operating a partially regulated distributing plant.

On or before the 25th day after the end of the month (except as provided in § 1000.90), the operator of a partially regulated distributing plant, other than a plant that is subject to marketwide pooling of producer returns under a State government's milk classification and pricing program, shall pay to the

market administrator for the producer-settlement fund the amount computed pursuant to paragraph (a) of this section or, if the handler submits the information specified in §§ 1051.30(b) and 1051.31(b), the handler may elect to pay the amount computed pursuant to paragraph (b) of this section. A partially regulated distributing plant that is subject to marketwide pooling of producer returns under a State government's milk classification and pricing program shall pay the amount computed pursuant to paragraph (c) of this section.

(a) The payment under this paragraph shall be an amount resulting from the following computations:

(1) From the plant's route disposition in the marketing area:

(i) Subtract receipts of fluid milk products classified as Class I milk from pool plants, plants fully regulated under other Federal orders, and handlers described in § 1051.9(c) or (d)of this chapter, except those receipts subtracted under a similar provision of another Federal milk order;

(ii) Subtract receipts of fluid milk products from another nonpool plant that is not a plant fully regulated under another Federal order to the extent that an equivalent amount of fluid milk products disposed of to the nonpool plant by handlers fully regulated under any Federal order is classified and priced as Class I milk and is not used as an offset for any payment obligation under any order; and

(iii) Subtract the pounds of reconstituted milk made from nonfluid milk products which are disposed of as route disposition in the marketing area;

(2) For orders with multiple component pricing, compute a Class I differential price by subtracting Class III price from the current month's Class I price. Multiply the pounds remaining after the computation in paragraph (a)(1)(iii) of this section by the amount by which the Class I differential price exceeds the producer price differential, both prices to be applicable at the location of the partially regulated distributing plant except that neither the adjusted Class I differential price nor the adjusted producer price differential shall be less than zero;

(3) For orders with skim milk and butterfat pricing, multiply the remaining pounds by the amount by which the Class I price exceeds the uniform price, both prices to be applicable at the location of the partially regulated distributing plant except that neither the adjusted Class I price nor the adjusted uniform price differential shall be less than the lowest announced class price; and

(4) Unless the payment option described in paragraph (d) is selected, add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(1)(iii) of this section by any positive difference between the Class I price applicable at the location of the partially regulated distributing plant (less $1.00 if the reconstituted milk is labeled as such) and the Class IV price.

(b) The payment under this paragraph shall be the amount resulting from the following computations:

(1) Determine the value that would have been computed pursuant to § 1051.60 for the partially regulated distributing plant if the plant had been a pool plant, subject to the following modifications:

(i) Fluid milk products and bulk fluid cream products received at the plant from a pool plant, a plant fully regulated under another Federal order, and handlers described in § 1051.9(c) or § 1051.9(d) of this chapter shall be allocated at the partially regulated distributing plant to the same class in which such products were classified at the fully regulated plant;

(ii) Fluid milk products and bulk fluid cream products transferred from the partially regulated distributing plant to a pool plant or a plant fully regulated under another Federal order shall be classified at the partially regulated distributing plant in the class to which allocated at the fully regulated plant. Such transfers shall be allocated to the extent possible to those receipts at the partially regulated distributing plant from the pool plant and plants fully regulated under other Federal orders that are classified in the corresponding class pursuant to paragraph (b)(1)(i) of this section. Any such transfers remaining after the above allocation which are in Class I and for which a value is computed pursuant to § 1051.60 for the partially regulated distributing plant shall be priced at the statistical uniform price or uniform price, whichever is applicable, of the respective order regulating the handling of milk at the receiving plant, with such statistical uniform price or uniform price adjusted to the location of the nonpool plant (but not to be less than the lowest announced class price of the respective order); and

(iii) If the operator of the partially regulated distributing plant so requests, the handler's value of milk determined pursuant to § 1051.60 shall include a value of milk determined for each nonpool plant that is not a plant fully regulated under another Federal order which serves as a supply plant for the partially regulated distributing plant by making shipments to the partially regulated distributing plant during the month equivalent to the requirements of § 1051.7(c) subject to the following conditions:

(A) The operator of the partially regulated distributing plant submits with its reports filed pursuant to §§ 1051.30(b) and 1051.31(b) similar reports for each such nonpool supply plant;

(B) The operator of the nonpool plant maintains books and records showing the utilization of all skim milk and butterfat received at the plant which are made available if requested by the market administrator for verification purposes; and

(C) The value of milk determined pursuant to § 1051.60 for the unregulated supply plant shall be determined in the same manner prescribed for computing the obligation of the partially regulated distributing plant; and

(2) From the partially regulated distributing plant's value of milk computed pursuant to paragraph (b)(1) of this section, subtract:

(i) The gross payments that were made for milk that would have been producer milk had the plant been fully regulated;

(ii) If paragraph (b)(1)(iii) of this section applies, the gross payments by the operator of the nonpool supply plant for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated; and

(iii) The payments by the operator of the partially regulated distributing plant to the producer-settlement fund of another Federal order under which the plant is also a partially regulated distributing plant and, if paragraph (b)(1)(iii) of this section applies, payments made by the operator of the nonpool supply plant to the producer-settlement fund of any order.

(c) The operator of a partially regulated distributing plant that is subject to marketwide pooling of returns under a milk classification and pricing program that is imposed under the authority of a State government shall pay on or before the 25th day after the end of the month (except as provided in § 1000.90) to the market administrator for the producer-settlement fund an amount computed as follows:

After completing the computations described in paragraphs (a)(1)(i) and (ii) of this section, determine the value of the remaining pounds of fluid milk products disposed of as route disposition in the marketing area by multiplying the hundredweight of such

pounds by the amount, if greater than zero, that remains after subtracting the State program's class prices applicable to such products at the plant's location from the Federal order Class I price applicable at the location of the plant.

(d) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients that are reconstituted for fluid use. Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the positive difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed and the Class IV price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

§ 1051.77 Adjustment of accounts.

See § 1000.77.

§ 1051.78 Charges on overdue accounts.

See § 1000.78.

Administrative Assessment and Marketing Service Deduction

§ 1051.85 Assessment for order administration.

On or before the payment receipt date specified under § 1051.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than 8 cents per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1051.9(c) or (d) that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1051.9(c) or (d);

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1051.43(d) and other source milk allocated to Class I pursuant to § 1051.44(a)(3) and (8) and the corresponding steps of § 1051.44(b), except other source milk that is excluded from the computations pursuant to § 1051.60 (h) and (i); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1051.76(a)(1)(i) and (ii).

§ 1051.86 Deduction for marketing services.

See § 1000.86.

Subpart D—Miscellaneous Provisions

§ 1051.90 Dates.

See § 1000.90.

Proposal Number 3

Submitted by the California Producer Handlers Association

■ 5. This proposal would preserve the entire ''Quota'' system that is currently in place under the terms of the California Pooling Act, California state marketing order and milk pooling plan administered by the California Department of Food and Agriculture (CDFA). Specifically, should USDA recommend a California Federal milk marketing order, this proposal argues that any provisions incorporated to ''recognize quota'' as outlined in the 2014 Farm Bill, would include provisions that recognize, in the same manner that is done currently by CDFA, the exempt quota held by current producer-distributors operating in the State. Should USDA recommend administering all aspects of the California quota program, CPHA also proposes to remove the degrees of family consanguinity as it pertains to the ownership of exempt quota to allow for the continuation of exempt quota transfers within a family.

Proposal Number 4

Submitted by Ponderosa Dairy

■ 6. This proposal would add a new paragraph (e) to § 1051.76 as described under either Proposal 1 or Proposal 2 above, to read as follows:

§ 1051.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(e) Any handler may elect partially regulated distributing plant status for any plant located within the California marketing area with respect to receipts of milk from farms located outside of the California marketing area. Such plant shall with respect to such receipts make an election as provided for in § 1051.76 and shall meet the reporting and payment requirements in paragraph (a) or paragraph (b) of this section with respect to such receipts.

Proposal No. 5

Proposed by Dairy Program, Agricultural Marketing Service

Make such changes as may be necessary to ensure that all provisions of any potential marketing agreement or order that may result from this hearing conform with each other.

Copies of this notice of hearing may be obtained online at *http://www.ams.usda.gov/dairy,* or from the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue SW., Washington, DC 20250–9200.

Copies of the transcript of testimony and exhibits taken at the hearing will be made available for viewing at *http://www.ams.usda.gov/dairy* after the hearing adjourns. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

When a Notice of Hearing is issued, USDA employees gain knowledge that a hearing will be held. From this time and until the issuance of a Final Decision in this proceeding, USDA employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an *ex parte* basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the Administrator, AMS; Office of the General Counsel; and the AMS Dairy Program (Washington, DC office), and the offices of all Market Administrators. Procedural matters are not subject to the above prohibition and may be discussed at any time.

Dated: July 27, 2015.

Rex A. Barnes,

Associate Administrator.

[FR Doc. 2015–18704 Filed 8–5–15; 8:45 am]

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Part V

Agency for International Development

22 CFR Part 205

Amendment To Participation by Religious Organizations in USAID Programs To Implement Executive Order 13559; Proposed Rule

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 205

RIN 0412–AA75

Amendment To Participation by Religious Organizations in USAID Programs To Implement Executive Order 13559

AGENCY: U.S. Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) is proposing to amend its regulations governing the participation by religious organizations in USAID's programs to reflect guidance from the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships on implementing Executive Order 13559.

DATES: Submit comments on or before September 8, 2015.

ADDRESSES: Address all comments concerning this proposed rule to C. Eduardo Vargas, Center for Faith-Based & Community Initiatives (A/AID/CFBCI), U.S. Agency for International Development, Room 6.07–100 RRB, 1300 Pennsylvania Avenue NW., Washington, DC 20523. Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: Submit electronic comments to *FBCI@usaid.gov.* See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing.

Mail: USAID, Center for Faith-Based & Community Initiatives (A/AID/CFBCI), Room 6.07–100, 1300 Pennsylvania Avenue NW., Washington, DC 20523.

A copy of each communication submitted will be available for inspection and copying between 8:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Mark Brinkmoeller, Director, Center for Faith-Based and Community Initiatives, USAID, Room 6.07–023, 1300 Pennsylvania Avenue NW., Washington, DC 20523; *telephone:* (202) 712–4080 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On October 20, 2004, USAID published its final rule (the ''Original Rule'') on participation by religious organizations in USAID programs (69 FR 61,716, codified at 22 CFR parts 202, 205, 211, and 226). The Original Rule implemented Executive Branch policy that, within the framework of constitutional guidelines, religious organizations should be able to compete on an equal footing with other organizations for USAID funding. The Original Rule revised USAID regulations pertaining to grants, cooperative agreements and contracts awarded for the purpose of administering grant programs to ensure their compliance with this policy and to clarify that religious organizations are eligible to participate in programs on the same basis as any other organization, with respect to programs for which such other organizations are eligible.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319 (available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf*). Executive Order 13559 incorporated the Advisory Council's recommendations by making certain amendments to Executive Order 13279. In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, OMB, in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. The guidance incorporated the Working Group's Report, which noted that it focused largely on domestic considerations. The Report went on to note that for programs operating in foreign countries, additional considerations may be implicated, and that agencies, such as USAID, should consult with the Department of Justice on implementation of the Executive Order. Thus, the changes proposed in this rule result from those consultations.

On March 25, 2011, USAID issued a Notice of Public Rulemaking (NPRM) proposing amendments to section (d) of its Original Rule. That process is ongoing. USAID is not proposing any amendments to section (d) under this proposed rulemaking.

II. Overview of Proposed Rule

USAID proposes to amend 22 CFR part 205, Participation by Religious Organizations in USAID Programs, to make it consistent with Executive Order 13559.

Prohibited Uses of Direct Federal Financial Assistance

Part 205 and Executive Order 13279 prohibit nongovernmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities.

Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the government program did not orchestrate or encourage such comments.

USAID, therefore, proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

Intermediaries

USAID proposes language that will clarify that organizations who receive USAID financial assistance through subawards must comply with the requirements relating to protections for beneficiaries and the restrictions on prohibited uses of federal financial assistance. The language of USAID's rule has always couched the requirements in the rule as applying to organizations ''that receive direct financial assistance from USAID,'' which by its terms includes any organizations that receive such assistance, whether they did so through a prime award or a sub-award. However, to avoid any doubt, USAID proposes to add language explicitly stating that the requirements of the rule apply to organizations ''that receive direct financial assistance from USAID (including through a prime award or sub-award).''

Protections for Beneficiaries

Executive Order 13559 makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance. USAID proposes to add language to the sections of its rule covering these concepts to conform

more directly to the Executive Order language.

Political or Religious Affiliation

The proposed rule provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. USAID must instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

III. Findings and Certifications

Regulatory Planning and Review

This is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review. This rule is not a major rule under 5 U.S.C. 804. The main effect of the rule is to provide clarifying language around the types of activities that may be funded with Federal financial assistance, thereby preventing confusion in stakeholders and lessening the need for stakeholders to consult USAID for clarification on appropriate activities.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USAID has considered the economic impact of the proposed rule. USAID certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Burden

This proposed rule does not impose any new recordkeeping requirements nor does it change or modify an existing information collection activity. Thus, the Paperwork Reduction Act does not apply to this proposed rule.

List of Subjects of 22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

For the reasons stated in the preamble, USAID proposes to amend chapter II of title 22 of the Code of Federal Regulations as follows:

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

■ 1. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a).

■ 2. Amend § 205.1 by revising paragraphs (b), (c), (e), and (f), and adding paragraph (j), to read as follows:

§ 205.1 Grants and cooperative agreements.

* * * * *

(b) Organizations that receive direct financial assistance from USAID under any USAID program (including through a prime award or sub-award) may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services directly funded with direct financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. These restrictions on explicitly religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID (including through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

* * * * *

(e) An organization that participates in programs funded by financial assistance from USAID (including through a prime award or sub-award) shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs (including through a prime award or sub-award), including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

* * * * *

(j) Decisions about awards of USAID financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

Dated: April 16, 2015.

Mark Brinkmoeller,

Director, Center for Faith-Based and Community Initiatives.

Editorial note: This document was received for publication by the Office of the Federal Register on July 21, 2015.

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Part VI

Department of Agriculture

Office of the Secretary

7 CFR Part 16

Equal Opportunity for Religious Organizations in USDA Programs: Implementation of E.O.13559; Proposed Rule

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 16

RIN 0503–AA55

Equal Opportunity for Religious Organizations in USDA Programs: Implementation of E.O. 13559

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise USDA's regulation that covers equal opportunity for participation of faith-based (religious) organizations in USDA programs. These revisions are being undertaken to implement Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations. Executive Order 13559 amended Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which provides the legal basis for USDA's current equal participation regulations to protect religious liberty rights of beneficiaries of USDA funded programs. This rule adopts changes to Executive Order 13279 made by Executive Order 13559, including changes to specific terminology, additional beneficiary protections, and clarifications on the responsibilities of intermediaries. In addition to proposing regulatory amendments to implement Executive Order 13559, USDA is also publishing for public comment a Paperwork Reduction Act information collection notice of beneficiary protections for use by religious organizations.

DATES: *Comment Due Date.* October 5, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to as indicated below. Instructions for submitting public comments on the information collection notice are set forth in Section III.h. There are two methods for submitting public comments on this proposed rule. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* USDA strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by USDA, and enables USDA to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to RIN 0503–AA55 and the title of this rule.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

FOR FURTHER INFORMATION CONTACT: Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250; telephone number (202) 720–2032 (this is not a toll-free number). Persons with disabilities or who require alternative means of communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

I. Supplementary Information

Background

On December 12, 2002, President George W. Bush signed Executive Order 13279, ''Equal Protection of the Laws for Faith-Based and Community Organizations,'' which was published on December 16, 2002, at 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with, and necessary to, the furthering of the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

Also on December 12, 2002, President Bush signed Executive Order 13280 (67 FR 77145), ''Responsibilities of the Department of Agriculture and the Agency for International Development, with Respect to Faith-Based and Community Initiatives,'' which created a Center for Faith-Based and Community Initiatives at USDA and charged USDA to identify and eliminate regulatory, contracting, and other programmatic barriers to full participation of faith-based and community organizations in its programs.

USDA implemented Executive Order 13279 through the final rule, Equal Opportunity for Religious Organizations, published on July 9, 2004, at 69 FR 41375, and added USDA's regulations in 7 CFR part 16.

The regulations established by that rule provide the following: (1) Faith-based (religious) organizations are eligible on the same basis as any other eligible organization to participate in USDA programs and activities; (2) religious organizations that participate in USDA programs or activities may retain their independence; (3) a religious organization that participates in a USDA program does not forfeit its exemption from the prohibition on employment discrimination on the basis of religion, as provided in Title VII of the Civil Rights Act of 1964 (though some individual USDA programs may have independent statutory nondiscrimination requirements); (4) organizations may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion or religious beliefs; (5) organizations may not engage in inherently religious activities as part of programs or services directly funded under a USDA program or activity.

On February 5, 2009, President Barack Obama signed Executive Order 13498, entitled ''Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships,'' which was published on February 9, 2009, at 74 FR 6533. Executive Order 13498 established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) for the purpose of bringing together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

In March of 2010, the Advisory Council issued its recommendations in a report entitled ''A New Era of Partnerships: Report of Recommendations to the President.'' [1] The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

On November 17, 2010, President Obama signed Executive Order 13559, entitled ''Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,'' which was published on November 22, 2010, at 75 FR 71319.[2] Executive Order 13559 incorporated many of the Advisory Council's recommendations and amended Executive Order 13279 to include additional Fundamental Principles and Policymaking Criteria for inclusion in guidance and regulations.[3] The principles include, as follows:

- The Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance (including prime awards and sub-awards), participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance (including prime awards and sub-awards), and participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- Religious providers are welcome to compete for Federal Government social service funding and maintain a religious identity as described in the order;
- Agencies that administer or award Federal financial assistance for social service programs must implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternate providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);
- Agencies that provide Federal financial assistance for social service programs must post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and must post online a list of entities receiving such assistance; and
- Agency decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) for the purpose of reviewing and evaluating existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the U.S. Department of Justice, must issue guidance to agencies on the implementation of Executive Order 13559. The Working Group issued its report in April of 2012.[4] In August of 2013, OMB issued guidance instructing specified agency heads to do the following: (1) Adopt regulations and guidance that will fulfill the requirements of Executive Order 13559 and (2) amend regulations and guidance to ensure that they are consistent with this executive order.[5]

II. Discussion of Proposed Rule

A. Overview of Proposed Regulations

This proposed rule updates 7 CFR part 16 to reflect the new Fundamental Principles and Policymaking Criteria in Executive Order 13559. Some of the principles do not require regulations and may be included in guidance issued by the Department.

USDA implements Executive Order 13559 in 7 CFR part 16 by: (1) Adding definitions for USDA direct assistance, USDA indirect assistance, and intermediary; (2) including a new requirement that decisions must be free from political interference or even the appearance of such interference; (3) clarifying the separation of explicitly religious activities from activities funded with USDA direct assistance and defining explicitly religious activities; (4) clarifying the responsibilities of intermediary organizations; (5) adding new beneficiary protections, and (6) amending existing language in 7 CFR part 16 to include the Executive Order 13559 changes. The Department may issue guidance on the applicability of the executive order and the rule to particular programs.

B. Specific Proposed Amendments

1. New Definitions

This proposed rule adds definitions for ''USDA direct assistance,'' ''USDA indirect assistance,'' and ''intermediary'' at 7 CFR 16.2.

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. To clarify this distinction, the proposed rule provides definitions of these terms.

Programs are supported with USDA direct assistance when either the Federal Government or an intermediary, as identified in this proposed rule, selects a service provider and either purchases services from that provider (*e.g.,* through a contract), or awards funds to that provider to carry out an activity (*e.g.,* through a contract, grant, sub-grant, or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

Indirect Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal Government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a Federal governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either

[1] *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.*

[2] *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf.*

[3] Executive Order 13279, Section 2 paragraphs (e)–(j).

[4] Recommendations of the Interagency Working Group on Faith-Based Organizations and Other Neighborhood Partnerships, April 2012, at *http://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf.*

[5] M–13–19, ''Implementation of Executive Order 13559, 'Fundamental Principles and Policymaking Criteria for Partnerships with Faith-based and Other Neighborhood Organizations' '', August 2, 2013, at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf.*

way, the Federal Government empowers the beneficiaries to choose for themselves whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal Government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice.[6]

The Supreme Court has held that if a program meets certain criteria, the Federal Government may fund the program if, among other things, the program places the benefit in the hands of individuals, who, in turn, have the freedom to choose the provider from which they receive their benefit and ''spend'' the Federal Government funds, whether that provider is public or private, non-religious or religious.[7] In these instances, the Federal Government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,''[8] was also neutral toward religion and offered beneficiaries adequate secular options. This type of Federal financial assistance is considered ''indirect'' within the meaning of the Establishment Clause of the First Amendment of the U.S. Constitution. Accordingly, these criteria also are included in the text of the proposed definition of ''USDA indirect assistance.''

The Department also proposes regulatory language that will clarify the responsibilities of intermediaries. An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The intermediary also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

2. Decisions Must Be Free From Political Interference

This proposed rule adds to the existing paragraph (a) of 7 CFR 16.2, redesignated as § 16.3 under the proposed rule, a sentence clarifying that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. To comply with this requirement, awarding entities, including intermediaries, should instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. Additionally, when selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account, but the awarding entity should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

3. Separation of Explicitly Religious Activities From Activities Funded With Direct Federal Financial Assistance and Definition of ''Explicitly Religious Activities''

This proposed rule would amend paragraph (b) in 7 CFR 16.2, redesignated as § 16.3, and paragraphs (b) and (d)(1) in § 16.3, redesignated as § 16.4, to clarify the requirement that activities supported by direct Federal financial assistance must be separate from explicitly religious activities, define ''explicitly religious activities,'' and replace the term ''inherently religious activities'' with the term ''explicitly religious activities.''

Executive Order 13559 makes clear that all organizations that receive Federal financial assistance are prohibited from discriminating against beneficiaries or potential beneficiaries of Federal programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. The Executive Order also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance.

USDA's existing regulations at 7 CFR part 16 and Executive Order 13279, prohibit nongovernmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious,'' however, has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that while all 26 of the religious social service providers GAO interviewed indicated they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule.[9]

[6] *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

[7] *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002).

[8] *Id.* at 653.

[9] GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance*

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' the Court has not used this term to indicate the boundary of what the Federal Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' [10] The Court has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion.[11] This terminology is fairly interpreted to prohibit the Federal Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a non-religious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgment of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions—for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs.[12] Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a Federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the Federal Government-funded program did not orchestrate or encourage such comments.

USDA, therefore, proposes to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures, and symbols in buildings where Federal financial assistance is delivered.

4. New Beneficiary Protections

This rule proposes to add new paragraphs (f) and (g) to § 16.3, redesignated as § 16.4 under this proposed rule, implementing a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

Executive Order 13559 requires that faith-based organizations administering a program that is supported by direct Federal financial assistance give written notice, in a manner prescribed by the agency, to beneficiaries and prospective beneficiaries, of their right to be referred to an alternate provider when available. Written notice should be provided prior to enrollment or receipt of services. However, when the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. A sample notification of beneficiary rights is attached in Appendix A.

In addition, there is a limited exception to the individual notice requirement at § 16.4(f). When the service provided involves only a brief interaction between the service provider and the beneficiary, and the beneficiary is receiving what may be a one-time service from the provider (such as a meal at an emergency kitchen, or one-time assistance with rent, mortgage payments, or utility bills), the service provider may post the written notice of beneficiary protections in a prominent place, in lieu of providing individual written notice to each beneficiary. Such posting does not relieve an organization of its obligations under the remainder of this part.

If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary must be referred to an alternate provider. More specifically,

Accountability, GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

[10] *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

[11] *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, J.J., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997).

[12] Where there is extensive government control over the environment of the Federally-financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment to ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

the proposed rule provides that, if a beneficiary or prospective beneficiary of a program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall within a reasonably prompt time undertake reasonable efforts to identify and refer the beneficiary to an alternate provider. Further, the executive order and the proposed rule require the relevant awarding entity to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations.

When appropriate, USDA may require the awarding entity to provide organizations information about alternate providers, and the organization that provides services may rely on that information to fulfill its duty under this proposed rule. For example, in the case of The Emergency Food Assistance Program (TEFAP), a State Distributing Agency may provide contact information for beneficiaries of publicly available Web sites or telephone ''hotlines'' that direct individuals to local emergency kitchens or pantries, a list of the emergency kitchens or pantries to which the State Distributing Agency distributes food, or another applicable directory or list of food assistance. It must be noted that in some instances, the awarding entity may also be unable to identify a suitable alternate provider within a reasonable geographic proximity.

5. Amending Existing 7 CFR Part 16 To Include Executive Order 13559 Changes

USDA also proposes to amend the other paragraphs in 7 CFR part 16 to include the new Executive Order 13559 principles and to make clarifying changes, including the replacement of the term ''inherently religious'' with ''explicitly religious,'' and adding the term ''USDA direct assistance'' where appropriate.

III. Regulatory Information

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and, therefore, OMB has not reviewed this proposed rule.

B. Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your answers in response to the questions below, as comments. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. USDA has determined that this rule will not have a significant impact on a substantial number of small entities. Consequently, USDA has not prepared a regulatory flexibility analysis.

D. Executive Order 12988: Civil Justice Reform

This proposed rule has been reviewed in accordance with Executive Order 12988, ''Civil Justice Reform.'' The provisions of this proposed rule will not have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with such provision or which otherwise impede their full implementation. The rule will not have retroactive effect.

E. Executive Order 13132: Federalism

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule would not have any substantial direct effect on 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. Also, this rule would not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

F. Executive Order 12372: Intergovernmental Review of Federal Programs

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons set forth in the Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule has been reviewed for compliance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' The Executive Order imposes requirements on the development of regulatory policies that have Tribal implications or preempt Tribal laws. The USDA Office of Tribal Relations has concluded that the policies contained in this rule do not, to our knowledge, preempt Tribal law.

H. Paperwork Reduction Act (PRA)

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35, as amended), an agency may not conduct or sponsor a collection of information, and a person is not required to respond to a collection of information, unless the collection displays a currently valid OMB control number. The new information collection requirements contained in the proposed rule have been submitted to OMB for review, pursuant to 44 U.S.C. 3507(d).

The proposed rule includes a new information collection section. Sections 16.4(f) and (g) would impose requirements on faith-based

organizations that carry out activities under a USDA program with direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in this proposed rule. Beneficiaries can provide a written response that may impose a burden under the PRA, and faith-based organizations must provide a referral if a beneficiary or prospective beneficiary objects to the religious character of the organization.

USDA estimates that a faith-based organization would need 2 minutes to distribute to each beneficiary the notice required in these proposed regulations. This estimate takes into consideration the likelihood that, in one-on-one interactions between a staff member and a beneficiary, providing the notice might take longer than a minute. Conversely, providing notice to a group of beneficiaries at the same time would take significantly less than a minute for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group.

USDA estimates that in cases where a beneficiary objects to the religious character of a faith-based organization, the time required for the faith-based organization to make a reasonable effort to identify an alternate provider and refer a beneficiary to that provider would be about 2 hours. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs, to the one under which the beneficiary is being served by the faith-based organization. This estimate includes the time required in a situation where the beneficiary asks the faith-based organization to follow up either with the beneficiary or the alternative service provider in order to determine whether the referral was successful.

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), implemented a similar referral requirement in its 2003 final rule, Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition From Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding from SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants (SAMHSA Program Rule), 68 FR 56430. Since SAMHSA implemented the referral requirement, the SAMHSA program office has received no reports of requests for an alternate provider. Because faith-based organizations are required to provide a written notification of the beneficiary's rights under this proposed rule, requests for referrals may be more likely. However, given SAMHSA's experience, USDA estimates that 0.10 percent of beneficiaries and potential beneficiaries would request referrals to alternate providers. USDA will monitor its programs to assess whether this estimate is accurate.

USDA is not estimating the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations. USDA has recordkeeping requirements included in information collection instruments for USDA programs. Those collection instruments cover burdens imposed by program and administrative requirements that exist under current, OMB-approved, information collection instruments; each of those collections has an OMB-assigned information collection control number.

The recordkeeping burden that this proposed rule would add to those program-specific information collection instruments is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the recordkeeping burden associated with these proposed regulations is large enough to be measurable, that burden will be calculated under the recordkeeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of the recordkeeping burden in this PRA analysis.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

[Faith based organizations reporting and recordkeeping burden]

Reg. section	Program	Number of respondents	Number of responses per beneficiary	Estimated average response time	Estimated annual burden hours
24 Section 5.109(g)	NIFA—Community Foods Projects Competitive Grants Program:				
	Written Notice of Rights handout	1,000	1	.03 (2 min.)	30
	Referral	1	1	2.00 hrs.	2
	FNS—The Emergency Food Assistance Program—Pantries (TEFAP): [13]				
	Referral	3,042	1	2	6,084
	FNS—The Emergency Food Assistance Program—Kitchens (TEFAP):				
	Referral	368	1	2	736
	RD—Community Facilities:				
	Written Notice of Rights handout	13,875	1	0.03	416
	Referral	14	1	2	28
	RD—Business Programs:				
	Written Notice of Rights handout	2,319	1	0.03	70
	Referral	2	1	2	4
	RD—Housing:				
	Written Notice of Rights handout	1,577	1	0.03	47
	Referral	2	1	2	4
	Totals	22,181			7,421

In accordance with 5 CFR 1320.8(d)(1), USDA is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposed rule by name and docket number (RIN 0503–AA55) and must be sent to:

USDA Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Email: *oira_submission@omb.eop.gov*, Fax: (202) 395–6947 and

Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Ave. SW., Washington, DC 20250.

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* USDA strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by USDA, and enables USDA to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

[13] Analysis for Written Notice of Rights handout not provided for TEFAP, as notification will be posted in a prominent place in lieu of a handout.

I. E-Government Act Compliance

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

List of Subjects in 7 CFR Part 16

Administrative practice and procedure. Grant programs.

Accordingly, 7 CFR Subtitle A is amended as set forth below:

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

■ 1. The authority citation for Part 16 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141; E.O. 13280, 67 FR 77145; E.O. 13559, 75 FR 71319.

■ 2. Revise paragraph (b) of § 16.1 to read as follows:

§ 16.1 Purpose and applicability.

* * * * *

(b) Except as otherwise specifically provided in this part, the policy outlined in this part applies to all recipients and subrecipients of USDA assistance to which 2 CFR part 400 applies, and to recipients and subrecipients of Commodity Credit Corporation assistance that is administered by agencies of USDA.

§§ 16.2 through 16.5 [Redesignated as §§ 16.3 through 16.6]

■ 3. Redesignate §§ 16.2 through 16.5 as §§ 16.3 through 16.6, respectively.

■ 4. Add a new § 16.2 to read as follows:

§ 16.2 Definitions.

As used in this part:

(a) *USDA direct assistance* is Federal financial assistance provided by USDA and means that the Federal Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). In general, USDA assistance shall be treated as direct, unless it meets the definition of ''USDA indirect assistance.''

(b)(1) *USDA indirect assistance* is Federal financial assistance provided indirectly by USDA and means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered ''indirect'' within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution when

(i) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(2) The recipients of sub-grants that receive Federal financial assistance through State-administered programs (*e.g.,* flow-through programs such as the National School Lunch Program authorized under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751, *et seq.*) are not considered recipients of ''USDA indirect assistance,'' as those terms are used in Executive Order 13559. These recipients of sub-awards are considered recipients of USDA direct assistance.

(c) *Intermediary* means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that accepts USDA direct assistance and distributes that assistance to other organizations that, in turn, provide government-funded services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant, or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

■ 4. Revise paragraph (a) and the introductory text of paragraph (b) of newly redesignated § 16.3 to read as follows:

§ 16.3 Rights of religious organizations.

(a) A religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in USDA assistance programs. Neither the Federal

Government nor a State or local government receiving USDA assistance shall, in the selection of service providers, discriminate for or against a religious organization on the basis of the organization's religious character or affiliation. Additionally, decisions about awards of USDA direct assistance or USDA indirect assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

(b) A religious organization that participates in USDA assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a religious organization may:

* * * * *

■ 5. Amend newly redesignated § 16.4 as follows:

■ a. Revise paragraphs (b) and (d); and

■ b. Add new paragraphs (e), (f), and (g).

The revisions and additions read as follows:

§ 16.4 Responsibilities of participating organizations.

* * * * *

(b) Organizations that receive USDA direct assistance under any USDA program may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services supported with USDA direct assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with USDA direct assistance, and participation must be voluntary for beneficiaries of the programs or services supported with such USDA direct assistance. These restrictions on explicitly religious activities do not apply where USDA funds or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

* * * * *

(d)(1) USDA direct assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting USDA programs and activities and only to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and explicitly religious activities, USDA direct assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 2 CFR part 400).

(2) Any use of USDA direct assistance funds for equipment, supplies, labor, indirect costs, and the like shall be prorated between the USDA program or activity and any use for other purposes by the religious organization in accordance with applicable laws, regulations, and guidance.

(3) Nothing in this section shall be construed to prevent the residents of housing who are receiving USDA direct assistance funds from engaging in religious exercise within such housing.

(e) USDA direct assistance under any USDA program may not be used for explicitly religious activities, speech, and materials generated or controlled by the administrators, instructors, or officials of the organization receiving USDA direct assistance.

(f) *Beneficiary protections: Written notice.* (1) Faith-based organizations that receive USDA direct assistance under any USDA program must give written notice in a manner prescribed by USDA to all beneficiaries and prospective beneficiaries of their right to be referred to an alternate provider when available. The written notice must be given in a manner prescribed by USDA, and state that:

(i) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(ii) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(iv) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternate provider; the organization may not be able to guarantee, however, that in every instance, an alternate provider will be available; and

(v) Beneficiaries may report violations of these protections to USDA (or, the intermediary, if applicable).

(2) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(g) *Beneficiary protections: Referral requirements.* If a beneficiary or prospective beneficiary of a social service program supported by USDA objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternate provider, within reasonable geographic proximity to the provider, if available, to which the prospective beneficiary has no objection. In making the referral, the organization shall comply with all applicable privacy laws and regulations.

(1) A referral may be made to another faith-based organization, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(2) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternate provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization, if one is available. The alternate provider also should have the capacity to accept additional clients, if one with capacity to accept additional clients is available.

(3) When the organization makes a referral to an alternate provider, or when the organization determines that it

is unable to identify an alternate provider, the organization shall notify the awarding entity. If the organization is unable to identify an alternate provider, the awarding entity shall determine whether there is any other suitable alternate provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternate provider may request assistance from USDA or a State or local government receiving USDA direct assistance.

(4) In some cases, USDA may require that the awarding entity provide the organization with information regarding alternate providers. Such information regarding alternative providers should include providers (including secular organizations) within a reasonable geographic proximity that offer services that are similar in substance and quality and that would reasonably be expected to have the capacity to accept additional clients, provided any such organizations exist. An organization which relies on such information provided by the awarding entity shall be considered to have undertaken reasonable efforts to identify an alternate provider under this subpart.

■ 6. Revise newly redesignated § 16.5 to read as follows:

§ 16.5 Effect on State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the USDA direct assistance funds or comingle them. If the funds are comingled, the provisions of this part shall apply to all of the comingled funds in the same manner, and to the same extent, as the provisions apply to the USDA direct assistance.

■ 7. Add Appendix A to part 16 to read as follows:

Appendix A to Part 16—Written Notice of Beneficiary Rights

Name of Organization:
Name of Program:
Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with USDA direct assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider. We cannot guarantee, however, that in every instance, an alternate provider will be available; and
- You may report violations of these protections to __.

We must provide you with this written notice before you enroll in our program or receive services from the program, as required by 7 CFR part 16.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternate provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

( ) Please check if you want to be referred to another service provider.

Please provide the following information if you want us to follow up with you:

Your Name:

Best way to reach me (phone/address/email):

Please provide the following information if you want us to follow up with the service provider only.

Your Name:

You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the service provider about your referral.

( ) Please check if you do not want follow up.

FOR STAFF USE ONLY

1. Date of Objection: ____/____/____
2. Referral (check one):

( ) Individual was referred to (name of alternate provider and contact information):

( ) Individual left without a referral

( ) No alternate service provider is available—summarize below what efforts you made to identify an alternate provider (including reaching out to USDA or the intermediary, if applicable):

3. Follow-up date: ____/____/____

( ) Individual contacted alternate provider

( ) Individual did not contact alternate provider

4. Staff name and initials:

Dated: July 16, 2015.

Thomas J. Vilsack,

Secretary.

[FR Doc. 2015–18262 Filed 8–5–15; 8:45 am]

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Part VII

Department of Education

2 CFR Part 3474

34 CFR Parts 75 and 76

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs; Proposed Rule

DEPARTMENT OF EDUCATION

2 CFR Part 3474

34 CFR Parts 75 and 76

[ED–2014–OS–0131]

RIN 1895–AA01

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs

AGENCY: Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Education Department General Administrative Regulations (EDGAR) governing direct grant programs and State-administered programs as they relate to faith-based organizations. The Secretary also proposes to amend the regulations governing uniform administrative requirements, cost principles, and audit requirements for Federal awards. The amendments are designed to implement Executive Order 13279, as amended by Executive Order 13559. Executive Order 13279 established fundamental principles to guide the policies of Federal agencies, including the Department of Education, regarding the participation of faith-based and other community organizations in programs that they administer. Executive Order 13559 amended Executive Order 13279 to clarify those principles and add certain protections for beneficiaries of Federal social service programs who are served by faith-based organizations.

DATES: We must receive your comments on or before October 5, 2015.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Are you new to the site?''.
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Rev. Brenda Girton-Mitchell, Director, Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Room 1E110–A, Washington, DC 20202–6132.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Rev. Brenda Girton-Mitchell, Director, Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Room 1E110–A, Washington, DC 20202–6132. Telephone: (202) 401–1876.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments in person in Room 1E110–A, 400 Maryland Avenue SW., Washington, DC 20202–6132, between 8:30 a.m. and 4:00 p.m. Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

On December 12, 2002, President George W. Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations (67 FR 77141). Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for these organizations, and to expand opportunities for, and strengthen the capacity of, these organizations to meet the need for social services in America's communities. In addition, Executive Order 13279 directed specified agency heads, including the Secretary of Education, to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with, and necessary to further, the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

To comply with this Executive Order, on June 4, 2004, the Department amended Parts 74, 75, 76, and 80 of EDGAR (69 FR 31708). These amendments clarified that faith-based organizations are eligible to participate in programs administered by the Department on the same basis as any other private organization, with respect to programs for which those other organizations are eligible. *See* 34 CFR 74.44(f), 75.52, 76.52, and 80.36(j) (CFR 2014 edition). The Department also has regulations, predating the regulations implementing Executive Order 13279, that prohibit the use of Federal funds to support religious activities. *See* 34 CFR 75.532 and 76.532.

Shortly after taking office, on February 9, 2009, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and

Neighborhood Partnerships (74 FR 6533). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council on Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled ''A New Era of Partnerships: Report of Recommendations to the President'' in March 2010. Available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.* The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010 (75 FR 71319). Available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf.* Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs. These protections include: (1) Providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services; and (2) ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in, or receive services from, the program;
- Affirm that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of that interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;
- Affirm that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Clarify (1) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance (the prior Executive Order stated this requirement as applying to ''inherently religious'' activity); (2) that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance; and (3) that participation in those activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- Emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the Executive order;
- Require agencies that provide Federal financial assistance for social service programs to post on their Web sites regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations, as well as a list of entities receiving that assistance;
- Clarify that the standards in the current and proposed agency regulations apply to sub-awards as well as to prime awards; and
- Direct agencies to adopt regulations and guidance that distinguish between ''direct'' and ''indirect'' Federal financial assistance for the purpose of implementing this Executive order.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive order also required that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the U.S. Department of Justice, issue guidance to agencies on the implementation of the Executive order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads, including the Secretary of Education, to adopt regulations and guidance that will fulfill the requirements of the Executive order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. These proposed new regulations and amendments are part of the Department's efforts to comply with the Executive order.

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

Note: While the actual proposed amendments to title 2 will appear in the **Federal Register** before the amendments to title 34, we discuss the amendments to title 34 first, because that order provides the context needed to better understand the amendments the Department is proposing to title 2.

Title 34—Education

Subtitle A—Office of the Secretary, Department of Education

PART 75—DIRECT GRANT PROGRAMS; PART 76—STATE ADMINISTERED PROGRAMS

Sections 75.52 Eligibility of Faith-Based Organizations for a Grant and 76.52 Eligibility of Faith-Based Organizations for a Subgrant

Current Regulations: Current §§ 75.52 and 76.52 govern the eligibility of faith-based organizations to apply for and receive funding under Department programs on the same basis as any other private organizations. Current paragraph (a) of these provisions makes clear that faith-based organizations are eligible to participate in the Department's grant programs on the same basis as any other private organization. Current paragraph (b) provides that a faith-based organization that receives a grant under a program of the Department is subject to the provisions in §§ 75.532 and 76.532, as applicable. These sections prohibit use of Federal funds for religious purposes. Under current §§ 75.52(c) and 76.52(c), an organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from services under a program of the Department and participation in those activities must be voluntary. However, under current paragraph (d), a faith-based organization that applies for or receives a grant may retain its religious identity. Current paragraph (e) prohibits a private organization that receives a grant or subgrant under a program of the Department from discriminating against beneficiaries or prospective beneficiaries on the basis of religion. Current paragraph (f) addresses a grantee's or subgrantee's contribution of its funds in excess of what is required and current paragraph (g) addresses a religious organization's exemption from

the Federal prohibition on employment discrimination on the basis of religion.

Proposed Regulations: The Secretary proposes to revise paragraph (a)(2) of §§ 75.52 and 76.52 to require the Department to ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief. Consistent with Executive Order 13559, this paragraph would further clarify that a faith-based organization is eligible to participate in the Department's direct and State-administered grant programs on the same basis as any other private organization.

The Secretary proposes to revise paragraph (c) of §§ 75.52 and 76.52. The current paragraph (c) would be redesignated as paragraph (c)(1) and, in that paragraph, the term ''inherently religious'' would be replaced with the term ''explicitly religious.'' This change will provide greater clarity and more closely match constitutional standards as they have developed in case law.

The Secretary also proposes to add paragraphs (c)(2) and (c)(3) to the revised paragraph (c). Paragraph (c)(2) would clarify that a faith-based organization that provides services to a beneficiary under a program of the Department supported only by ''indirect Federal financial assistance'' is not subject to the restrictions under newly redesignated paragraph (c)(1). To clarify the distinction between ''indirect Federal financial assistance'' and ''direct Federal financial assistance'' as used under these proposed regulations, paragraph (c)(3) would add definitions of those terms.

Finally, the Secretary proposes to revise paragraph (e) of §§ 75.52 and 76.52 to clarify that all private organizations that receive funds under a program of the Department are prohibited from discriminating against a beneficiary in the provision of program services on the basis of religion or religious belief.

Reasons: Consistent with Executive Order 13279, current regulations prohibit nongovernmental organizations from using direct Federal financial assistance (such as government grants, subgrants, contracts, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious'' has proven confusing, however. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. *See* Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

While the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973)). It has also said that a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent that they are allocated to those activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The teaching or acknowledgement of religion as a historical or cultural reality is also not an explicitly religious activity.

We note that, notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be federally financed under the Establishment Clause of the First Amendment to the U.S. Constitution and not subject to the direct Federal financial assistance restrictions; for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because, where there is extensive government control over the environment of the federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services are not explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program uses neutral language to ask beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the government

program did not orchestrate or encourage such comments.

Under current regulations, the Department characterizes ''inherently religious activities'' as including ''religious worship, instruction, or proselytization.'' The scope of activities encompassed by the term ''inherently religious activities'' is the same as the scope of activities encompassed under the proposed definition of ''explicitly religious activities,'' so the proposed regulations would not change or diminish existing regulatory protections for the religious identity of faith-based organizations. However, by proposing to change ''inherently religious activities'' to ''explicitly religious activities,'' the proposed regulations would provide greater clarity regarding the scope of the regulations and more closely match constitutional standards as they have developed in case law. Thus, the proposed regulations would not affect, for example, an organization's ability to use religious terms in its organizational name, select board members on a religious basis, include religious references in its mission statement and other organizational documents, and use its facilities without removing or altering religious art, icons, scriptures, and other symbols as provided under current §§ 75.52(d) and 76.52(d).

Executive Order 13559 also directed agencies to establish regulations that distinguish between ''direct'' and ''indirect'' Federal financial assistance. This is necessary because the limitations on explicitly religious activities under §§ 75.52 and 76.52 apply to programs that are supported with ''direct'' Federal financial assistance but do not apply to programs supported only by ''indirect'' Federal financial assistance. These definitions also are needed because the new notice and referral requirements under §§ 75.712–75.713 and 76.712–76.713, apply only to faith-based organizations that provide services under a program of the Department supported by ''direct'' Federal financial assistance, either through a grant, subgrant, or contract, and do not apply to programs supported by only ''indirect'' Federal financial assistance.

Programs are supported with ''direct'' Federal financial assistance when a grantee, subgrantee or contractor selected by the Department (or a grantee or subgrantee, as applicable) provides services under a program of the Department to a beneficiary. Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary. For example, if the government allowed a beneficiary to secure needed services on his or her own from among any available service providers using a mechanism such as a government-backed voucher or certificate to pay for the services, it would be a program of indirect Federal financial assistance.

Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either way, the government empowers the beneficiaries to choose for themselves where to receive the needed services, including those locations where explicitly religious activities also occur, through a faith-based or other neighborhood organization. The government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. In some indirect Federal financial assistance transactions, the government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher ''scheme'' at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of ''indirect Federal financial assistance.''

We note that the definitions of ''direct Federal financial assistance'' and ''indirect Federal financial assistance apply only to the regulations that implement the Executive order found in 34 CFR parts 75 and 76, and 2 CFR part 3474. These proposed regulations would not change the extent to which an organization is considered a ''recipient of Federal financial assistance'' for the purposes of the Department's civil rights regulations in 34 CFR parts 100, 104, 106, and 110.

Under the proposed regulations, a program shall be treated as supported by direct Federal financial assistance unless it meets the definition of ''indirect Federal financial assistance.'' Accordingly, most of the Department's programs would fall within the definition of a program supported by ''direct Federal financial assistance'' under the proposed regulations.

There are exceptions, however. For example, in most cases a supplemental educational service (SES) provider that contracts with a local educational agency (LEA) pursuant to section 1116 of Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended, would be providing services under a program supported only by ''indirect Federal financial assistance'' because, by statute, the government program is neutral toward religion and it is the parents who choose from among approved providers of SES. Only after a parent selects an approved provider does the LEA enter into a contract with the provider to facilitate payment. As long as a parent has at least one adequate secular option for an SES provider, then the payment to the SES provider would fall within the definition of ''indirect Federal financial assistance.''

The District of Columbia School Choice Incentive Program (DC Choice Program), sections 3001–3014 of the Scholarships for Opportunity and Results Act (Division C of Pub. L. 112–10, 125 Stat. 199–212 (April 15, 2011), as amended by Public Law 112–92, 125 Stat. 6–7 (Feb. 1, 2012)), which was modeled after the school voucher program upheld by the Supreme Court in *Zelman,* also would be considered to provide services under a program supported only by ''indirect Federal financial assistance'' under the proposed regulations. Under the DC Choice Program, nonprofit organization(s) receive federal funds to administer a scholarship program that makes scholarship payments to the parent of an eligible student from a low-income household in a manner which ensures that such payments will be used for the payment of tuition, fees, and transportation expenses for a participating private school. Similar to SES, a parent of a scholarship student selects from among the participating schools, which include both secular and non-secular options, with the school receiving payment based upon the

parent's decision, not a decision of the government.

Although in most cases both SES providers and participating private schools in the DC Choice Program would be providing services under a program supported only by ''indirect Federal financial assistance'' under the proposed definition, they still would be required to satisfy all applicable statutory requirements. For example, the requirement under section 1116(e)(5)(D) of the ESEA (20 U.S.C. 6316(e)(5)(D)) that an SES provider ensure that instruction is ''secular, neutral, and nonideological'' would not be altered by the proposed regulations. Similarly, under the DC Choice Program, the requirement that participating private schools ''shall not discriminate against program participants or applicants on the basis of race, color, national origin, religion or sex'' would continue to apply. Moreover, both the LEA that contracts with the SES provider and the eligible nonprofit organization(s) that makes scholarship payments would continue to be recipients of ''direct Federal financial assistance.''

Finally, Executive Order 13559 clarified that *all* organizations that receive Federal financial assistance under a social service program should be prohibited from discriminating against beneficiaries or potential beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Consistent with the Executive order, these proposed regulations would clarify that the scope and coverage of the existing non-discrimination provisions in paragraphs (e) of §§ 75.52 and 76.52 encompass all private organizations that receive funds under a program of the Department and not only those organizations that receive grants or subgrants.

Sections 75.712 and 76.712 Beneficiary Protections: Written Notice; Appendix A to Part 75

Current Regulations: None.

Proposed Regulations: Consistent with Executive Order 13559, the Secretary proposes new regulations requiring grantees and subgrantees that are faith-based organizations, and that provide services under a program of the Department, to provide a written notice of certain protections to beneficiaries of the program. Specifically, an organization that receives direct Federal financial assistance, as defined in these proposed regulations, would be required to give notice to beneficiaries that—

(1) The organization may not discriminate against a beneficiary on the basis of religion or religious belief;

(2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by the beneficiaries in those activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object; and

(5) A beneficiary may report violations of these protections to the Department or the grantee administering the program.

The Secretary also proposes to add Appendix A to part 75 that provides the notice that faith-based organizations must give to beneficiaries. If a beneficiary requests referral to another service provider, the required notice includes a clear method for a beneficiary to request that referral. This part of the notice, if provided to the beneficiary on paper, may be detached so the faith-based service provider can keep a record of the requested referral. Under the proposed regulations, grantees, subgrantees, and contractors that are subject to the regulation are authorized to translate the notice into other languages and formats to communicate with the entire population of beneficiaries and prospective beneficiaries that can receive services under a Department program. Federal civil rights laws, including Title VI of the Civil Rights Act and Section 504 of the Rehabilitation Act, will often *require* that the written notice be provided in other languages to those who have limited proficiency in English and provided in accessible formats to individuals with disabilities.

To account for unique circumstances that could arise under some programs, the proposed regulations also provide that, when the nature of the service provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

Reasons: Executive Order 13559 affirms a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when considering obtaining services from providers with a religious affiliation.

The Executive order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through grants and subgrants). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance and participation in those religious activities must be completely voluntary for beneficiaries of those programs.

Executive Order 13559 also requires that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must refer that individual to an alternative provider (addressed more fully in the discussion of proposed §§ 75.713 and 76.713). Relative to this requirement, the Executive order further requires a faith-based organization that is administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the Federal agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider, when an alternative provider is available.

Sections 75.713 and 76.713 Beneficiary Protections: Referral Requirements

Current Regulations: None.

Proposed Regulations: The Secretary proposes regulations that would require grantees and subgrantees that are faith-

based organizations, and that provide services under a program of the Department, to undertake reasonable efforts to identify, and refer a beneficiary or prospective beneficiary to, an alternative provider if the beneficiary objects to the religious character of the faith-based organization.

The proposed regulations further provide that, in satisfying the referral requirement, a faith-based organization may make a referral to another faith-based organization if the beneficiary does not object. However, if a beneficiary requests a secular provider, and one is available, the organization must make a referral to that provider.

With respect to referrals, we recognize that there are limits on the universe of providers that would be appropriate for a beneficiary. Therefore, the proposed regulations also provide that, except where services are provided by telephone, internet, or other similar means, a faith-based organization must refer the beneficiary to an alternative provider that—

(1) Is in reasonable proximity to the location where the beneficiary is receiving or would receive services;

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

Finally, the proposed regulations would require that, when a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the awarding entity (*i.e.,* either the Department under a direct grant program or the State under a State-administered program). If the organization is unable to identify an alternative provider, the awarding entity must determine whether there is any other suitable alternative provider to which the beneficiary may be referred. We recognize, however, that in some instances the awarding entity may also be unable to identify a suitable provider.

Reasons: As noted in the discussion of proposed §§ 75.712 and 76.712, Executive Order 13559 requires that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must promptly undertake reasonable efforts to refer that individual to an alternative provider to which the beneficiary has no objection.

We note that, if a federally supported alternative provider meets these requirements and is acceptable to the beneficiary, the faith-based organization would be required to make a referral to that provider. If, however, there is no federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, the organization would make a referral to a provider that does not receive Federal financial assistance and meets the requirements.

Sections 75.714 and 76.714 Subgrants, Contracts, and Other Agreements With Faith-Based Organizations

Current Regulation: None.

Proposed Regulations: The Secretary proposes regulations to require that, if a grantee or subgrantee under a program of the Department has the authority to select a private organization to provide services under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations.

Reasons: This requirement recognizes that, although grantees and subgrantees may have the authority to distribute Federal financial assistance to other organizations, they remain accountable for the use of those funds and must fulfill their traditional responsibility to effectively manage the day-to-day operations of grant- and subgrant-supported activities and monitor those activities to ensure compliance with applicable Federal requirements.

Title 2—Grants and Agreements

Chapter 34

PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

Section 3474.15 Contracting With Faith-Based Organizations

Current Regulations: Sections 74.44 (Procurement Procedures) and 80.36 (Procurement) established the policies and procedures grantees must follow when procuring property and services under a grant or subgrant. Sections 74.44(f) and 80.36(j) established specific requirements applicable to procurements involving faith-based organizations. Former 34 CFR parts 74 and 80 can be viewed at the following site: *http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+34%2FSubtitle+A%2FChapter%2FPart+80&oldPath=Title+34%2FSubtitle+A%2FChapter&isCollapsed=true&selectedYearFrom=2014&ycord=2000.*

These two sections were removed from title 34 when the Department adopted the ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards'' (Uniform Guidance) established by OMB in title 2, part 200, which OMB published as Interim Final Guidance on December 26, 2013. *See* 78 FR 78590. That guidance has been adopted by the Department and establishes requirements applicable to all grantees of the Department, covering a number of subjects that were formerly located in numerous OMB Circulars, common rules, and other directives, including the Department's regulations in 34 CFR parts 74 and 80. See 79 FR 75871, December 19, 2014.[1] Therefore, the Secretary does not propose to amend the regulations in parts 74 and 80 but, instead, proposes to amend part 3474, which was recently established by the Department to adopt the Uniform Guidance in 2 CFR part 200. The Department does not intend that the proposed amendments to title 2 of the CFR establish any policies inconsistent with the uniform regulations proposed by other agencies implementing E.O. 13559; the requirements regarding contracting with faith-based organizations in proposed 2 CFR 3474.15 merely restate current policy as formerly expressed in 34 CFR parts 74 and 80 while adding proposed notice and referral requirements to implement E.O. 13559.

The Department is authorized, after consultation with OMB, to establish grant-related requirements in addition to those established in part 200. Review of this notice of proposed rulemaking (NPRM) by OMB under Executive Order 12866 and 2 CFR 3474.10 constitutes the required review.

Proposed Regulations: The proposed amendments to part 3474 would add new § 3474.15 to require that grantees and subgrantees that contract with faith-based organizations to provide services under a program of the Department must impose certain requirements, as described in the proposed regulations, on faith-based contractors.

The regulations in former parts 74 and 80 that included requirements related to faith-based organizations establish the procedures that grantees and subgrantees must use to procure goods and services. *See* former 34 CFR 74.44(f)

[1] Preamble language specific to the Department begins on page 75873 and the Department's amendments to titles 2 and 34 of the CFR start on page 76091.

and 80.36(j) in the 2014 edition of title 34, CFR.

The guidance in part 200 that most closely aligns with §§ 74.44(f) and 80.36(j) is now contained in 2 CFR 200.318, General procurement standards. Therefore, the Secretary proposes to establish a new § 3474.15 to supplement the procurement requirements in § 200.318. The new section would be based on the language in former §§ 74.44(f) and 80.36(j) and would revise the content formerly in those sections to add requirements in 2 CFR 3474.15 that are needed to implement Executive Order 13559.

These proposed revisions conform to the same requirements that would be imposed on grantees and subgrantees under the amendments proposed in this NPRM to parts 75 and 76, extending those requirements to faith-based contractors that provide services under a direct Federal assistance program of the Department.

Reasons: These proposed amendments are intended to ensure the consistency of the Department's procurement regulations applicable to grantees and subgrantees with the requirements that would be in parts 75 and 76 under these proposed regulations. The reasoning supporting the proposed amendments to title 34 of the Code of Federal Regulations, as set forth above, applies to these changes as well.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from the requirements of Executive Order 13559 and those we have determined as necessary for administering the Department's programs and activities.

Executive Order 13559 requires grant-making agencies to adopt standard requirements regarding participation of faith-based organizations in assistance programs of the Federal government. The content of these proposed regulations was established in guidance to agencies prepared by the Working Group and the proposed regulations are consistent with that guidance. The Secretary proposes minor modifications necessary to maintain consistency with the Department's other regulations and to address unique elements of the Department's programs. The Working Group considered the least burdensome means for implementing Executive Order 13559 and those considerations were incorporated into the regulatory recommendations to agencies.

Elsewhere in this section, under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 75.52.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in

making the proposed regulations easier to understand? If so, how?

• What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define institutions as ''small entities'' if they are for-profit or nonprofit institutions with total annual revenue below $15,000,000, and defines ''non-profit institutions'' as small organizations if they are independently owned and operated and not dominant in their field of operation, or as small entities if they are institutions controlled by governmental entities with populations below 50,000. The Secretary invites comments from small entities as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department must promulgate these proposed regulations to impose information collection and the third-party notice requirements which implement the requirements of Executive Order 13559. Proposed 34 CFR 75.712, 75.713, Appendix A to part 75, 76.712, 76.713, and 2 CFR 3475.15 contain third-party notice and information collection requirements. Under the PRA, the Department has submitted a copy of these sections and Appendix A to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations, we will display the control number assigned by OMB to the information collection and third-party notice requirements proposed in this NPRM and adopted in the final regulations.

Beneficiary Protections: Written Notice

34 CFR 75.712 and 76.712 would require faith-based organizations that provide services under a grant or subgrant from the Department to notify beneficiaries of certain requirements the organization must fulfill regarding beneficiaries. The content of the notice and the actions the faith-based organization must take if a beneficiary objects to the religious character of the organization are described in this preamble under discussion of the proposed amendments to §§ 75.612 and 76.612.

These proposed regulations would also require all grantees and subgrantees that contract with FBOs to provide services under a program of the Department to impose on those contractors the same responsibility to provide notice to beneficiaries as is required of FBO grantees and subgrantees. We believe that most grantees and subgrantees do not contract out for the services they administer under their grants and subgrants because these recipients are required to directly administer or supervise the administration of the project or program. See 34 CFR 75.701 and 76.701. However, we think that at least a few grantees or subgrantees contract with nonprofit organizations to provide program services. See the discussion later in this PRA section of the preamble under the heading *Notice and Referral Burden for Faith-Based Contractors (2 CFR 3474.15)*.

The notice that faith-based organizations must give beneficiaries is specified in the proposed Appendix A to 34 CFR part 75. The burden imposed on FBOs to provide the notice is estimated in this Paperwork section of the preamble.

Beneficiary Protections: Referral Requirements

The proposed regulations in 34 CFR 75.713 and 76.713 and 2 CFR 3474.15 also would impose burden on faith-based grantees, subgrantees, and contractors that provide services to beneficiaries under a program of the Department to make reasonable efforts to identify and refer requesting beneficiaries to alternative service providers. The burden of identifying and referring a beneficiary to an alternative service provider is estimated in this PRA section of the preamble under the heading *How Do We Calculate the Burden the Proposed Regulations Would Have on Faith-Based Organizations*?

Recordkeeping Requirements

Faith-based organizations that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. See 34 CFR 75.730–75.732 and 76.730–76.732. As discussed earlier in this preamble, we believe that faith-based organizations could meet the recordkeeping requirements in these proposed regulations by keeping, in the case of paper notices, the bottom portion of the notice required under the proposed Appendix A to part 75. For those faith-based organizations that provide notice electronically, the notices would have to include a means for beneficiaries to request an alternative placement—and follow-up, if desired—that is recorded so the faith-based grantee, subgrantee, or contractor may retain evidence of compliance with these proposed regulations. However, as explained in the following paragraphs, we do not include an estimate of the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations.

The Department has recordkeeping requirements included in information collection instruments for Department programs. Those collection instruments cover burdens imposed by program and administrative requirements that exist under current, OMB-approved, information collection instruments and each of those collections has an OMB-assigned information collection control number.

The recordkeeping burden that these proposed regulations would add to those program-specific information collection instruments is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the recordkeeping burden associated with these proposed regulations is large enough to be

measurable, that burden will be calculated under the recordkeeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of recordkeeping burden in this PRA analysis.

How do we calculate the burden the proposed regulations would have on faith-based organizations?

We estimate that, for a student or other beneficiary served under a program of the Department, a faith-based organization would need two minutes to distribute to each beneficiary the notice required in proposed 34 CFR 75.712 and 76.712. This estimate takes into consideration the likelihood that, in one-on-one interactions between a staff member and a beneficiary, providing the notice might take longer than two minutes. Conversely, providing notice to a group of beneficiaries at the same time might take significantly less than two minutes for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group. This estimate of the time needed to distribute the notice required under the Appendix A to part 75 also includes the time needed for a beneficiary to read the notice and decide if she or he wants to request a referral.

To determine the total time burden that would be imposed on faith-based organizations to distribute the notice required under these proposed regulations, we multiplied the time required to distribute the notice by the estimated number of beneficiaries served by faith-based organizations.

Notice Burden Under Discretionary Grant Programs (§ 75.712)

Calculating the number of faith-based organizations that provide services under programs of the Department poses challenges. Our estimate of the number of faith-based organizations that receive discretionary grants from the Department is not exact because we do not collect information that directly identifies whether a grantee is a faith-based organization. We do collect information identifying whether a grantee is a nonprofit, private organization and have used that information as a starting point to estimate of the number of discretionary grants awarded to faith-based organizations. We reviewed the names of our nonprofit, private grantees to determine whether they use religious terms in their names and used the number so identified as a the basis for our determination of the number of faith-based organizations that receive discretionary grants from the Department.

We understand that the use of a religious term in the name of an organization does not necessarily mean that the organization is a faith-based organization. Some organizations that use religious terms in their names may no longer pursue religious objectives and some organizations that do not have religious terms in their names may pursue religious objectives. Thus, our estimate may either over-count or under-count the number of discretionary grants made to faith-based organizations. This method of identification, while not exact, is the only way we could estimate the number of grantees that are faith-based organizations and we have relied on a number calculated using this method to estimate the burden imposed on faith-based organizations under these proposed regulations.

The Department determined, based on the calculation method described above, that it has approximately 6,152 active discretionary grants and approximately 280 of those active grants are held by faith-based organizations. Using these numbers, we calculated that 4.5% of our discretionary grants are awarded to faith-based organizations. To determine the time required to provide the notices under all discretionary grant programs that provide services to beneficiaries, we then multiplied 4.5% by the number of beneficiaries served under the discretionary grant programs and multiplied that result by the time needed to give notice to each beneficiary (two minutes).

We estimate that the discretionary grant programs of the Department serve a total population of 10,003,323 students and other beneficiaries. Based on our estimate of the percentage of grants awarded to faith-based organizations, we estimate that the total number of beneficiaries served under these programs by faith-based organizations is 450,150 students and other beneficiaries ($10{,}003{,}323 \times 4.5\% = 450{,}150$). Thus, we estimate that the total time burden imposed to provide notice to beneficiaries is 15,005 hours (450,150 [beneficiaries] $\times$ 2 [minutes per beneficiary] $\div$ 60 [to convert minutes to hours] = 15,005 hours).

Notice Burden Under State-Administered Programs (§ 76.712)

Under a State-administered program for which nonprofit organizations are eligible to receive subgrants, estimating the number of faith-based organizations that receive subgrants is particularly difficult. We do not have a direct relationship with subgrantees and asking the States to estimate the number of subgrantees that are faith-based organizations would impose significant burden on the States, which would require approval of an information collection request of its own. We believe that conducting an information collection for the sole purpose of estimating the burden that these proposed regulations would impose on faith-based organizations is more burden than can be justified under the PRA. This is especially true considering that, even for those programs where faith-based organizations are eligible, many States are not likely to track whether subgrantees are faith-based organizations. Thus, the accuracy of State estimates of the number or faith-based organizations that receive subgrants would be subject to the same difficulties as we faced in determining the number of discretionary grants awarded directly to faith-based organizations.

Given these difficulties, we have decided that, for those State-administered programs that authorize subgrants to nonprofit organizations, we will estimate the number of those subgrantees that are faith-based organizations by using the same percentage that we used to estimate the percentage faith-based organizations that receive direct grants from the Department.

The vast majority of beneficiaries served under Department programs receive services under State-administered programs, and those services are provided by local educational agencies (LEAs) under most of the State-administered programs. Based on data available to the Department regarding fiscal years 2012 and 2013, the Department estimates that it served more than 35,000,000 students and children under State-administered programs, including those authorized under the Elementary and Secondary Education Act of 1965 (ESEA) and the Individuals with Disabilities Education Act (IDEA). Because subgrants under these programs cannot be made to faith-based organizations, we have concluded that none of the students and children served under these programs receives services from subgrantees that are faith-based organizations. We note that faith-based organizations are eligible to be SES providers under Title I, Part A of the ESEA; however, those services generally are provided under a program of indirect Federal financial assistance, as discussed earlier in this preamble. Thus, we believe that, under most State-administered programs of the

Department, no beneficiaries are served by subgrantees that are faith-based organizations.

The only State-administered program that authorizes subgrants to nonprofit, private organizations, including faith-based organizations, is the Twenty-First Century Community Learning Centers program (TCCLC). We estimate that the TCCLC program served, in fiscal year 2013, approximately 1,733,000 students. Using the same percentage that we used to estimate the number of students served by discretionary grantees, we estimate that approximately 77,985 (1,733,000 × 4.5% = 77,985) students are served by faith-based subgrantees under the TCCLC. We estimate the total burden that would be imposed on faith-based organizations to provide notices under TCCLC by these proposed regulations is 2,600 hours (77,985 [students] × 2 [minutes per beneficiary] ÷ 60 [to convert minutes to hours] = 2,600 hours).

Total Notice Burden Under TCCLC and Discretionary Grant Programs

Adding the discretionary grant and TCCLC subgrant burden hours together, the total notice burden under all service programs of the Department is 17,605 (15,005 [discretionary grant notice burden] + 2,600 [TCCLC notice burden] = 17,605).

Basis for Estimating Referral Burden

We estimate that, in those cases where a beneficiary objects to the religious character of a faith-based organization, the time required for the faith-based organization to make a reasonable effort to identify an alternative provider and refer a beneficiary to that provider would average about two hours. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs to the one under which the beneficiary is being served by the faith-based organization. The estimate also includes the time required to determine whether one of the alternative providers has the capacity to serve the beneficiary and whether that provider is acceptable to the beneficiary. Also, depending on whether the beneficiary asked the faith-based organization to follow up either with the beneficiary or the alternative service provider to determine whether the referral is successful, this estimate includes the time required to do the follow-up.

We are not aware of any instances in which a student or other beneficiary of a program of the Department has objected to receiving services from a faith-based organization. There is a possibility that, when students and other beneficiaries start receiving notices of their right to request referral to an alternative service provider, more of them may raise objections. However, our estimate of the number of referrals is also informed by the experience of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa, *et seq.* and 42 U.S.C. 300x–21 *et seq.*

Specifically, 42 U.S.C. 290kk–1 and 300x–65 require faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their right under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate Federal, state, or local government agency that administers the program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients.

Based on that experience, we estimate that, at most, 0.10% of students and other beneficiaries would request alternative placements. We will monitor our programs to assess whether this estimate is accurate.

To determine the burden on faith-based organizations to provide referrals, we multiplied the number of students and other beneficiaries served by faith-based organizations by our estimated percentage of beneficiaries that would request alternative placements and multiplied that result by the two hour burden we estimated for making those referrals.

Referral Burden Under Discretionary Grant Programs (§ 75.713)

Under the discretionary grant programs of the Department that provide services to beneficiaries, we estimate that faith-based organizations will have to make reasonable efforts to refer 451 students and other beneficiaries (450,150 [students served by faith-based organizations × 0.10% [percent of students that would request referrals] = 451 referrals) and faith-based organizations will need 902 hours to identify alternative providers and make referrals to those providers (451 × 2 [hours per referral] = 902).

Referral Burden Under the TCCLC Program (§ 76.713)

Under the TCCLC State-administered program, faith-based subgrantees would have to make reasonable efforts to refer 78 students (77,985 [students served by faith-based organizations] × 0.10% [percent of students requesting referral] = 78 referrals) and faith-based organizations would take 156 hours (78 × 2 [hours per referral] = 156 hours) to make reasonable efforts to refer students to alternative service providers.

Total Referral Burden Under TCCLC and Discretionary Grant Programs

Adding the referral burden under both discretionary grant programs (902 hours) and the TCCLC program (156 hours) the total hourly burden on faith-based grantees and subgrantees of making reasonable efforts to refer students and other beneficiaries to alternative service providers is 1,058 hours.

Costs To Provide Notice and Make Referrals

To determine the cost to grantee and subgrantee faith-based organizations to provide the notices and make the referrals that would be required under these proposed regulations we used data compiled by the Labor Department, Bureau of Labor Statistics, regarding the employer costs for employee compensation for workers in the private educational services industry through September 2014.[2]

The total costs per hour worked for all workers in the private educational services industry through September, 2014, are $41.57. Using this as our cost multiplier, we estimate that these proposed regulations would cost faith-based grantees and subgrantees—

$731,840 per year to provide notice to beneficiaries (17,605 [hours to provide notice under the TCCLC and discretionary grant programs] × $41.57 = $731,840); and

$43,982 per year to refer beneficiaries to alternative service providers (1,058 [referral hours under the TCCLC and discretionary grant programs] × $41.57 = $43,982).

Thus, the total dollar burden on faith-based grantees and subgrantees to notify students ($731,840) and make reasonable referral efforts ($43,982) under the TCCLC and discretionary grant programs of the Department would be $775,822 per year ($731,840 + $43,982).

Notice and Referral Burden for Faith-Based Contractors (2 CFR 3474.15)

These proposed regulations would impose a duty on grantees and

[2] See Table 26, Employer Costs for Employee Compensation Supplementary Tables Historical Data December 2006—September 2014, available at *http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf.* The most recent table was downloaded January 12, 2015.

subgrantees to include conditions in contracts with faith-based organizations that provide program services to students and other beneficiaries of Department programs. These conditions would require faith-based organizations to notify beneficiaries of their rights under the Executive Order and to make reasonable efforts to refer beneficiaries to alternative service providers. The Department has no credible information upon which it could estimate the number of contracts that grantees would have to award to faith-based organizations to provide program services under the programs of the Department. We are aware that many research grantees of the Department contract with other organizations to conduct some of the research required under a grant. However, research programs do not provide services to beneficiaries of Department programs. Our understanding is that, under the Department programs that authorize grantees and subgrantees to provide services to beneficiaries, most grantees and subgrantees provide those services directly to the beneficiaries. To determine whether our understanding is correct, we are interested in learning whether grantees and subgrantees contract to provide program services and, if so, how many contracts are made with faith-based organizations to serve beneficiaries. While we do not have the information needed to estimate the number of faith-based organizations that provide program services to beneficiaries, we believe that at least a few such contracts exist. Therefore, we made a preliminary estimate that 14,151 students and other beneficiaries are served by faith-based contractors under the Department's programs. Using that number and, based on the same two-minute estimate of distribution time, we estimate that providing notice would take 472 hours (14,151 × 2 [minutes per beneficiary] ÷ 60 [to convert to hours] = 472). Based on the estimate that 0.10% of beneficiaries would request referral, we estimate that 14 beneficiaries (14,151 [beneficiaries] × 0.1% = 14) would request referrals and that faith-based organizations would take 28 hours (14 [beneficiaries] × 2 [hours referral time]) to make reasonable efforts to refer beneficiaries. Thus, we estimate that the total burden that these proposed regulations would imposed on faith-based contractors would be 500 hours (472 [notice burden hours] + 28 [referral burden house] = 500).

The total cost to faith-based contractors to provide notice and make referrals would be $20,785 (500 × $41.57 = $20,785). Because this dollar burden is based on our preliminary estimate that faith-based contractors serve 14,151 students and other beneficiaries, we are interested in whether there is any factually-based, reasoned support for this estimate.

COLLECTION OF INFORMATION AND THIRD-PARTY NOTICE BURDEN HOURS

Regulatory section	Information collection	OMB Control No. and estimated burden
34 CFR 75.712 and 76.712	These proposed sections would impose on faith-based grantees and subgrantees that provide services under an Department program a requirement to notify beneficiaries of the program of certain responsibilities that the grantee or subgrantee has toward the beneficiaries.	OMB 1895–New The burden under these proposed notice requirements would be 17,605 hours.
34 CFR 75.713 and 76.713	These proposed sections would impose on faith based grantees and subgrantees that provide services under a Department program a requirement to make reasonable efforts to refer a beneficiary that objects to the religious character of the grantee or subgrantee to an alternative service provider.	OMB 1895–New The burden under these proposed referral requirements would be 1,058 hours.
34 CFR part 75, appendix A	This proposed new Appendix would prescribe the form of the notice that faith-based grantees, subgrantees and contractors must use to notify beneficiaries of the responsibilities imposed under 34 CFR 75.712, 75.713, 76.712, 76.713, and 2 CFR 3474.15.	OMB 1895–New The burden under this proposed form would be 17,605 hours.
2 CFR 3474.15	This new section would require grantees and subgrantees of the Department to impose on faith-based contractors that provide services under a program of the Department an obligation to notify beneficiaries of the program of certain responsibilities that the contractors have toward the beneficiaries and to make reasonable efforts to refer a beneficiary who objects to the religious character of a contractor to an alternative service provider.	OMB 1895–New The burden under these proposed notice and referral requirements would be 500 hours.

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by email to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble or submit electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2014–OS–0131.

We have prepared an Information Collection Request (ICR) for this collection. In preparing your comments you may want to review the ICR, which is available at *www.reginfo.gov.* Click on

''Information Collection Review.'' This proposed collection is identified as proposed collection 1895–New.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

OMB is required to make a decision concerning the collection of information requirements contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by September 8, 2015. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

Some of the programs that are affected by these proposed regulations are subject to review under Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for the programs that would be affected by these proposed regulations.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects

2 CFR Part 3474

Accounting, Auditing, Colleges and universities, State and local governments, Grant programs, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements.

34 CFR Part 75

Accounting, Copyright, Education, Grant programs—Education, Inventions and patents, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory, Private schools, Reporting and recordkeeping requirements, Virgin Islands.

Dated: May 28, 2015.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 3474 of title 2 of the Code of Federal Regulations (CFR) and parts 75 and 76 of title 34 of the CFR as follows:

Title 2—Grants and Agreements

Chapter XXXIV—Department of Education

PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 3474 continues to read as follows:

Authority: 20 U.S.C. 1221e–3, 3474, and 2 CFR part 200, unless otherwise noted.

■ 2. Add § 3474.15 to read as follows:

§ 3474.15 Contracting with faith-based organizations.

(a) This section establishes responsibilities that grantees and subgrantees have in selecting contractors to provide direct Federal services under a program of the Department. Paragraphs (c)(1) and (d)(1) of this section establish procurement requirements that supplement those in 2 CFR 200.313–200.326. Every contract between a grantee or subgrantee and a faith-based organization under a program of direct Federal financial assistance must include conditions to implement the requirements in paragraphs (c)(1) and (d)(1) of this section.

(b)(1) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(2) In selecting providers of goods and services, grantees and subgrantees, including States, may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief.

(c)(1) The provisions of 34 CFR 75.532 and 76.532 (Use of funds for religion prohibited), 75.712 and 76.712 (Beneficiary protections: Written notice), and 75.713 and 76.713 (Beneficiary protections: Referral requirements) that apply to a faith-based organization that is a grantee or subgrantee also apply to a faith-based organization that contracts with a grantee or subgrantee, including a State.

(2) The requirements referenced under paragraph (c)(1) of this section do not apply to a faith-based organization that provides goods or services to a beneficiary under a program supported only by indirect Federal financial

assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(d)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the contract must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (d)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(e)(1) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services on the basis of religion or religious belief.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a), is not forfeited when the organization contracts with a grantee or subgrantee.

(Authority: 20 U.S.C. 1221e–3 and 3474; 2 CFR Part 200)

Title 34—Education

Subtitle A—Office of the Secretary, Department of Education

PART 75—DIRECT GRANT PROGRAMS

■ 3. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 4. Section 75.52 is amended by:
■ A. Revising paragraph (a)(2).
■ B. Revising paragraph (c).
■ C. Revising paragraph (e).
The revisions read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant.

(a) * * *

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief.

* * * * *

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a grant from the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, 34 CFR 75.52, 75.712, 75.714, and Appendix A to this part, the following definitions apply:

(i) *Direct Federal financial assistance* means that the Department, a grantee, or a subgrantee selects a provider and either purchases goods or services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of ''indirect Federal financial assistance.''

(ii) *Indirect Federal financial assistance* means that the choice of a service provider under a program of the Department is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is ''indirect'' under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(B) The organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government; and

(C) The beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment.

Note to paragraph (c)(3): The definitions of ''direct Federal financial assistance'' and ''indirect Federal financial assistance'' do not change the extent to which an organization is considered a ''recipient'' of ''Federal financial assistance'' as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

* * * * *

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

* * * * *

■ 5. Add §§ 75.712, 75.713, and 75.714 to subpart F before the undesignated center heading ''Reports'' to read as follows:

§ 75.712 Beneficiary protections: Written notice.

(a) A faith-based organization that receives a grant under a program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion or religious belief;

(2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by the beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report violations of these protections to the Department.

(b) A faith-based organization that receives a grant under a program of the Department must provide beneficiaries or prospective beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization. When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in Appendix A to this part.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.713 Beneficiary protections: Referral requirements.

(a) If a beneficiary or prospective beneficiary of a program of the Department supported by direct Federal financial assistance objects to the religious character of a faith-based organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d) When a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the Department. If the organization is unable to identify an alternative provider, the Department assists the organization by identifying whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52, 75.532, and 75.712–75.713, Appendix A to this part, and 2 CFR 3474.15.

(Authority: 20 U.S.C. 1221e–3 and 3474)

■ 6. Part 75 is amended by adding Appendix A to read as follows:

Appendix A to Part 75—Form of Required Notice to Beneficiaries

A faith-based organization that serves beneficiaries under a program funded at least in part by direct Federal financial assistance from the U.S. Department of Education must provide the following notice, or an accurate translation of this notice, to a beneficiary or prospective beneficiary of the program.

(OMB number will be provided in the final regulations)

NOTICE OF BENEFICIARY RIGHTS

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by direct Federal financial assistance from the U.S. Department of Education, we are required to let you know that—

(1) We may not discriminate against you on the basis of religion or religious belief;

(2) We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance under this program;

(4) If you object to the religious character of our organization, we will undertake reasonable efforts to identify and refer you to an alternative provider to which you have no objection; however, we cannot guarantee that, in every instance, an alternative provider will be available; and

(5) You may report violations of these protections to [Insert the name of the entity that awarded the grant or subgrant or, in the case of services provided under a contract, the name of the grantee or subgrantee that awarded the contract.].

We must give you this written notice before you enroll in our program or receive services from the program.

BENEFICIARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider.

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me.

Name:

Best way to reach me (phone/address/email):

( ) Please follow up with the service provider to which I was referred.

( ) Please do not follow up.

(Authority: 20 U.S.C. 1221e–3 and 3474)

PART 76—STATE–ADMINISTERED PROGRAMS

■ 7. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 8. Section 76.52 is amended by:

■ A. Revising paragraph (a)(2).

■ B. Revising paragraph (c).

■ C. Revising paragraph (e).

The revisions read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant.

(a) * * *

(2) In the selection of subgrantees, States may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and

are made on the basis of merit, not on the basis of religion or religious belief.

* * * * *

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, 34 CFR 76.52, 76.712 and 76.714, the following definitions apply:

(i) *Direct Federal financial assistance* means that the Department, grantee, or subgrantee selects a provider and either purchases services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of ''indirect Federal financial assistance.''

(ii) *Indirect Federal financial assistance* means that the choice of a service provider under a program of the Department is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is ''indirect'' under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(B) The organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government; and

(C) The beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment.

Note to paragraph (c)(3): The definitions of ''direct Federal financial assistance'' and ''indirect Federal financial assistance'' do not change the extent to which an organization is considered a ''recipient'' of ''Federal financial assistance'' as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

* * * * *

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

* * * * *

■ 9. Add §§ 76.712, 76.713, and 76.714 to subpart G before the undesignated center heading ''Reports'' to read as follows:

§ 76.712 Beneficiary protections: Written notice.

(a) A faith-based organization that receives a grant or subgrant under a State-administered program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion or religious belief;

(2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by the beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report violations of these protections to the State agency administering the program.

(b) A faith-based organization that receives a subgrant under a State-administered program of the Department must provide beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization. When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in Appendix A to part 75.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.713 Beneficiary protections: Referral requirements.

(a) If a beneficiary or prospective beneficiary of a State-administered program of the Department supported by direct Federal financial assistance objects to the religious character of a faith-based organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d) When a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the State agency administering the program. If the organization is unable to identify an alternative provider, the State agency must determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred.

(Authority: 20 U.S.C. 1221e–3 and 3474)

§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a State-administered program of the Department has the authority under the

grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52, 76.532, and 76.712–76.713 and 2 CFR 3474.15.

(Authority: 20 U.S.C. 1221e–3 and 3474)

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Part VIII

Department of Health and Human Services

Administration for Children and Families

45 CFR Parts 87 and 1050

Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 87

Administration for Children and Families

45 CFR Part 1050

RIN 0991–AB96

Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants

AGENCY: Office of the Secretary and Administration for Children and Families (HHS), Department of Health and Human Services.

ACTION: Proposed rule; request for comments.

SUMMARY: The United States Department Health and Human Services (HHS) proposes to amend its general regulations regarding the equal treatment of religious organizations in HHS programs and the protection of religious liberty for HHS social service providers and beneficiaries. Specifically, this proposed rule would: Clarify the definition of direct and indirect financial assistance, replace the term ''inherently religious activities'' with the term ''explicitly religious activities,'' require faith-based organizations administering a program supported with direct HHS financial assistance to provide beneficiaries with a written notice informing them of their religious liberty protections, including the right to a referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and based on merit.

DATES: Comments must be submitted by October 5, 2015.

ADDRESSES: You may submit comments via the Federal eRulemaking Portal at *www.regulations.gov*. In addition, please include the Docket ID at the top of your comments.

FOR FURTHER INFORMATION CONTACT: For general information, please contact Acacia Bamberg Salatti, Director, U.S. Department of Health and Human Services Center for Faith-Based and Neighborhood Partnerships, 200 Independence Ave. SW., Room 747D, Washington, DC 20201 or via email at *Partnerships@hhs.gov,* telephone: 202–358–3595, fax: 202–205–2727 with contact number for confirmation of receipt 202–690–6060.

SUPPLEMENTARY INFORMATION:

I. Background

This proposal concerns and implements two Executive Orders: Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations,* issued on December 12, 2002, 67 FR 77141 (Dec. 16, 2002) and Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* issued on November 17, 2010, 75 FR 71319 (Nov. 22, 2010), which amends Executive Order 13279. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service programs, as defined within Executive Order 13279, and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

HHS implemented Executive Order 13279 in regulations at 45 CFR part 87 entitled ''Equal Treatment for Faith-based Organizations.'' The regulatory language provided in this notice is extensive because 45 CFR part 87 is being fundamentally revised to remove separate sections for discretionary grants and formula and block grants. Those distinctions are now made within a single regulatory section. The changes to these regulations clarify that faith-based and community organizations may participate in the Department's social service programs without regard to the organizations' religious character or affiliation, and are able to apply for and compete on an equal footing with other eligible organizations to receive federal financial assistance from HHS. These regulations further ensure that the Department's social service programs are implemented in a manner consistent with the Establishing Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution.

In the existing regulations located at 45 CFR part 87, HHS social service providers, including State and local governments and other pass-through entities administering federal financial assistance from HHS, have certain responsibilities as recipients of federal financial assistance from HHS. Sections 87.1(e) and 87.2(e) of the current Equal Treatment regulations sets forth one of these responsibilities, namely that directly funded HHS social service providers must not discriminate for or against any beneficiary on the basis of religion or religious belief. In addition, HHS service providers must ensure that no direct federal financial assistance from HHS is used to support inherently religious activities as explained in § 87.1(c) and § 87.2(c). Inherently religious activities are currently described in the existing rule as ''activities that involve overt religious content such as worship, religious instruction, or proselytization.'' If such a provider engages in inherently religious activities, such activities must be offered separately, in time or location, from the social service programs receiving direct HHS financial assistance, and participation must be voluntary for the beneficiaries of HHS social service programs. Both § 87.1(j) and § 87.2(j), clarify that these responsibilities do not apply to social service programs where federal financial assistance from HHS is provided to a religious organization indirectly.

Also in the standing regulations located at 45 CFR part 87, both § 87.1(g) and § 87.2(g) clarify that receipt of HHS grant support does not cause religious organizations to forfeit their exemption from title VII of the Civil Rights Act of 1964's prohibitions on employment discrimination on the basis of religion. However, the Equal Treatment Regulations do not alter the effect of other statutes which may require recipients of certain types of federal financial assistance from HHS to refrain from religious discrimination.

Lastly, in the existing regulations at 45 CFR part 87, § 87.1(h) and § 87.2(h) of the rule establishes alternative mechanisms by which organizations can prove they are nonprofit, which is sometimes an eligibility requirement for receiving federal financial assistance from HHS. Such mechanisms, however, do not apply where a statute requires a specific method for establishing nonprofit status.

Shortly after taking office, President Obama signed Executive Order 13498, *Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships,* 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of social services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a revised set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* on November 17, 2010. 75 FR 71319 (available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf*). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- Emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;
- Clarify (i) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, (ii) that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance, and (iii) that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- Direct agencies to adopt regulations and guidance that distinguish between ''direct'' and ''indirect'' Federal financial assistance;
- Clarify that the standards in these proposed regulations apply to sub-awards as well as prime awards;
- Require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;
- State that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program); and
- State that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies. Executive Order 13559, § 1(c) (amending § 3 of Executive Order 13279).

The Executive Order also required OMB, in coordination with the Department of Justice, to issue guidance to agencies on the implementation of the Order following receipt of the Working Group's report. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order to the extent such regulations and guidance do not exist and, where appropriate and to the extent permitted by law, to amend any existing regulations and guidance to ensure that they are consistent with the requirements set forth in Executive Order 13559. Memorandum from Sylvia M. Burwell, Director, on Implementation of Executive Order 13559 to Heads of Executive Departments and Agencies (Aug. 2, 2013) (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13–19.pdf).* Pursuant to the August 2, 2013 OMB Memo, the Department is hereby publishing this proposed rule amending its existing Equal Treatment regulations to ensure they are consistent with Executive Order 13279 as amended by Executive Order 13559.

As explained below, the Department's existing Equal Treatment Regulations at 45 CFR part 87, already implements many of the provisions of Executive Order 13559. However, the regulation is being revised in order to meet the new requirements of Executive Order 13279 that were added once it was amended by Executive Order 13559. The Department looks forward to comments on the fundamental changes within the proposed rule.

II. Overview of Proposed Rule

A. Purpose of the Proposed Rule

Consistent with Executive Order 13559, this proposed rule would revise the Department's Equal Treatment Regulations to: (1) Clarify the distinction between direct and indirect Federal financial assistance as well as the rights and obligations of HHS social service providers; (2) replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and designate the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization''; (3) require faith-based organizations administering a program supported with direct HHS financial assistance to provide beneficiaries with a written notice informing them of their religious liberty protections, including the right to a referral to an available alternative provider if the beneficiary objects to the religious character of the organization providing services, and (4) add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and made based on merit. In order to accommodate the requisite changes, the proposed rule's format differs from the current rule. Unlike the current rule, the proposed rule is not sectioned based on grant type (*i.e.,* discretionary grants or formula and block grants). In order to draw out distinctions based on the grant type, the rule includes an applicability section. These changes will ensure the

Department's regulations implement all of the requirements of Executive Order 13279 as amended.

These proposed rules will apply to grants awarded in HHS social service programs after the effective date of the Final Rule. As indicated in the applicability section, these include grants awarded in social service programs governed by either ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements'' at 45 CFR part 75, or block grant regulations at 45 CFR part 96.

Part 87 currently exempts grants governed by the Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice rule at 42 CFR part 54 and 45 CFR part 96, subpart L, as well as grants governed by the Temporary Assistance for Needy Families (TANF) Charitable Choice rule at 45 CFR part 260. Those grants will remain exempt from part 87. Those Charitable Choice rules currently provide their program beneficiaries who object to the religious character of an HHS supported social service provider with an option to request an alternative provider.

Part 87 also currently exempts grants governed by the Community Services Block Grant (CSBG) Charitable Choice rule at 45 CFR part 1050. That Charitable Choice rule does not have an alternative provider provision. This proposed rule, which identifies new regulatory provisions and a conforming amendment, will apply to CSBG grants. In addition, this proposed rule identifies new regulatory provisions that will apply to the Childcare and Development Block Grant program, which is currently exempt from part 87 and does not have an alternative provider provision.

B. Proposed Amendments to HHS Equal Treatment Regulations

HHS proposes to amend its Equal Treatment Regulations at 45 CFR part 87, to address the areas identified below.

1. Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. Executive Order 13559, § 1(c) (amending § 3(b) of Executive Order 13279).

Programs are supported with direct Federal financial assistance when either the government or an pass-through entity, as identified in these proposed rules, selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Federal government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a Federal agency, operating under a neutral program of aid, could present each beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Federal government-provided certificate, *e.g.* through the use of Individual Training Accounts. Either way, the Federal government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Federal government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice'' was also neutral toward religion and offered beneficiaries adequate secular options.

The Department's current Equal Treatment Regulations do not provide explicit definitions for the terms ''direct Federal financial assistance'' and ''indirect Federal financial assistance.'' To help to clarify the distinction, the Department proposes to add definitions of these terms to § 87.1, the section containing the definition of certain terms used in the Equal Treatment Regulations. Section 87.1(b) defines the term ''*Direct Federal financial assistance.*'' Consistent with Executive Order 13559's mandate to adopt regulations on ''the distinction between 'direct' and 'indirect' Federal financial assistance.'' Proposed paragraph (b) provides a definition for the terms ''*direct Federal financial assistance,*'' ''*Federal financial assistance provided directly,*'' ''direct funding'' and ''directly funded'' and defines them to mean that the Government or pass-through entity selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via a grant or cooperative agreement). In general, Federal financial assistance will be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly.*

Proposed paragraph (c) provides a definition for the term ''*indirect Federal financial assistance*'' or ''*Federal financial assistance provided indirectly*'' and defines it to mean that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered ''indirect'' when (1) the government funded program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; (2) the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and (3) the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment. Proposed § 87.1(c)(1) notes that recipients of sub-awards that receive Federal financial assistance through programs administered by states or other pass-through entities are not considered recipients of indirect Federal financial assistance.

The Department also proposes to add definitions for two additional terms used in 45 CFR part 87. Proposed paragraph (d) provides a definition for the term ''Pass-through entity'' as defined in 2 CFR 200.74. Proposed

paragraph (e) provides a definition for the term ''Recipient'' as defined in 2 CFR 200.86.

2. Inherently Religious Activities

Existing agency regulations and Executive Order 13279 prohibits non-governmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow.

The Supreme Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ. plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. Secular activity also includes the study or acknowledgement of religion as a historical or cultural reality.

The Department, therefore, proposes to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' throughout the Equal Treatment Regulations and to define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language are consistent with the use of the term ''explicitly religious activities'' in Executive Order 13559 and will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

3. Pass-Through Entities

The Department also proposes to add regulatory language at proposed § 87.3(m) that will clarify the rights and responsibilities of pass-through entities. A pass-through entity is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each pass-through entity must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The pass-through entity also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While pass-through entities may be used to distribute Federal financial assistance to other organizations in some programs, pass-through entities remain accountable for the Federal financial assistance they disburse. Accordingly, pass-through entities must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of pass-through entities does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant and sub-grant supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of pass-through entities does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

4. Protections for Beneficiaries

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

Executive Order 13559, § 1(b) (amending § 2(d) of Executive Order 13279) makes clear that all organizations that receive Federal financial assistance for the purpose of delivering social services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice, and this proposed rule implements confirming changes for greater consistency with that principle. Both also state that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that a directly funded organization provides explicitly religious activities, those activities must be offered

separately in time or location from programs or services supported with direct Federal financial assistance. As noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by direct Federal financial assistance.

To strengthen the protections provided to beneficiaries, Executive Order 13559 requires that organizations administering a program that is supported by direct Federal financial assistance must give written notice in a manner prescribed by the Department to beneficiaries of their religious liberty protections, including the right to be referred to an alternative provider when available. If a beneficiary or of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the social service program must refer the beneficiary to an alternative provider. Accordingly, the proposed rule supplements existing beneficiary protections in the Equal Treatment Regulations by adding two new sections to the regulations—one addressing the written notice requirement at proposed § 87.3(i) and the other addressing the referral requirement at proposed § 87.3(j).

a. Written Notice

Executive Order 13279, as amended by Executive Order 13559, requires that the Secretary of Health and Human Services, among other agency heads, establish policies and procedures designed to ensure that each beneficiary of a social service program receives written notice of their religious liberty protections. Executive Order 13279, § 2(h)(ii) as amended by Executive Order 13559, § 1, 75 FR at 71320–21. Consistent with this mandate, proposed § 87.3(i) requires HHS social service providers with a religious affiliation to give beneficiaries written notice of their religious liberty protections when seeking or obtaining services supported by direct HHS financial assistance. The notice is set forth in proposed paragraph § 87.3(i) and informs beneficiaries that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) the organization may not require beneficiaries to attend or participate in any explicitly religious activities, and any participation by beneficiaries in such activities must be purely voluntary;

(3) the organization must separate out in time or location any explicitly religious activities from activities supported with direct federal financial assistance from HHS;

(4) if a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which there is no objection; and

(5) beneficiaries may report violations of these enumerated religious liberty protections to the awarding entity.

The purpose of the notice is to make beneficiaries aware of their religious liberty protections and helps to ensure that beneficiaries are not coerced or pressured along religious lines in order to obtain HHS-supported social service programs. An example of the notice is provided as Appendix A to the preamble.

As indicated in proposed § 87.3(i), when the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. In cases where service providers only have brief interaction with beneficiaries, or when beneficiaries receive what may be a one-time service from a provider, providers may clearly post the written notice in a service area.

b. Referral Requirements

Proposed § 87.3(j) implements Executive Order 13559's requirement that a beneficiary be referred to an alternative provider when he or she objects to the religious character of an organization that provides services under the federally-financed program. Executive Order 11246, § 2(h)(i) as amended by Executive Order 13559, § 1; 75 FR 71320. Accordingly, paragraph (j) of proposed § 87.3 provides that, if a beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. Paragraph (j) of proposed § 87.3 states that a referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

Paragraph § 87.3(j) specifies that, except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients. If a Federally-supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral must be made to that provider. If, however, there is no Federally-supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under paragraph (k) of proposed § 87.3 to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. This means that a religious social service provider that is the prime recipient of Federal financial assistance must notify the HHS awarding agency; whereas, a religious social service provider that has been funded through a sub-award from a prime recipient of Federal financial assistance must notify the prime recipient entity from which it has received funds. The prime recipient of Federal financial assistance must notify the HHS awarding agency when a sub-recipient makes a referral to an alternative provider or is unable to identify an alternative provider. An HHS social service prime recipient may request assistance from the HHS awarding entity in identifying an alternative service provider. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider. Referrals must be made in a manner consistent with applicable laws and regulations. It must be noted, however, that in some instances, the awarding entity may also be unable to identify a suitable alternative provider.

5. Political or Religious Affiliation

Consistent with § 2(j) of Executive Order 11246 as amended by § 1 of Executive Order 13559, the proposed rule adds a new provision at proposed § 87.3(l) to require that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made based on

merit, not on the basis of religion or religious belief. This requirement will increase confidence that the rules applicable to Federal financial assistance are being observed and that decisions about government grants are made on the merits of proposals, not on political or religious considerations. The awarding entity must instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting grant reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage diversity among reviewers by advertising for these positions in a wide variety of venues.

III. Regulatory Procedures

Executive Orders 12866 and 13563

Executive Orders (E.O.) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects 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) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are the requirements that HHS social service providers with a religious affiliation: (1) Give beneficiaries a written notice informing them of their religious liberty protections when seeking or obtaining services supported by direct HHS financial assistance, (2) at the beneficiary's request, make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, and (3) document such action. To minimize compliance costs and allow maximum flexibility in implementation, the proposed rule provides the language of the notice directly within the proposed rule. Additionally, the preamble incudes an example of the notice in Appendix A to the preamble. An estimate of the burden, in term of the number of hours involved in referring beneficiaries, is discussed in the Paperwork Reduction Act section of this proposed rule.

At this time, there is no known source of information to quantify precisely the numbers or proportions of program beneficiaries who will request referral to alternative providers. We are not aware of any instances in which a beneficiary of a program of the Department has objected to receiving services from a faith-based organization. There is however a possibility that we will begin to see objections when, as a result of the implementation of this rule, beneficiaries begin to receive notices of their option to request referral to an alternative service provider. We therefore estimate that the number of requests for referrals will be one per year for each faith-based or religious organization that receives HHS funding through prime or sub-awards. While a precise estimate is not available, we believe that this estimate is reasonable, though it likely errs on the higher end in view of our experience at the Department of Health and Human Services. The Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa, *et seq.* and 42 U.S.C. 300x–21 *et seq.* Specifically, 42 U.S.C. 290kk–1 and 300x–65, requires faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their ability under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate federal, state, or local government agency that administers the SAMHSA program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients. The Department invites interested parties to provide data on which to base estimates of the number of beneficiaries who will request referral to an alternative service provider and the attendant compliance cost service providers may face.

Notwithstanding the absence of concrete data, the Department believes that this proposed rule is not significant within the meaning of the Executive Order because the annual costs associated with complying with the written notice and referral requirements will not approach $100 million.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis which will describe the impact of the proposed rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Furthermore, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact on a substantial number of small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions.

As described above, the Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing in the rule the notice for providers to give beneficiaries informing them of their protections and by not proscribing a specific format for making referrals. The Department estimates it will take no more than two minutes for providers to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries. In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every small service provider with a religious affiliation, the Department believes that a substantial number of these small entities may be affected by this provision. However, the Department does not believe that a compliance cost of less than $100 per provider per year is a significant percentage of a provider's total revenue. In addition, we note that after the first year, the labor cost associated with compliance will

likely decrease because small service providers will be familiar with the requirements.

The rule will also require religious social service providers, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. If an organization is unable to identify an alternative provider, the organization is required to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An HHS social service pass-through entity may request assistance from the HHS awarding agency in identifying an alternative service provider. The Department estimates that an estimated one request for referral per year will require no more than two hours of a social service provider's time each year. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs to the one under which the beneficiary is being served by the faith-based organization. The estimate also includes the time required to determine whether one of the alternative providers has the capacity to serve the beneficiary and whether that provider is acceptable to the beneficiary. Also, depending on whether the beneficiary asked the faith-based organization to follow up either with the beneficiary or the alternative service provider to determine whether the referral is successful, this estimate includes the time required to do the follow-up. The Department does not believe that referral costs will be appreciable for small service providers. The Department invites interested parties to provide data on which we can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512). This rule may require the collection of additional information from beneficiaries should a request for referral to an alternative service provider be received.

Section § 87.3(i) would impose requirements on religious social service providers to give beneficiaries a standardized notice instructing beneficiaries of their protections. The Department has determined this notice is not a collection of information subject to OMB clearance under the PRA because the Federal Government has provided the exact text that a provider must use. See 5 CFR 1320.3(c)(2). The beneficiary's response, however, is subject to OMB clearance under the PRA. In the sample notice provided as an appendix to this Notice of Proposed Rulemaking (NPRM), care has been taken to limit the information to simply obtaining minimal identifying information and providing check boxes for material response. The new reporting requirement in proposed section 87.3(k), and the record keeping that is necessary to comply with that requirement, would be subject to the Paperwork Reduction Act.

To quantify this potential collection, and recognizing the need for OMB clearance as a possibility, the Department has estimated the burden that the beneficiary response would impose on faith-based or religious recipients by reviewing data from the most recent assessment of the number of faith-based or religious organizations in 65 HHS grant programs. During the assessment, which was conducted in 2007, the Center for Faith-based and Neighborhood Partnerships reviewed the names of our nonprofit and private recipients to determine whether they use religious terms in their names. This approach was necessary as HHS does not currently collect information that directly identifies a recipient as a faith-based or religious organization. The data from this review was used to estimate the number of faith-based organizations that receive discretionary grants from the Department. According to the 2007 data, an estimated 10% of HHS awards were made to faith-based or religious organizations. While we recognize that Section § 87.3(i) of this NPRM does not impose the same methodology as the 2007 survey to identify social service providers with a religious character, our 2007 survey provides best estimates of the proportion of HHS supported social service providers to the extent practicable.

Using the most recently completed fiscal year of 2014, the Department (excluding the National Institutes of Health) awarded 13,720 discretionary grants. Using the previously justified estimate of 10%, the Department estimates that 1,372 discretionary grants will be awarded to faith-based or religious organizations. Furthermore, using our estimate of one request for referral per a year per a faith-based or religious organization, we estimate that there will be 1,372 requests for referral per year. Multiplying that number times the two hours of a social service provider's time, we estimates the Total Estimated Annual Burden Hours will be 2,744 hours per a year.

We have not estimated the burden on State and local entities or on pass-through entities because today we have no data on which to base such an estimate. As the Department does not have a direct relationship with sub-recipients, asking States to estimate the number of its sub-recipients that are faith-based or religious organizations would impose significant burden and require approval of an information collection request of its own.

Religious social service providers that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. We do not include an estimate of the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on religious social service providers. The record-keeping and reporting burden that these proposed regulations would add is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the record-keeping burden associated with these proposed regulations is large enough to be measurable, that burden will be calculated under the record-keeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of record-keeping burden in this PRA analysis.

The Department will submit an information-collection request (ICR) to OMB to obtain PRA approval for the information-collection formatting

requirements contained in this notice of proposed rulemaking (NPRM).

Executive Order 13132

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

This proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of Government, within the meaning of the Executive Order 13132. Any action taken by a State as a result of the proposed rule would be at its own discretion as the rule imposes no requirements.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (Reform Act). Under the Reform Act, a Federal agency must determine whether a regulation proposes a Federal mandate that would result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any single year. The Department has determined this proposed rule does not include any Federal mandate that may result in increased expenditure by State, local, and Tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Effect on Family Life

The Department certifies that this proposed rule has been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), for its effect on family well-being. It will not adversely affect the well-being of the nation's families. Therefore, the Department certifies that this proposed rule does not adversely impact family well-being.

Appendix A to the Preamble—Example Notice

Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the awarding agency/entity.

We must give you this notice before you enroll in our program or receive services from the program.

Beneficary Referral Request

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me.
Name:
Best way to reach me (phone/address/email):

( ) Please do not follow up.

List of Subjects

45 CFR Part 87

Administrative practice and procedure; Claims; Courts; Government employees; Religious Discrimination.

45 CFR Part 1050

Grant programs-social programs.

For the reasons stated in the preamble, under the Authority of 5 U.S.C. 301, the Department of Health and Human Services and the Administration for Children and Families, respectively, propose to amend 45 CFR parts 87 and 1050 as set forth below:

■ 1. Revise part 87 to read as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.
87.1 Definitions.
87.2 Applicability.
87.3 Grants.

Authority: 5 U.S.C. 301.

§ 87.1 Definitions.

(a) These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular program or activities.

(b) The terms *direct Federal financial assistance, Federal financial assistance provided directly, direct funding, and directly funded* mean that the government or a pass-through entity [under this part] selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

(c) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment.

(1) Federal financial assistance provided to an organization is considered indirect when:

(i) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion;

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

(2) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of ''indirect Federal financial assistance'' [or recipients of ''Federal funds provided indirectly''] as those terms are used in this part.

(d) *Pass-through entity* means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

(e) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients.

§ 87.2 Applicability.

This part applies to grants awarded in HHS social service programs governed by either Uniform Administrative Requirements, Cost Principles, and Audit Requirements at 45 CFR part 75 or Block Grant regulations at grants governed by 45 CFR part 96, except as provided in paragraphs (a) and (b) of this section.

(a) *Discretionary grants.* This part is not applicable to the discretionary grant programs that are governed Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice regulations found at 42 CFR part 54a. This part is also not applicable to discretionary grant programs that are governed by the Community Services Block Grant Charitable Choice regulations at 45 CFR part 1050, with the exception of § 87.1 and § 87.3(i) through (l) which do apply to such discretionary grants.

(b) *Formula and block grants.* This part is not applicable to non-discretionary and block grant programs governed by the SAMHSA Charitable Choice regulations found at 42 CFR part 54 and 45 CFR part 96, subpart L, or the Temporary Assistance for Needy Families (TANF) Charitable Choice regulations at 45 CFR part 260. Block grants governed by the Community Service Block Grant (CSBG) Charitable Choice regulations at 45 CFR part 1050 do not apply to this part, with the exception that § 87.1 and § 87.3(i) through (l) do apply to such block grants. This part is not applicable to Child Care and Development Block Grants governed by 45 CFR part 98, with the exception that § 87.1 and § 87.3(b), (c) and (i) through (m) do apply to such block grants.

§ 87.3 Grants.

(a) Faith-based or religious organizations are eligible, on the same basis as any other organization, to participate in any HHS awarding agency program for which they are otherwise eligible. Neither the HHS awarding agency, nor any State or local government and other pass-through entity receiving funds under any HHS awarding agency program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, ''program'' refers to activities supported by discretionary, formula or block grants.

(b) Organizations that apply for or receive direct financial assistance from an HHS awarding agency may not support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services funded with direct financial assistance from the HHS awarding agency, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the HHS awarding agency, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered ''explicitly religious activities'' that is subject to direct Federal financial assistance restrictions.

(c) A faith-based or religious organization that participates in HHS awarding agency-funded programs or services will retain its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the HHS awarding agency (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). A faith-based or religious organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based or religious organization that receives financial assistance from the HHS awarding agency retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of HHS Awarding Agency-funded activities.

(d) An organization that participates in programs funded by financial assistance from an HHS awarding agency shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by an HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in HHS awarding agency programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of HHS awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall disqualify faith-based or religious organizations from participating in the HHS awarding agency's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) A faith-based or religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the faith-based or religious organization receives direct or indirect financial assistance from an HHS awarding agency. Some HHS awarding agency programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment

on the basis of religion. Accordingly, recipients should consult with the appropriate HHS awarding agency program office if they have questions about the scope of any applicable requirement.

(g) In general, the HHS awarding agency does not require that a recipient, including a faith-based or religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under HHS awarding agency programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements. In HHS awarding agency programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (g)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(h) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement HHS awarding agency-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

(i) Faith-based or religious organizations providing social services to beneficiaries under an HHS program that is supported by direct Federal financial assistance must give written notice to beneficiaries of certain protections. This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. Notice must be given in a manner prescribed by the HHS awarding agency. This notice must state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to the awarding entity.

(j) If a beneficiary of a social service program supported by the HHS awarding agency objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. A referral may be made to another faith-based or religious organization, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider. Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(k) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the prime recipient entity from which it has received funds. The prime recipient of Federal financial assistance must notify the HHS awarding agency when a sub-recipient makes a referral to an alternative provider or is unable to identify an alternative provider.

(l) Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

(m) If a pass-through entity, acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal government, the pass-through entity must ensure compliance with the provisions of this part and any implementing rules or guidance by the sub-recipient. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

PART 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES BLOCK GRANT ACT PROGRAMS

■ 2. The authority citation for part 1050 continues to read as follows:

Authority: 42 U.S.C. 9901 *et seq.*

■ 3. Amend § 1050.3 by revising paragraph (h) to read as follows:

§ 1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?

* * * * *

(h) If a nongovernmental pass-through entity, acting under a grant, contract, or other agreement with the Federal, State or local government, is given the authority to select nongovernmental

organizations to provide services under an applicable program, then the intermediate organization must ensure that there is compliance with these Charitable Choice provisions and 45 CFR 87.1 and 87.3(i) through (l). The pass-through entity retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

Dated: July 20, 2015.

Sylvia M. Burwell,

Secretary.

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Part IX

Department of Homeland Security

Office of the Secretary

6 CFR Part 19

Nondiscrimination in Matters Pertaining to Faith-Based Organizations; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 19

[Docket No. DHS–2006–0065]

RIN 1601–AA40

Nondiscrimination in Matters Pertaining to Faith-Based Organizations

AGENCY: Office of the Secretary, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This proposed rule would implement revised Executive Branch policy that, consistent with constitutional church-state parameters, faith-based organizations compete on an equal footing with other organizations for direct Federal financial assistance, and to fully participate in Federally supported social service programs, while beneficiaries under those programs receive appropriate protections. This rulemaking is intended to ensure that the Department of Homeland Security's social service programs are implemented in a manner consistent with the requirements of the First Amendment to the Constitution.

DATES: Written comments must be received on or before October 5, 2015.

ADDRESSES: You may submit comments, identified by agency name and docket number DHS–2006–0065, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Facsimile:* Federal eRulemaking portal at 866–466–5370. Include the docket number on the cover sheet.
- *Mail:* Scott Shuchart/Mail Stop No. 0190, Office for Civil Rights and Civil Liberties, 245 Murray Lane SW., Bldg. 410, Washington, DC 20528–0190. To ensure proper handling, please reference DHS Docket No. DHS–2006–0065 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.

FOR FURTHER INFORMATION CONTACT: Scott Shuchart, Department of Homeland Security Office for Civil Rights and Civil Liberties, 202–401–1474 (telephone), 202–357–1196 (facsimile), *scott.shuchart@hq.dhs.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. The Department of Homeland Security (DHS) also invites comments that relate to the potential economic, environmental, or federalism effects of this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. See **ADDRESSES** above for information on how to submit comments.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

II. Executive Summary

A. Purpose of the Regulatory Action

On January 14, 2008, the Department of Homeland Security (DHS) proposed regulations to ensure that faith-based organizations be equally eligible to participate in certain programs, as directed by Executive Order 13279. 73 FR 2187. While DHS's final rule was still pending, additional Executive Orders bearing on the same subject matter were signed by President Obama: Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009), and Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 75 FR 71319 (Nov. 17, 2010). Executive Order 13559 amended Executive Order 13279 in several important respects.

DHS now again proposes to issue a rule implementing the principles of Executive Order 13279, as amended by Executive Order 13559, to ensure that faith-based and community organizations are able to participate fully in social service programs funded by DHS, consistent with the Constitution, and with appropriate protections for the beneficiaries and potential beneficiaries of those programs. The proposed rule is largely similar to the rule proposed in 2008, with changes to address, *inter alia,* public comments and the changes required by Executive Order 13559.

B. Summary of Major Provisions

The proposed rule would provide for full participation by faith-based and community groups in social service programs funded by DHS, with suitable protections for individual beneficiaries, consistent with the U.S. Constitution:

- *Equal treatment, nondiscrimination, and independence.* Faith-based organizations would be eligible to seek and receive direct financial assistance from DHS for social service programs; the proposal provides that neither DHS, nor states or local governments acting as intermediaries distributing DHS funds, may discriminate against an organization on the basis of the organization's religious character or affiliation. By the same token, the proposal provides that recipients of direct financial assistance may not discriminate against beneficiaries on the basis of religion or religious belief. Those organizations may maintain their independence, including practice of their religious beliefs, selection of board members, and use of space with religious symbols, so long as explicitly religious activities are not supported with direct Federal financial assistance.
- *Explicitly religious activities.* The proposal provides that organizations receiving direct financial assistance (see below) to participate in or administer social service programs may not engage in explicitly religious activities in programs supported by or administered by DHS. Recipients also wishing to offer non-DHS-supported explicitly religious activities are free to do so, separately in time or location from the DHS-supported programs, and only on a voluntary basis for beneficiaries of DHS-supported social service programs.
- *Direct and indirect assistance.* Most provisions of the rule would apply to direct federal financial assistance, meaning that the government or an intermediary (such as a State or local government) selects the provider of the social service program, funded through either a contract or grant. Programs involving indirect financial assistance, where government funding is provided through a voucher, certificate, or similar means placed in the hands of the beneficiary, provide greater scope for explicitly religious content in programs or activities, so long as the overall government program is neutral toward religion, the choice of provider is the beneficiary's, and there is an adequate secular option for use of the funds.
- *Notice to beneficiaries.* Faith-based or religious organizations receiving direct financial assistance for social service programs would, in most

circumstances, be required to provide beneficiaries and prospective individual beneficiaries written notice of particular protections afforded to them:

○ The faith-based organization's obligation not to discriminate against beneficiaries on the basis of religion or religious belief;

○ that the beneficiary cannot be required to attend or participate in any explicitly religious activities, but may do so voluntarily;

○ that privately funded explicitly religious activities must be separate in time or place from the program receiving Federal financial assistance;

○ that if the beneficiary objects to the religious character of the organization, the organization must attempt to refer the beneficiary to an alternative provider to which the beneficiary does not object; and

○ that beneficiaries may report violations of these protections to DHS.

• *Referral requirement.* Where a beneficiary objects to the religious character of an organization providing social service programs supported by DHS financial assistance, the organization would be required to undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object. Such organizations must notify DHS when such a referral is made, or when it is unable to identify an appropriate alternative provider to which the beneficiary can be referred. DHS would then also attempt to identify an alternative provider.

• *Employment discrimination.* The exemption from the federal prohibition on employment discrimination based on religion (under section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1)) remains applicable for religious organizations delivering Federally supported social services; independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees would not be waived or mitigated by this regulation.

III. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141 (Dec. 16, 2002). Executive Order 13279 sets forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 required specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On January 14, 2008, following Executive Order 13403 (which brought DHS within the scope of Executive Order 13279), DHS proposed to amend its regulations to clarify that faith-based organizations are equally eligible to participate in any social or community service programs established, administered, or supported by DHS (including any component of DHS), and would be equally eligible to seek and receive Federal financial assistance from DHS service programs where such assistance is available to other organizations. 73 FR 2187. DHS published the proposed rule with a thirty-day public comment period from January 14 to February 13, 2008. During this time, DHS received twenty comments on the proposed rule; some expressed support while others expressed concerns with certain elements of the proposed rule.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (Advisory Council Report) (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319 (Nov. 22, 2010). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

• Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of such programs by providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services written notice of these and other protections to beneficiaries before enrolling in or receiving services;

• state that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;

• state that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;

• clarify the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, and that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance and that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

• emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;

• require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and

policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;

• clarify that church-state standards and other standards apply to sub-awards as well as prime awards; and

• distinguish between ''direct'' and ''indirect'' Federal financial assistance.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf*). In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559.

Building on the rule first proposed in 2008, DHS hereby proposes a rule that incorporates the language and recommendations from Executive Order 13559 and the succeeding reports and guidance just described. The proposed rule would ensure that DHS social service programs are implemented in a manner consistent with the requirements of the U.S. Constitution and are open to all qualified organizations, regardless of their religious character. To that end, under this proposed rule, private, nonprofit faith-based organizations seeking to participate in Federally supported social service programs or seeking Federal financial assistance for social service programs would be eligible to participate fully, with appropriate protections for beneficiaries.

IV. Changes From the Original Proposed Rule

DHS has made several changes to the previously proposed regulatory text from the original notice of proposed rulemaking.

Definition of Social Service Program

The original proposed rule defined ''social service program'' differently than does Executive Order 13279. (The definition in Executive Order 13279 is unaffected by the Executive Order 13559 amendments.) This rule proposes to use the definition in Executive Order 13279, instead of the definition in the original proposed rule. This approach will better ensure uniformity with the rules of other agencies and consistency with the relevant Executive Orders. DHS may also issue guidance at a future time with respect to the applicability of the Executive Orders and the rule to particular programs. At the present time, DHS believes that it administers four programs with grantees, subgrantees, and beneficiaries that would be covered by this rule.[1]

Explicitly Religious Activities

The original proposed rule and Executive Order 13279 prohibit nongovernmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious,'' which was carried over in several other agencies' regulations implementing Executive Order 13279, has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Federal government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (plurality opinion); *id.* at 845 (O'Connor, J., concurring in judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions: For instance, where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because where there is extensive government control over the environment of the Federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of

[1] Within FEMA, the covered programs would be the Emergency Food and Shelter Program, the Crisis Counseling Program, and the Disaster Case Management Program. The USCIS Citizenship and Integration Grant Program would also covered by this rule.

penalty.''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the government is obligated by the First Amendment ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a Federally supported job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrators of the government program did not orchestrate or encourage such comments.

DHS, therefore, now proposes that § 19.4 employ the term ''explicitly religious activities'' (in lieu of ''inherently religious activities'' in the initially proposed rule) and define the term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' This language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish previously proposed regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. DHS proposes to define these terms in § 19.2. Programs are supported with direct Federal financial assistance when either the Federal government or an intermediary, as identified in these proposed rules, selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

Indirect Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either way, the government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the programs if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of ''indirect financial assistance.''

Intermediaries

The Department also proposes regulatory language in § 19.2 that will clarify the responsibilities of intermediaries.[2] An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal government or with a State or local government, that accepts Federal financial assistance and distributes such assistance to other organizations that, in turn, provide government-funded social services. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The intermediary also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries

[2] In this document, the terms ''intermediary'' and ''pass-through entity'' may be used interchangeably. *See* 2 CFR 200.74.

does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

Protections for Beneficiaries

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries.[3] These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The executive order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also states that organizations administering a program that is supported by Federal financial assistance must provide written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. Where the recipient and beneficiary have only a brief, potentially one-time interaction, such as at a soup kitchen, individual notice may be impracticable; in those cases, DHS anticipates that a conspicuous posted notice would satisfy this requirement.

These requirements are set forth in §§ 19.6 and 19.7 of the proposed rule. Section 19.7 states that if a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary shall be referred to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

Model language for the notice to beneficiaries is provided in the proposed Appendix A to the rule.

A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

The proposed rule would specify that, except for services provided by telephone, internet, or similar means, the referral would be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also would need to have the capacity to accept additional clients. If a Federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no Federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify the awarding entity and that entity would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted, however, that in some instances, the awarding entity may also be unable to identify a suitable alternative provider.

Political or Religious Affiliation

DHS proposes to add proposed § 19.3(c) to clarify that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. The awarding entity should instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

Additional Changes Based on Comments on the Notice of Proposed Rulemaking

In addition to the aforementioned changes regarding the scope of the rule or based on the new policy guidance in Executive Order 13559, this proposed rule includes further revisions to address comments made on the initial notice of proposed rulemaking. DHS revised proposed § 19.1 to reflect that the purpose of these regulations is to ensure equal treatment of faith-based organizations, not to establish equal participation rates for faith-based organizations. The term ''sectarian'' was removed from proposed § 19.2 as a response to a comment that suggested the term may be perceived pejoratively. To address comments on new reporting and monitoring requirements, a new paragraph (c) was added to proposed

[3] DHS proposes to define ''beneficiary'' in § 19.2 to mean an individual recipient of goods or services provided as part of a social service program specifically supported by Federal financial assistance. Beneficiary does not mean an individual who may incidentally benefit from Federal financial assistance provided to a State, local, or Tribal government, or a private nonprofit organization.

§ 19.4 to clarify that all DHS programs apply the same standards to faith-based and secular organizations, and that all organizations carry out eligible activities in accordance with all program requirements and requirements governing the conduct of DHS-supported activities. A new paragraph (d) was also added to proposed § 19.4 to clarify that restrictions regarding the use of direct DHS financial assistance apply only to direct financial assistance; they do not apply to social service programs where DHS financial assistance is provided to a religious or other non-governmental organization indirectly. The proposed changes to FEMA-specific regulations have been removed as unnecessary because those changes amended regulations for programs that DHS has not presently identified as being covered by this rule.

V. Discussion of the Public Comments Received on the January 14, 2008, Proposed Rule

DHS received 20 comments on the notice of proposed rulemaking from civil rights organizations, religious organizations, and interested members of the public. Some of the comments were generally supportive of the proposed rule; others were critical.

A. Participation by Faith-Based Organizations in DHS Programs

Some commenters supported the participation of religious organizations, noting the widespread contributions of religious organizations to civil society, connections to their communities, and concern for those in need. Other commenters suggested that DHS should prohibit either all faith-based organizations, or a subset of ''pervasively sectarian'' organizations, from participating in DHS programs, to avoid violating the First Amendment's Establishment Clause. U.S. Const. Amdt I (1791).

The Establishment Clause does not bar direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988). The Constitution does require the application of certain safeguards, however, when government financial assistance flows to religious organizations, and the proposed rule articulated here respects those safeguards. *See* § 19.2, definitions of ''direct'' and ''indirect Federal financial assistance,'' and § 19.4(a)–(b). For the reasons described above, DHS believes that the proposed rule provides the appropriate approach to this matter.

B. Inherently (Explicitly) Religious Activities

One commenter suggested DHS clarify the definition of inherently religious activities, and suggested that DHS provide additional examples. As discussed, DHS agrees that the term ''inherently religious'' is confusing, and has revised its proposal to remove the term and replace it with ''explicitly religious.''

DHS believes that it would be difficult at best to establish an acceptable list of all explicitly religious activities. Inevitably, the regulatory definition would fail to include some explicitly religious activities or include certain activities that are not explicitly religious. Rather than attempt to establish an exhaustive regulatory definition, the proposed definition of ''explicitly religious activities'' both provides examples of the general types of activities that are prohibited by the regulations, and establishes that providing services does not become explicitly religious merely because providers are religiously motivated to undertake them. This approach is consistent with judicial decisions that likewise have not comprehensively defined explicitly religious activities. DHS also anticipates providing additional guidance to assist recipients in identifying explicitly religious activities.

The commenter also urged DHS to revise the definition of inherently religious activities to remove the term ''sectarian,'' noting that the term is often used pejoratively and does not add any significant clarification. DHS agrees that the term ''sectarian'' may be perceived pejoratively, which is not the intent of the rule, and has revised proposed § 19.2 accordingly. While, with these revisions, DHS believes the definition of explicitly religious activities is sufficiently clear, comments on the revised definition are welcome.

C. Separation and Monitoring of Explicitly Religious Activities

Some commenters asserted that religious organizations are incapable of distributing aid without regard to religion or other prohibited factors, or incapable of separating their inherently (explicitly) religious activities from Federally supported, secular activities. One commenter suggested DHS amend the proposed rule to prohibit all organizations participating in DHS programs from engaging in inherently (explicitly) religious activities, regardless of whether the activities are separated from the activities supported with direct Federal financial assistance and voluntary for DHS program beneficiaries. The commenter asserted that the proposed rule advances religion by giving faith-based organizations access to disaster victims who may be persuaded to religion when they otherwise may not have been inclined. Similarly, one commenter suggested that religious organizations should only be permitted to participate in the immediate aftermath of a disaster, in order to minimize the role of religious organizations and avoid ''entanglement with religion.'' DHS believes such a change would be unnecessarily restrictive and not consistent with either the law or good government.

Other commenters suggested that the proposed rule did not specify a sufficient means of monitoring the separation of organizations' inherently (explicitly) religious activities from activities supported with direct Federal financial assistance. One of these commenters recommended sanctions for violating this provision. Others suggested that an effort to monitor for such separation would require improper ''excessive entanglement'' between government and religion in violation of the Constitution. One commenter recommended DHS revise the proposed rule to include ''specific language forbidding officials from applying more stringent reporting, certification, or other requirements to faith-based organizations than their secular counterparts.''

DHS proposes substantial revisions to proposed § 19.4, which would address concerns over separation requirements for faith-based or religious organizations that receive direct Federal financial assistance for social service programs. Under § 19.4(b), any explicitly religious activities must be separate, distinct, and voluntary for beneficiaries or potential beneficiaries of DHS-supported social service programs. Faith-based or religious organizations need to make this distinction completely clear to beneficiaries or prospective beneficiaries. In addition to this notification requirement, faith-based or religious organizations must also uphold further beneficiary protections, as discussed above. DHS also anticipates providing additional guidance to assist recipients in abiding by, among other things, the separation requirement.

With regard to monitoring and compliance concerns,[4] any organization

[4] DHS has considered, in connection with the monitoring question, both the 2006 GAO report discussed above and a 2005 Urban Institute report noted by commentators. Fredrica D. Kramer et al., Urban Institute, *Federal Policy on the Ground:*

Continued

could violate DHS rules on inappropriate use of direct DHS financial assistance or fail to comply with DHS requirements, not just religious or faith-based organizations. All organizations therefore must be monitored for compliance with program requirements, and no organization may use direct DHS financial assistance for any ineligible activity. Moreover, the First Amendment requires the Federal government to monitor the activities and programs it funds to ensure that they comply with church-state requirements, including prohibition against the use of direct Federal financial assistance in a manner that results in governmental indoctrination on religious matters. *See Bowen* v. *Kendrick,* 487 U.S. 589, 615 (1988); *see also Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 780 (1973).

Executive Order 13559 amended Executive Order 13279 to describe the Federal government's obligation to monitor and enforce constitutional, statutory, and regulatory requirements relating to the use of Federal financial assistance, including the constitutional obligation to monitor and enforce church-state standards in ways that avoid excessive entanglement between religion and government. To address this issue and the comments received on it, DHS has added proposed § 19.4(c) to clarify that all DHS programs must apply the same standards to faith-based and secular organizations, and that all organizations that participate in DHS programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities.

Any organization receiving direct DHS financial assistance that uses the DHS portion of their funding for prohibited purposes will be subject to the imposition of sanctions or penalties to the extent authorized by the program's statutory authority. Recipients of Federal financial assistance must therefore demonstrate, through proper accounting principles, that direct DHS financial assistance is only being used for the Federally supported program. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using direct DHS financial assistance. For example, a faith-based or religious organization may fulfill this requirement by keeping separate track of all staff hours charged to the Federally supported program or showing cost allocations for all items and activities that involve both Federally supported and non-Federally supported funded programs, such as staff, time, equipment, and other expenses, such as travel to event sites.

At the same time, the Federal government must respect the constitutional command against excessive entanglement between government and religion. *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971). Three commenters suggested that the Federal government's efforts to monitor or enforce compliance with the proposed rule would create excessive government entanglement with religion. One commenter suggested that the proposed rule satisfied *Lemon* since the protection provisions in proposed § 19.6 (now § 19.8) and § 19.7 (now § 19.9) ''prevent[] the government from interfering with the day to day operations of the religious organization.''

The Supreme Court has said that excessive entanglement includes ''comprehensive, discriminating, and continuing state surveillance.'' *Id.* at 619. So, for example, the Federal government need not and should not engage in ''pervasive monitoring'' of religious bodies. *Id.* at 627. DHS believes that the monitoring of Federal financial assistance provided for in the proposed rule falls far short of the ''pervasive monitoring'' of religious bodies that would be prohibited under the Constitution. Nonetheless, DHS is interested in further comment regarding oversight and entanglement concerns, and anticipates providing further guidance regarding appropriate compliance monitoring.

D. Beneficiary Protections

Several commenters suggested that the proposed rule did not sufficiently require faith-based organizations to explain to beneficiaries that all inherently (explicitly) religious activities are voluntary and not required for participation in the Federally supported program. Some commenters expressed a concern that beneficiaries would be unwilling to seek services from a religious organization because of the perception that they would be forced into participating in inherently (explicitly) religious activities, or that an individual receiving an invitation to attend an inherently religious activity would feel obligated to attend.

Another commenter suggested that the proposed rule be revised to include a right for beneficiaries to receive services from an alternate or non-religious provider, and that beneficiaries be informed of this right by the faith-based provider. The commenter suggested that without an equivalent secular alternative, beneficiaries might be forced to participate in programs provided by faith-based organizations where they may be required to participate in religious activity in order to receive essential Federally supported benefits.

In accordance with Executive Order 13559, DHS added §§ 19.6 and 19.7 to this proposal, which address these concerns. As discussed above, new proposed § 19.6 includes a written notice requirement. New proposed § 19.7 describes the requirements that a faith-based organization must follow when referring a beneficiary or prospective beneficiary to an alternative provider. DHS is interested in public comment on whether new and revised §§ 19.5, 19.6, and 19.7 provide sufficient protection for the interests of program beneficiaries with respect to their individual decisions regarding religion.

E. The ''Separate in Time or Location'' Requirement

Three commenters suggested that the proposed rule's requirement that inherently (explicitly) religious activities be separate in time or location from the Federally supported activities is unclear or does not provide constitutionally mandated separation, and should be changed to require that inherently (explicitly) religious activities be separate by both time and location.

Under § 19.4 of this proposal, where a religious organization receives direct government assistance, any religious activities that the organization offers must be offered separately—in time or place—from the activities supported by direct Federal financial assistance. This separation by time or place must be done in such a way that it is clear that the two programs are separate and distinct. For example, when separating the two programs by time but presenting them in the same location, the service provider must ensure that one program completely ends before the other program begins. DHS believes that requiring separation by both time and place is not legally necessary and could impose an unnecessary burden on small faith-based organizations. DHS welcomes additional input on the matter. DHS also anticipates providing additional guidance to assist recipients in abiding by, among other things, the separation requirement.

Faith-Based Organizations Delivering Local Services (July 2005) (available at *http://www.urban.org/UploadedPDF/311197_DP05-01.pdf*).

F. Faith-based Organizations' Display of Religious Art or Symbols

Several commenters objected to the proposed rule's clarification that faith-based organizations may use space in their facilities to provide DHS-supported services ''without removing or concealing religious articles, texts, art, or symbols.''

A number of Federal statutes affirm the principle embodied in this rule. *See, e.g.,* 42 U.S.C. 290kk–1(d)(2)(B). Moreover, no other DHS regulations prescribe the types of artwork, statues, or icons that must be removed by program participants from within the structures or rooms in which DHS-supported services are provided. A prohibition on the use of religious icons could make it more difficult for many faith-based organizations to participate in DHS programs than other organizations. It might require them to procure additional space, for example. Such a requirement would thus be typical of the types of barriers that the proposed rule seeks to eliminate. Furthermore, this prohibition would also threaten excessive government entanglement. Accordingly, the proposed rule would continue to permit faith-based organizations to use space in their facilities to provide DHS-supported services, without removing religious art, icons, scriptures, or other religious symbols. At the same time, the proposed rule also contains added protections for beneficiaries, including the requirement that written notice be provided to beneficiaries informing them of their ability to request an alternative provider if the religious character of their existing provider is objectionable to them. These provisions attempt to strike a sensible balance between protecting beneficiaries and faith-based institutions.

G. Nondiscrimination in Providing Assistance

One commenter suggested that the proposed rule's prohibition on discrimination against beneficiaries on the basis of ''religion, belief or religious practice'' should specifically include ''refusing to engage in any religion, belief, or religious practice.'' Federal award recipients may not establish selection criteria that have the effect of discriminating against beneficiaries based on religion or non-religion. Accordingly, Federally supported programs should not limit outreach, recruitment efforts, or advertising of the Federal program services exclusively to religious or non-religious target populations. The new language on nondiscrimination requirements in § 19.5, and on beneficiary protections in §§ 19.6 and 19.7, is meant to prevent discrimination against beneficiaries who do not engage in any religion, belief, or religious practice.

H. The Exemption of Chaplains From the Restriction on Direct Financial Assistance for Inherently (Explicitly) Religious Activities

The proposed rule provided an exemption from the restrictions on inherently (explicitly) religious activities for chaplains serving inmates in detention facilities and organizations assisting those chaplains. One commenter noted that chaplains also often provide non-religious activities such as secular counseling. The commenter proposed that DHS revise the rule to limit the exemption for inherently (explicitly) religious activity conducted by chaplains and the organizations providing assistance to chaplains to ''inherently religious activity conducted by chaplains and the organizations providing assistance to chaplains in such religious activity,'' and urged DHS to set up a monitoring system to ensure chaplains and organizations assisting chaplains do not engage in inherently (explicitly) religious activities during their secular duties.

As noted above, the legal restrictions that apply to religious programs within detention facilities will sometimes be different from legal restrictions that are applied to other DHS programs. This difference is because detention facilities are heavily regulated, and this extensive government control over the facility environment means that officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to provide an opportunity for detainees to exercise their religion.

Sometimes the activities of chaplains and those assisting them will be explicitly religious. For example, a chaplain might provide religious counseling, conduct worship services, or administer sacraments. Religious activities must be purely voluntary for all detainees. The proposed rule would not make any change in the professional or legal responsibilities of chaplains or those persons or organizations assisting them in detention facilities. Neither would the proposed rule diminish the fact that chaplains' duties often include the provision of secular counseling. Rather, the chaplaincy exemption is intended to clarify that the proposed rule's otherwise-applicable restrictions on the use of direct DHS financial assistance for explicitly religious activities do not apply to chaplains in detention facilities or those functioning in similar roles, as provision of explicitly religious activities is part of their duties and necessary to accommodate detainees' exercise of religion.

I. Definition of Financial Assistance

One commenter expressed the view that the proposed rule did not sufficiently distinguish between direct and indirect financial assistance. The commenter suggested that passages of the rule referring to ''direct financial assistance'' may suggest that the freedoms secured by the rule do not apply where DHS ''direct financial assistance'' is administered by a State or local agency (as opposed to ''direct financial assistance'' administered by a component of DHS). The commenter also urged DHS to revise the proposed rule to make clear that the restrictions on inherently (explicitly) religious activities do not apply to DHS-supported programs where individual beneficiaries are provided a choice among a range of qualified service providers, and DHS financial assistance reach the private organization by independent choice.

As discussed above, in light of Executive Order 13559, DHS has clarified the distinction between direct and indirect assistance in proposed § 19.2 and revised the proposed rule to recognize that, where DHS financial assistance reaches an organization indirectly, through the genuine and independent choice of the beneficiary (*e.g.,* voucher, certificate, or other ''indirect'' financial assistance mechanism), the restrictions on explicitly religious activities outlined in the proposed rule are not applicable. DHS proposes to add a definition of ''intermediary'' to proposed § 19.2 to clarify that the restrictions on explicitly religious activities would apply to intermediaries that are acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by direct Federal financial assistance. Thus, direct DHS financial assistance would include DHS funds administered by States and local governments as well as funds administered by DHS's component organizations and regional offices. For example, direct DHS financial assistance includes subawards of DHS financial assistance made by a State to nonprofit organizations to provide social services to beneficiaries; in this example, DHS, the State, and the nonprofit organizations would be required to administer DHS financial assistance and the services provided by

that assistance in accordance with this proposed rule.

J. Recognition of Faith-Based Organizations' Title VII Exemption

A number of commenters expressed views on the proposed rule's provision that faith-based organizations do not forfeit their exemption under Title VII of the Civil Rights Act of 1964, Public Law 88–352, as amended, codified at 42 U.S.C. 2000e–1, to consider religion in hiring decisions, if they receive DHS financial assistance, absent statutory authority to the contrary. Some commenters supported the rule as drafted, noting that a religious organization will retain its independence in this regard, while others disagreed with the provision retaining the Title VII exemption. Some asserted that it is unconstitutional for the government to provide financial assistance for the provision of social services to an organization that considers religion in its employment decisions.

With respect to the Title VII exemption, in 1972, Congress broadened section 702(a) of the Civil Rights Act to exempt religious organizations from the religious nondiscrimination provisions of Title VII, regardless of the nature of the job at issue. The broader, amended provision was upheld. *See Corp. of Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987). This Title VII exemption is applicable when religious organizations are delivering Federally supported social services. As the proposed rule also notes, however, where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this regulation. Accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

One commenter stated that this provision likely violates the ''no religious tests'' clause in Article VI, clause 3 of the Constitution, under which ''no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'' This provision has no application in the current regulation. The receipt of government financial assistance does not convert the employment decisions of private institutions into ''state action'' that is subject to the constitutional restrictions such as the ''no religious tests'' clause.

One commenter suggested religious organizations participating in DHS programs should be required to hire or deploy staff on a religious basis, so that the religious beliefs of the staff reflect the religious demographics of the service area. DHS does not believe it would be appropriate to direct hiring decisions of recipients in this manner.

Finally, two commenters sought a statement that where a specific statute or regulation contains general prohibitions against a recipient considering religion when hiring staff, they may seek, and if they meet the qualifications, be granted relief under the Religious Freedom Restoration Act (RFRA), Public Law 103–141, sec. 3, 107 Stat. 1488 (Nov. 16, 1993), found at 42 U.S.C. 2000bb–1 *et seq.* RFRA applies to all Federal law, regardless of whether it is specifically mentioned in these regulations. *See* 42 U.S.C. 2000bb–3. Thus, organizations that believe RFRA affords them an exemption from any legal obligation should raise that claim with appropriate DHS program offices.

K. Interaction With State and Local Laws

Several commenters expressed views on the proposed rule's interaction with State and local laws. One commenter supported proposed § 19.8 (now § 19.10) as supporting the principle ''that federal funds should be governed by federal policies and that DHS funded programs should be governed by all of its provisions, even when state or local funds are commingled with federal funds.'' One commenter also expressed support for this section but urged DHS to revise the rule to clarify that its provisions override any contrary state or local laws. Another commenter suggested that the proposed rule be revised to explicitly state that nothing in the rule is intended to modify or affect any state law or regulation that relates to discrimination in employment.

The requirements that govern direct Federal financial assistance under the DHS programs at issue in these regulations do not directly address preemption of State or local laws. Federal funds, or direct Federal financial assistance, however, carry Federal requirements. Federal requirements continue to be applicable even when Federal financial assistance is first awarded to States and localities that are then responsible for administering the Federal financial assistance. No organization is required to apply for direct Federal financial assistance from or to participate in DHS programs, but organizations that apply and are selected must comply with the requirements applicable to the program funds. As noted in proposed § 19.10, if a State or local government voluntarily contributes its own funds to supplement Federally supported activities, the State or local government has the option to segregate the Federal assistance or commingle it. If the Federal assistance is commingled, this regulation would apply to all the commingled finances.

L. Tax-Exempt 501(c)(3) Status or Other Separate Corporate Structure

Two commenters expressed concerns regarding the type of corporate structure that should be required of organizations applying to participate in DHS programs. One commenter urged DHS to revise the rule to require religious organizations to establish a ''separate corporate structure'' for its government-supported social welfare activities in order to prevent diversion of direct Federal financial assistance to ''religious activities.''

An organization may create a separate account for its direct DHS financial assistance. All program participants receiving financial assistance from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed by all recipients of DHS financial assistance, including but not limited to the methods described above and the regulation on commingling of Federal assistance in § 19.10. This system of monitoring is expected to adequately protect against the diversion of direct Federal financial assistance for religious activities.

One commenter suggested DHS clarify whether nonprofit organizations, religious or secular, are required to obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. 501(c)(3), to receive DHS financial assistance, particularly where the pertinent statute requires only ''nonprofit'' status. This commenter noted that requiring nonprofit organizations to obtain tax-exempt status can pose a barrier to participation in Federally supported programs. Requirements for tax exempt status under the Internal Revenue Code are unique to each DHS financial assistance program and are established in each program's regulations and program guidance. Where not otherwise required by statute or regulation, this rule does not impose a requirement that an eligible nonprofit organization have tax-exempt status.

M. Participation by ''Anti-Semitic, Racist, or Bigoted Organizations''

One commenter wrote that the proposed rule fails ''to take any steps to

prevent government money from flowing to anti-Semitic, racist, or bigoted organizations.'' Another commenter asked how DHS will stop a faith-based organization from discriminating against a beneficiary based on his or her sexual orientation. Other Federal law prohibits beneficiaries from being excluded from participation in DHS-supported services or subject to discrimination based on race, color, national origin, sex, age, or disability, and this proposed rule does not in any way alter those existing prohibitions. *See, e.g.,* Rehabilitation Act of 1973, 29 U.S.C. 794 (prohibiting discrimination on the basis of disability in federal programs and by recipients of financial assistance); title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (prohibiting discrimination on the basis of race, color, or national origin by recipients of financial assistance).

While Federal law does not expressly prohibit recipients of direct Federal financial assistance from discriminating against beneficiaries because of their sexual orientation or gender identity, Federal law does prohibit Federal contractors and subcontractors from discriminating against employees and applicants for employment on these bases, *see* Executive Order 13627, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014) (prohibiting employment discrimination on the bases of sexual orientation and gender identity in the Federal government and its contracting workforce); Directive 2014–02, Gender Identity and Sex Discrimination (Aug. 19, 2014) (clarifying that all Federal contractors and subcontractors are protected from gender identity discrimination as a form of sex discrimination under Executive Order 11246, as amended); and Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 41 CFR parts 60–1, 60–2, 60–4, and 60–50, (Dec. 9, 2014) (implementing these principles for contracts entered into on or after April 8, 2015).

Regardless of the organization's own beliefs, it would be required under the proposed rule not to discriminate against or among beneficiaries on the basis of religion, belief, religious practice, or lack thereof, and any beneficiary objecting to the religious character of the organization could seek a referral to a different service provider pursuant to the beneficiary protections provided by the rule.

N. Participation of Faith-Based Organizations in Disaster Programs

Several commenters expressed their views on the proposed rule's clarification that faith-based nonprofit organizations that are otherwise eligible to receive direct Federal financial assistance for the repair, restoration, or replacement of damaged facilities, should not have the organization's religious status considered in determining whether to authorize a grant. Two commenters expressed support for the rule; one of these commenters stated that the initial proposal would remedy a previous disparity of treatment. Two commenters objected to the proposal as unconstitutional; one commenter specified a concern that Stafford Act funds might be used to replace religious items such as sacred texts.

Although FEMA's program that provides Federal financial assistance for the repair, restoration, or replacement of damaged facilities has not been identified by DHS as being covered by this rule, section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act provides disaster assistance on the basis of neutral criteria to an unusually broad class of beneficiaries defined without reference to religion. Eligible private nonprofit facilities under the Stafford Act's Public Assistance program are educational, utility, emergency, medical, or custodial care facilities (including a facility for the aged or disabled) or other facilities that provide essential governmental type services to the general public, and such facilities on Indian reservations. 44 CFR 206.221(e). An eligible private nonprofit organization is a nongovernmental agency or entity that has an IRS tax exemption ruling letter under sections 501(c), (d), or (e) of the Internal Revenue Code or satisfactory evidence from the State that it is a nonprofit organized or doing business under State law. 44 CFR 206.221(f). Religious organizations are able to receive these generally available government benefits and services, just as other organizations that meet the eligibility criteria.

O. Effect of Receipt of Disaster Grant With Regard to Other Federal Laws

One commenter urged DHS to include a specific statement that ''a faith-based school receiving a federal grant for the restoration or repair of facilities damaged in a disaster is not deemed to be a 'recipient of federal funds' for the purposes of other statutes.'' DHS does not have the legal authority to exempt its programs from such statutory requirements, if any. Statutes that restrict Federal grant recipients' actions or limit their eligibility to receive additional Federal financial assistance, as well as any exemptions from those limitations, are established by Congress. The statutes authorizing the financial assistance do not contain such an exemption. DHS does not have the legal authority to unilaterally create the exemption requested by the commenter.

P. Purpose and Applicability of the Regulation

One commenter noted that proposed § 19.1 uses the term ''equal participation'' to characterize the intent of the proposed rule, suggested that the term ''wrongly implies that faith-based organizations should take part in DHS programs to the same extent as secular organizations,'' and recommended DHS consider revising that section to better express the intent of the rule. In response to this comment, DHS has revised proposed § 19.1 to reference the regulation's purpose as ensuring the ''equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs''. DHS did not intend to suggest that it would establish participation rates for religious organizations in DHS programs. As described in the preamble of this proposed rule, the purpose of the rule is to ensure all qualified organizations may compete for funds offered under DHS social service programs, regardless of their religious character.

One commenter suggested DHS revise the title of the proposed rule because several aspects of the proposed rule apply to secular as well as faith-based organizations. Although several aspects of the rule apply to all organizations seeking to participate in DHS social service programs, secular or religious, the title conveys the principal intent of the rule and poses little risk of confusion.

VI. Statutory and Regulatory Review

A. Executive Order 12866 and 13563

Executive Orders 13563 and 12866 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of

reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are the requirements that:

(1) Faith-based organizations that receive direct financial assistance from DHS to participate in or administer any social service program must give beneficiaries a written notice informing them of particular protections afforded to them including their ability to request an alternative provider if the religious character of their existing provider is objectionable to them; and

(2) where a beneficiary objects to the religious character of an organization providing social service programs supported by DHS financial assistance, the social service provider make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object.

The Department considered and adopted alternatives that minimized compliance costs on social service providers given the requirements of Executive Orders 13279 and 13559. Specifically, the proposed rule includes model language for the notice to beneficiaries and for the beneficiary referral request form, in Appendix A. Individual advance notice forms are not required where it is impracticable to provide them. Where individual, advance written notice is impracticable because the recipient and beneficiary have only a brief, potentially one-time interaction, such as at a soup kitchen, DHS believes a conspicuous posted notice would suffice.

In addition, to minimize compliance costs and allow maximum flexibility in implementation, the Department has elected not to establish a specific format for the referrals required when beneficiaries request an alternative provider. Furthermore, if the social service provider is unable to identify an appropriate alternative provider after undertaking reasonable efforts, DHS would then attempt to identify an alternative provider.

The Department estimates this rule would impose a maximum cost of approximately $500,000 annually. A more detailed estimate of the cost of providing these notices to beneficiaries and, if requested, the beneficiary referral request form is discussed below in the Regulatory Flexibility Act section of this proposed rule. An estimate of the cost of the referral provision is also discussed in Regulatory Flexibility Act section. In addition, an estimate of the annual total burden hours of the referral provision is discussed in the Paperwork Reduction Act section of this proposed rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to consider the impacts of their rules on small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions.

Given the lack of specific small entity data, the Department has prepared an initial regulatory flexibility analysis even though the Department does not believe this rule will impose a significant economic impact on a substantial number of small entities. As described above, the Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing a model notice to beneficiaries and model beneficiary referral request form in Appendix A, and by not requiring the social service providers to follow a specific format for the referrals. The Department estimates it will take no more than two hours for providers to familiarize themselves with the notice requirements and print and duplicate an adequate number of disclosure notices and referral request forms for potential beneficiaries. Using May 2013 Bureau of Labor Statistics information, the hourly mean wage for a Training and Development Specialist is $29.22.[5] In addition to wage costs, employers incur costs for employee benefits such as paid vacation and insurance. The ''fully loaded'' hourly cost to employers (which includes both wage and employee benefit costs) of a Training and Development Specialist equates to $42.75.[6] This results in an estimate of the labor cost per service provider of preparing the notice and referral form of approximately $85.50 (2 hours × $42.75). In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices and referral request forms for covered grantees and subgrantees, except for certain grantees and subgrantees under the Emergency Food and Shelter Program.[7] Because these costs will be borne by every small service provider with a religious affiliation, the Department believes that a substantial number of small entities will be affected by this provision. However, the Department does not believe that a compliance cost of less than $200 per provider per year is significant percentage of a provider's total revenue. In addition, we note that after the first year, the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.[8] Assuming, consistent with the Paperwork Reduction Act analysis below, that this rule would cover approximately 2,624 faith-based grantees and subgrantees, the annual costs associated with the notice requirement are unlikely to exceed $487,000 [2,624 entities × ($100 printing + $85.50 labor)].

The rule will require service providers, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. The Department estimates that each referral request will require no more than four hours of a Training and Development Specialist's time to process and complete a referral at a ''fully loaded'' labor cost of $42.75 per hour. The Department's estimate for the total annual cost burden can be summarized as follows.

- Total Estimated Number of Notices: N, where N equals the total number of

[5] Per BLS SOC 13–1151, the mean hourly wage of a Training and Development Specialist is $29.22. *http://www.bls.gov/oes/2013/may/oes131151.htm.*

[6] The fully loaded Training and Development Specialist wage is calculated using a load factor of 1.463 (1 + (10.49 ÷ 22.65)) based on the Bureau of Labor Statistics Employer Costs for Employee Compensation for civilian workers (Table 1) from December 2014 for all workers, retrieved from *http://www.bls.gov/news.release/ecec.t01.htm.* This equates to a fully loaded Training and Development Specialist wage of $42.75 ($29.22 × 1.463) when applied to the hourly mean wage for a Training and Development Specialist ($29.22).

[7] In this analysis and the Paperwork Reduction Act analysis below, the Department assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program will not print and disseminate a paper notice and referral form to each individual beneficiary. Many of the activities supported by that program, such as soup kitchens and one-time assistance with rent, mortgage, or utility bills, are ones for which individual beneficiary forms would not be practicable, and in those cases, a commonly posted notice, produced at minimal cost, should suffice. The Department believes that requests for referrals will be negligible for activities involving these sorts of interactions, such that the overall estimated cost and labor burden related to the referral provision is conservative enough to encompass the limited number of referral requests that may result from these brief interactions.

[8] We also note that the costs associated with this rule's notice provisions may be an eligible management and administrative cost under DHS grant programs. Such costs would count towards the administrative cap cost for a program. The cost of the referral to an alternate provider may also be grant-eligible.

beneficiaries under DHS social service programs for whom individual written notices can practicably be provided. Faith-based organizations covered by this rule would be required to provide a notice to each beneficiary of a DHS-supported social service program, except where a limited exception for a commonly posted notice applies. Based on subject-matter expert best estimates, DHS estimates that the total annual number of notices required under this rule equals approximately 60,000.[9]

- Total Estimated Annual Number of Requests for Referrals: N × Z, where Z is the percentage of beneficiaries or potential beneficiaries who request referrals. DHS assumes that Z is equal to 0.0025.[10] Under these assumptions, DHS estimates approximately 150 requests for referrals annually.
- Total Time required to complete a referral: T, where T is less than or equal to 4 hours.
- Labor cost of a Training and Development Specialist: L, where L equals $42.75.
- Total estimated Annual Referral Cost Burden: C, where C is equal to the following:

$C = (L \times T) \times (N \times Z)$
$C = (\$42.75 \times 4) \times (60{,}000 \times 0.0025)$
$C = \$25{,}650$

The Department therefore estimates the total estimated annual cost burden to equal $512,650 or less ($487,000 notice requirement cost + $25,650 referral cost = $512,650). The cost on a per entity basis averages approximately $200 ($512,650 total cost ÷ 2,624 entities = $195.37). DHS expects that this estimates likely overestimates the actual cost burden associated with this rulemaking. The Department invites interested parties to provide comments on this assumption, or to provide data on which we can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

C. Unfunded Mandates Reform Act

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

D. Federalism

Pursuant to Executive Order 13132, DHS has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13, all agencies are required to submit to the OMB, for review and approval, any reporting requirements inherent in a rule. See 44 U.S.C. 3506. Specifically, a Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection of information under the PRA, and the collection of information must display a currently valid OMB control number. Notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. 44 U.S.C. 3512.

The proposed rule includes new requirements. Section 19.6 would require faith-based or religious organizations that provide social services to beneficiaries under a DHS program supported by direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) a notice instructing them of their rights and protections under this regulation and to make reasonable efforts to identify and refer beneficiaries requesting referrals to alternative service providers. The content of the notice and the actions the faith-based or religious organizations must take if a beneficiary objects to the religious character of the organization are described in the preamble and in the proposed regulatory text. The burden of providing the notice to beneficiaries, and identifying and referring a beneficiary to an alternative service provider are estimated in this section.

Pursuant to program guidance and grant agreements, faith-based organizations that would be subject to these requirements may have to retain records to show that they have met the referral requirements in the proposed regulations. Faith-based organizations could meet such a retention requirement by maintaining, in the case of paper notices, the bottom portion of the notice required under the proposed Appendix. DHS does not include an estimate of the burden of records retention.

The Department has retention requirements included in information collection instruments for Department programs. Those collection instruments cover burdens imposed under program and administrative requirements under current information collection instruments that are approved by OMB and each of those collections has an OMB-assigned information collection control number.

The retention burden that would be added to those information collection instruments under these proposed regulations is so small as to not be measurable in the context of all the program and administrative requirements in the existing program collection instruments. For example, a grantee or subgrantee that had to provide notice under these proposed regulations could meet the record-keeping requirement by collecting the tear-off portion of the notice for those beneficiaries that request alternative provider and keeping it in a designated folder. Therefore, the Department has determined that no burden would be added that would require estimates of time and cost burden as a result of maintaining records of compliance with these proposed regulations.

The Department must impose the third-party notice requirements to implement the requirements of Executive Order 13559.

The Department will submit an information collection request (ICR) to the OMB to obtain PRA approval for the information collection formatting requirements contained in this NPRM. Draft control number 1601–NEW will be used for public comment. The burden for the information collection provisions of this NPRM can be summarized as follows:

Agency: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties.

Title of Collection: Written Notice of Beneficiary Protections.

OMB ICR Reference Number Control Number: 201505–1601–001.

Affected Public: State and local governments, not-for-profit organizations.

- Total Estimated Number of Organizations: R, where R represents the total number of entities that must give notice. To estimate this number, the Department relied upon information

[9] DHS notes that in light of the nature of the grantor-grantee-subgrantee framework attendant to some of its programs, it is very difficult to estimate with accuracy the total number of beneficiaries served by faith-based organizations administering DHS-supported social service programs.

[10] In DHS's experience, beneficiaries do not frequently object to receiving services from faith-based organizations. DHS assumes a referral request rate of 0.25% for purposes of this analysis, consistent with the practice of other agencies in this area. DHS expects that this rate overestimates the likely referral request rate.

from two of its grant-making components: FEMA and USCIS. FEMA estimates that there are approximately 2,600 grantees and subgrantees that would have to provide some form of notice to beneficiaries.[11] USCIS estimates that there are approximately 24 grantees subject to the notice requirement.[12] Accordingly, DHS estimates that R is equal to approximately 2,600.

- Total Estimated Number of Notices: N, where N equals the total number of beneficiaries under DHS social service programs to whom provision of an individual written notice would be practicable. Faith-based organizations covered by this rule would be required to provide, where practicable, a notice to each beneficiary of a DHS-supported social service program.[13] Based on subject-matter expert best estimates, DHS estimates that the total annual number of notices required under this rule equals approximately 60,000.[14]
- Total Estimated Annual Burden to Provide Each Notice: 60,000 minutes, or 1,000 hours (equivalent to 60,000 × T, where T is less than or equal to one minute).
- Total Estimated Annual Number of Requests for Referrals: N × Z, where Z is the percentage of beneficiaries or potential beneficiaries who request referrals. DHS assumes that Z is equal to .0025.[15] Under these assumptions, DHS estimates approximately 150 requests for referrals annually.
- Total time required to complete a referral T, where T is less than or equal to 4 hours.
- Total Estimated Annual Referral Burden Hours: B, where B is equal to the following:

$B = (N \times Z) \times T.$
$B = (60{,}000 \times .0025) \times 4$
$B = 600$

The Department therefore estimates that the Total Estimated Annual Burden Hours is 1,600 hours or less. DHS expects that this significantly overestimates the actual burden hours associated with this rulemaking. DHS requests comments on this assumption, as well as the remainder of this PRA analysis and this proposed rule.

The recipient provider will be required to complete the referral form, notify the awarding entity, and maintain information only if a beneficiary requests a referral to an alternate provider.

List of Subjects in 6 CFR Part 19

Civil rights, Religious discrimination.

For the reasons set forth above, DHS proposes to amend title 6 of the Code of Federal Regulations to add a new part 19 as follows:

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH–BASED ORGANIZATIONS

Sec.
19.1 Purpose.
19.2 Definitions.
19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.
19.4 Explicitly religious activities.
19.5 Nondiscrimination requirements.
19.6 Beneficiary protections: written notice.
19.7 Beneficiary protections: referral requirements.
19.8 Independence of faith-based organizations.
19.9 Exemption from Title VII employment discrimination requirements.
19.10 Commingling of Federal assistance.
Appendix A to Part 19—Model Written Notice to Beneficiaries

Authority: 5 U.S.C. 301; 6 U.S.C. 111, 112; E.O. 13279, 67 FR 77141; E.O. 13403, 71 FR 28543; E.O. 13498, 74 FR 6533; and E.O. 13559, 75 FR 71319.

§ 19.1 Purpose.

It is the policy of Department of Homeland Security (DHS) to ensure the equal treatment of faith-based organizations in social service programs administered or supported by DHS or its component agencies. The equal treatment policies and requirements contained in this part are generally applicable to faith-based organizations participating or seeking to participate in any such programs. More specific policies and requirements regarding the participation of faith-based organizations in individual programs may be provided in the statutes, regulations, or guidance governing those programs, such as regulations in title 44 of the *Code of Federal Regulations.* DHS or its components may issue guidance at a future time with respect to the applicability of this policy and this part to particular programs.

§ 19.2 Definitions.

For purposes of this part 19:

Beneficiary means an individual recipient of goods or services provided as part of a social service program specifically supported by Federal financial assistance. ''Beneficiary'' does not mean an individual who may incidentally benefit from Federal financial assistance provided to a State, local, or Tribal government, or a private nonprofit organization.

Direct Federal financial assistance or *Federal financial assistance provided directly* means that the government or an intermediary (*e.g.,* State, local, or Tribal government, or nongovernmental organization) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* through a grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly''.

Explicitly religious activities include activities that involve overt religious content such as worship, religious instruction, or proselytization. An activity is not explicitly religious merely because it is motivated by religious faith.

Financial assistance means assistance that non-Federal entities receive or administer in the form of grants, sub-grants, contracts, subcontracts, prime awards, loans, loan guarantees, property, cooperative agreements, food, direct appropriations, or other assistance, including materiel for emergency response and incident management. Financial assistance includes assistance provided by DHS, its component organizations, regional offices, and DHS financial assistance administered by intermediaries such as

[11] This figure includes known grantees and subgrantees of the Emergency Food and Shelter Program, the Crisis Counseling Program and the Disaster Case Management Program.

[12] This figure includes known grantees and subgrantees of the Citizenship and Integration Grant Program.

[13] As noted above, in this analysis, the Department assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program provide services of a brief and potentially one-time nature such that individual notice would not be practicable. Creation of a common posted notice in those circumstances would be comparable in burden to creating a single notice, and so creation of such common notices is encompassed within the estimates provided for compliance with the beneficiary notice provision.

[14] DHS notes that in light of the nature of the grantor-grantee-subgrantee framework attendant to some of its programs, it is very difficult to estimate with accuracy the total number of beneficiaries served by faith-based organizations administering DHS-supported social service programs. In general, to produce the estimate described above, for each covered program, DHS calculated the percentage of grantees and subgrantees that may qualify as a faith-based or religious organization under this rule. DHS then multiplied that percentage figure by the estimated total number of beneficiaries for each program, producing an estimate of the total number of individuals served by faith-based or religious organizations under each program.

Where using this methodology was not feasible due to data limitations, DHS relied on subject matter experts in the relevant grant program to make an appropriate best estimate.

[15] In DHS's experience, beneficiaries do not frequently object to receiving services from faith-based organizations. DHS assumes a referral request rate of 0.25% for purposes of this analysis, consistent with the practice of other agencies in this area. DHS expects that this rate overestimates the likely referral request rate.

State, local, and Tribal governments, such as formula or block grants.

Indirect Federal financial assistance or *Federal financial assistance provided indirectly* means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. For purposes of this part, sub-grant recipients that receive Federal financial assistance through State-administered programs are not considered recipients of ''indirect Federal financial assistance.'' Federal financial assistance provided to an organization is considered ''indirect'' within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution when:

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(2) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(3) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. If an intermediary, acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services supported by the Federal government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

Social service program means a program that is administered by the Federal government, or by a State or local government using Federal financial assistance, and that provides services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need. Such programs include, but are not limited to, the following:

(1) Child care services, protective services for children and adults, services for children and adults in foster care, adoption services, services related to the management and maintenance of the home, day care services for adults, and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities);

(2) Transportation services;

(3) Job training and related services, and employment services;

(4) Information, referral, and counseling services;

(5) The preparation and delivery of meals and services related to soup kitchens or food banks;

(6) Health support services;

(7) Literacy and mentoring programs;

(8) Services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to intervention in, and prevention of, domestic violence; and

(9) Services related to the provision of assistance for housing under Federal law.

§ 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

(a) Faith-based organizations are eligible, on the same basis as any other organization, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(c) Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

(d) Nothing in this part shall be construed to preclude DHS or any of its components from accommodating religious organizations and persons to the fullest extent consistent with the Constitution and laws of the United States.

(e) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, or policy by DHS or an intermediary in administering financial assistance from DHS shall disqualify a religious organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation.

§ 19.4 Explicitly religious activities.

(a) Organizations that receive direct financial assistance from DHS to participate in or administer any social service program may not use direct Federal financial assistance that it receives (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) or in any other manner prohibited by law.

(b) Organizations receiving direct financial assistance from DHS for social service programs are free to engage in explicitly religious activities, but such activities must be

(1) Clearly distinct from programs specifically supported by direct federal assistance:

(2) Offered separately, in time or location, from the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs; and

(3) Voluntary for the beneficiaries of the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs.

(c) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities, including those prohibiting the use of direct financial assistance from DHS to engage

in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, or policy by DHS or a State or local government in administering financial assistance from DHS shall disqualify a religious organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation.

(d) The use of indirect Federal financial assistance is not subject to the restriction in paragraphs (a), (b), and (c) of this section.

(e) Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered ''explicitly religious activities'' that are subject to direct Federal financial assistance restrictions.

§ 19.5 Nondiscrimination requirements.

An organization that receives direct financial assistance from DHS for a social service program shall not favor or discriminate against a beneficiary or prospective beneficiary of said program or activity on the basis of religion, belief, religious practice, or lack thereof. Organizations that favor or discriminate against a beneficiary will be subject to applicable sanctions and penalties, as established by the requirements of the particular DHS social service program or activity.

§ 19.6 Beneficiary protections: Written notice.

(a) Faith-based or religious organizations providing social services to beneficiaries under a DHS program supported by direct Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice may be given in the form set forth in Appendix A of this part. This notice must state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to DHS through the Office for Civil Rights and Civil Liberties.

(b) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

§ 19.7 Beneficiary protections: Referral requirements.

(a) If a beneficiary or prospective beneficiary of a social service program covered under § 19.6 objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

(b) A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(d) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify DHS. If the organization is unable to identify an alternative provider, DHS shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediate organization that receives a request for assistance in identifying an alternative provider may request assistance from DHS.

§ 19.8 Independence of faith-based organizations.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance contrary to § 19.4.

(b) Faith-based organizations may use space in their facilities to provide social services using financial assistance from DHS without removing or concealing religious articles, texts, art, or symbols.

(c) A faith-based organization using financial assistance from DHS for social service programs retains its authority over internal governance, and may also retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

§ 19.9 Exemption from Title VII employment discrimination requirements.

(a) A faith-based organization's exemption, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1), from the Federal prohibition on employment discrimination on the basis of religion is not forfeited when the organization seeks or receives financial assistance from DHS for a social service program or otherwise participates in a DHS program.

(b) Where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this regulation. Accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

§ 19.10 Commingling of Federal assistance.

(a) If a State, local, or Tribal government voluntarily contributes its own funds to supplement Federally supported activities, the State, local, or Tribal government has the option to segregate the Federal assistance or commingle it.

(b) If the State, local, or Tribal government chooses to commingle its own and Federal funds, the requirements of this part apply to all of the commingled funds.

(c) If a State, local, or Tribal government is required to contribute matching funds to supplement a Federally supported activity, the matching funds are considered commingled with the Federal assistance

and therefore subject to the requirements of this part.

Appendix A to Part 19—Model Written Notice to Beneficiaries

NOTICE OF BENEFICIARY RIGHTS

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by direct financial assistance from the Federal government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance under this program;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; however, we cannot guarantee that in every instance, an alternative provider will be available; and
- You may report violations of these protections to the Department of Homeland Security, Office for Civil Rights and Civil Liberties:

E-mail: *CRCLCompliance@hq.dhs.gov*

Fax: 202–401–4708

U.S. Mail: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties, Compliance Branch, 245 Murray Lane SW., Building 410, Mail Stop #0190, Washington, DC 20528

We must give you this written notice before you enroll in our program or receive services from the program.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider.

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me.

Name:

Best way to reach me (phone/address/email):

( ) Please follow up with the service provider to which I was referred.

( ) Please do not follow up.

Jeh Charles Johnson,

Secretary.

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Part X

Department of Housing and Urban Development

24 CFR Parts 5, 92, 570, et al.

Equal Participation of Faith-Based Organizations in HUD Programs: Implementation of E.O. 13559; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 570, 574, 576, 578, 582, 583 and 1003

[Docket No. FR–5781–P–01]

RIN 2501–AD65

Equal Participation of Faith-Based Organizations in HUD Programs: Implementation of E.O. 13559

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise HUD's regulation that covers the equal participation of faith-based (religious) organizations in HUD Programs, including all of HUD's Native American Programs, as well as several program-specific regulations regarding the equal participation of faith-based organizations. These revisions are being undertaken to implement Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations. Executive Order 13559 revised Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which provides the legal basis for HUD's current equal participation regulations. This rule implements changes to Executive Order 13279 made by Executive Order 13559, including changes to specific terminology, additional beneficiary protections, and clarifications on the responsibilities of intermediaries. In addition to proposing regulatory amendments to implement Executive Order 13559, HUD is also publishing for public comment a sample notice of beneficiary protections for use by faith-based organizations.

DATES: *Comment Due Date.* October 5, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, 451 7th Street SW., Room 10276, Department of Housing and Urban Development, Washington, DC 20410–0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. All comments received by mail are a part of the public record and will be posted to *www.regulations.gov* without change.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., eastern time, weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paula Lincoln, Director, Center for Faith-Based and Neighborhood Partnerships, Department of Housing and Urban Development, 451 7th Street SW., Room 10184, Washington, DC 20410–7000; telephone number 202–708–2404 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which was published on December 16, 2002, at 67 FR 77141. Executive Order 13279 set forth fundamental principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

HUD implemented Executive Order 13279 through three final rules:

Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, published on September 30, 2003, at 68 FR 56396, and amended HUD's regulations in 24 CFR part 92 (HOME Investment Partnerships Program), part 570 (Community Development Block Grants), part 572 (HOPE for Homeownership of Single Family Homes (HOPE 3)), [1] part 574 (Housing Opportunities for Persons with AIDS), part 576 (Emergency Shelter Grants Program, now Emergency Solutions Grants Program), part 582 (Shelter Plus Care), part 583 (Supportive Housing Program), and part 585 (Youthbuild Program); [2]

Equal Participation of Faith-Based Organizations, published on July 9, 2004, at 69 FR 41712, and amended HUD's regulations in 24 CFR part 5 (General HUD Program Requirements and Waivers) and 24 CFR part 570 (Community Development Block Grant Program); and

Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, published on October 22, 2004, at 69 FR 62164, and amended HUD's regulations at 24 CFR part 954 (Indian HOME

[1] Part 572 was removed by a HUD final rule published on September 2, 2014, at 79 FR 51893.

[2] Part 585 was removed by a HUD final rule published on September 2, 2014, at 79 FR 51893.

Program),[3] and 24 CFR part 1003 (Community Development Block Grants for Indian Tribes and Alaska Native Villages).

The regulations established by each of these three rules provide that faith-based (religious) organizations are eligible on the same basis as any other eligible organization to participate in HUD programs and activities;[4] organizations may not engage in inherently religious activities as part of programs or services directly funded under a HUD program or activity; faith-based organizations that participate in HUD programs or activities may retain their independence; and a faith-based organization that participates in a HUD program does not forfeit its exemption from the Federal prohibition against employment discrimination on the basis of religion, as provided in title VII of the Civil Rights Act of 1964 (though some individual HUD programs may have independent statutory nondiscrimination requirements). These regulations also provide that organizations may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion or religious beliefs; address the use of HUD funds for acquisition, construction, and rehabilitation of structures that are used for inherently religious activities; and clarify the attachment of requirements to State, tribal, and local funds that are commingled with HUD funds.

On February 5, 2009, President Obama signed Executive Order 13498, entitled ''Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships,'' which was published on February 9, 2009, at 74 FR 6533. Executive Order 13498 established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) for the purpose of bringing together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled ''A New Era of Partnerships: Report of Recommendations to the President'' in March 2010.[5] The Advisory Council Report included recommendations to amend Executive Order 13279 to clarify the legal foundation of partnerships, and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

On November 17, 2010, President Obama signed Executive Order 13559, entitled ''Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,'' which was published on November 22, 2010, at 75 FR 71319.[6] Executive Order 13559 incorporated many of the Advisory Council's recommendations and amended Executive Order 13279, to revise and add additional fundamental principles and policymaking criteria for inclusion in guidance and regulations.[7] The principles include:

- The Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and the Federal Government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Organizations engaging in explicitly religious activities must separate these activities, in time or location, from programs supported with direct Federal financial assistance (including prime awards and sub-awards). Participation in any explicitly religious activity cannot be subsidized with direct Federal financial assistance (including prime awards and sub-awards), and participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- Religious providers are welcome to compete for Federal Government funding and maintain a religious identity as described in the order;
- Agencies that administer or award Federal financial assistance must implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);
- Agencies that provide Federal financial assistance must post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations, and post online a list of entities receiving such assistance; and
- Agency decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) for the purpose of reviewing and evaluating existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of Executive Order 13559. The Working Group issued its report in April 2012.[8] In August 2013, OMB issued guidance instructing specified agency heads to adopt regulations and guidance that will fulfill the requirements of Executive Order 13559, and to amend regulations and guidance to ensure that they are consistent with this Executive order.[9]

Prior to the issuance of the August 2013 guidance and after the issuance of Executive Order 13559, HUD issued one interim rule, one final rule, and one proposed rule that incorporated language to reflect Executive Order 13559:

Interim Rule: Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, published on July 31, 2012, at 77 FR 45422, which provided a new regulation on the equal participation of faith-based organizations in 24 CFR part 578 (Continuum of Care Program);

Final Rule: HOME Investment Partnerships Program: Improving Performance and Accountability; Updating Property Standards, published on July 24, 2013, at 78 FR 44627, which modified HUD's equal participation of faith-based organizations regulation in

[3] HUD stopped awarding grants on the Indian Home Program on September 30, 1997, and part 954 was removed by a HUD final rule published on February 9, 2012, at 77 FR 6673.

[4] Faith-based organizations must also meet any applicable program requirements to participate in a HUD program.

[5] *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.*

[6] *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf.*

[7] Executive Order 13279, Section 2, paragraphs (e)–(j).

[8] Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, April 2012, at *http://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf.*

[9] M–13–19, ''Implementation of Executive Order 13559, 'Fundamental Principles and Policymaking Criteria for Partnerships with Faith-based and Other Neighborhood Organizations','' August 2, 2013, at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf.*

24 CFR part 92 (HOME Investment Partnerships Program); and

Proposed Rule: Homeless Emergency Assistance and Rapid Transition to Housing: Rural Housing Stability Assistance Program and Revisions to the Definition of ''Chronically Homeless,'' published on March 27, 2013, at 78 FR 18725, which proposed regulations at 24 CFR part 579 for the new Rural Housing Stability Assistance Program, including a regulation on the equal participation of faith-based organizations.

II. This Proposed Rule

A. Overview of Proposed Regulations

This proposed rule updates all HUD regulations governing the equal participation of faith-based organizations in HUD programs to reflect the new fundamental principles and policymaking criteria in Executive Order 13559. Some of the principles do not require regulations and will be included in guidance that will accompany the final rule to follow this proposed rule. HUD may issue guidance on the applicability of the Executive order and this proposed rule to particular programs or activities.

HUD is implementing Executive Order 13559 by amending its § 5.109 regulation to: (1) Add definitions for direct Federal financial assistance, Federal financial assistance, indirect Federal financial assistance, and an intermediary; (2) state that decisions must be free from political interference or even the appearance of such interference; (3) clarify the separation of explicitly religious activities from activities funded with direct Federal financial assistance and defining explicitly religious activities; (4) clarify the responsibilities of intermediary organizations; (5) add new beneficiary protections, and (6) amend existing language in § 5.109 to include Executive Order 13559 changes.

This proposed rule also proposes to remove duplicate faith-based regulations in 24 CFR parts 92, 570, 574, 576, 578, 582, 583, and 1003, and replaces them with cross-references to a uniform regulation at § 5.109.

B. Specific Proposed Amendments

1. New Definitions

This proposed rule adds a new paragraph (b) to § 5.109 providing definitions for direct Federal financial assistance, Federal financial assistance, indirect Federal financial assistance, and an intermediary, meaning one that accepts and distributes Federal financial assistance.

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. To clarify this distinction, the proposed rule provides definitions of these terms.

Programs are supported with ''direct'' Federal financial assistance when either the Federal Government or an intermediary, as identified in this proposed rule, selects a service provider and either purchases services from that provider (*i.e.,* through a contract) or awards funds to that provider to carry out an activity (*e.g.,* through a grant, sub-grant, sub-award, or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity, the beneficiary being the end user of the service, product, or assistance.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal Government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Federal Government could choose to allow the beneficiary to secure the needed service on their own. Alternatively, a governmental agency, operating under a program of aid that has at least one secular provider, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Government-provided certificate. Either way, the Government empowers the beneficiaries to choose for themselves whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal Government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Federal Government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice.[10] An example would be the Housing Choice Voucher Program.

The Supreme Court has held that if a program meets certain criteria, the Government may fund the program if, among other things, the program places the benefit in the hands of individuals, who, in turn, have the freedom to choose the provider from which they receive their benefit and ''spend'' the Government funds, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the Government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice'' [11] was also neutral toward religion and offered beneficiaries adequate secular options. This type of Federal financial assistance is considered ''indirect.'' Accordingly, these criteria also are included in the text of the proposed definition of ''indirect Federal financial assistance.''

HUD also adds the definition of ''Federal financial assistance'' from Executive Order 13279 to clarify the new definitions ''direct Federal financial assistance'' and ''indirect Federal financial assistance.''

HUD also proposes a definition for intermediary. An intermediary is an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide Government-funded services. This definition clarifies the application of these requirements to recipients of Federal financial assistance from HUD that are classified as intermediaries.

2. Decisions Must Be Free From Political Interference

This proposed rule adds to the existing paragraph (b) of § 5.109, redesignated as paragraph (c) under the proposed rule, that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief. To comply with this requirement, entities that award Federal financial assistance (HUD or an intermediary) should instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in the process of awarding or allocating funds; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or

[10] *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

[11] *Zelman.* at 653.

related or unrelated to a specific religion. In addition, when selecting peer reviewers, entities that award Federal financial assistance should never ask about religious affiliation or take such matters into account, but should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

3. Separation of Explicitly Religious Activities From Activities Funded With Direct Federal Financial Assistance and Definition of Explicitly Religious Activities

This proposed rule would amend paragraphs (c) and (d) in § 5.109, redesignated as paragraphs (d) and (e) under this proposed rule, to clarify the requirement that activities supported by direct Federal financial assistance must be separate from explicitly religious activities; define ''explicitly religious activities;'' and replace the term ''inherently religious activities'' with the term ''explicitly religious activities.''

Executive Order 13559 makes clear that all organizations that receive Federal financial assistance are prohibited from discriminating against beneficiaries or potential beneficiaries of Federal programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Executive Order 13559 also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately, in time or location, from programs or services supported with direct Federal financial assistance.

HUD's existing regulations and Executive Order 13279 prohibit nongovernmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, sub-awards, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious,'' however, has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, although all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule.[12]

Further, though the Supreme Court has sometimes used the term ''inherently religious,'' the Court has not used this term to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' [13] The Court has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion.[14] This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance must not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities.

HUD provides the following activities as examples of permissible use of funds, but anticipates that such activities would generally not apply to HUD programs. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity. Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are rare instances when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions; for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs.[15] Since such activities have only been recognized in correctional settings, they would likely not arise in HUD-funded programs.

It is important to emphasize that the restrictions on explicitly religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the Government-funded program did not orchestrate or encourage such comments.

HUD, therefore, proposes to replace the term ''inherently religious activities'' with the term ''explicitly

[12] GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (*available at http://www.gao.gov/new.items/d06616.pdf*).

[13] *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

[14] *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *Helms,* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997).

[15] Where there is extensive Government control over the environment of the Federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

4. Responsibilities of Intermediary Organizations

HUD also proposes to add a new paragraph (f) to § 5.109 to clarify the responsibilities of intermediaries, which may include States, tribes, or units of local governments. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The intermediary also has the same duties as the Federal Government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules; for example, through funding contracts or agreements. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

5. New Beneficiary Protections

This rule proposes to add a new paragraph (g) to § 5.109 implementing a variety of valuable protections for the religious liberty rights of beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

Executive Order 13559 requires that faith-based organizations providing services under a program that is supported by direct Federal financial assistance give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider if they object to the organization's religious character, when available. Written notice should be provided prior to enrollment or receipt of services. However, when the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries in writing of their protections at the earliest available opportunity. A sample notification of beneficiary rights is attached in appendix A for public comment.

If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must attempt to refer the beneficiary to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection. HUD will provide further guidance regarding the referral requirement.

A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider. The proposed rule specifies that, except for services provided by telephone, Internet, or similar means, the referral would be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the referring organization. The alternative provider also would need to have the capacity to accept additional clients. If a Federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no Federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary. In the case of a referral, the organization should follow up with the beneficiary, if the beneficiary provides contact information, or the organization to which the beneficiary has been referred unless the beneficiary opts out of follow up. Under no circumstances, however, may an organization violate privacy laws in following up on a beneficiary referral.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify HUD or the intermediary, if applicable, and that entity would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the Executive order and the proposed rule require that HUD or the intermediary ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted that in some instances that HUD or the intermediary may also be unable to identify a suitable alternative provider. In all instances, the organization must maintain records of all requests for referrals, referrals made, and attempts to make a referral. HUD will issue guidance to clarify what constitutes reasonable efforts to identify an alternative provider.

6. Amending Existing § 5.109 To Include Executive Order 13559 Changes

HUD also proposes to amend the other paragraphs in § 5.109 to include the new Executive Order 13559

principles and to make clarifying changes, including the replacement of the terms religious organizations with faith-based organization and ''inherently religious'' with ''explicitly religious;'' adding the term ''direct Federal financial assistance'' where appropriate; and clarifying that the regulations apply to all HUD programs, including all of HUD's Native American programs.

In addition, HUD proposes to replace the current reference to 24 CFR parts 84 and 85 with a reference to 2 CFR part 200 in new paragraph (j) of this proposed rule. The Federal Government-wide regulations governing real property disposition at 24 CFR 84 and 85 have been replaced by the new provision at 2 CFR part 200 for awards made on or after December 26, 2014. When program-specific regulations governing real property disposition conflict with the real property disposition regulations in 2 CFR part 200, the HUD program office will provide guidance on recipients' (or subrecipients') compliance responsibilities.

III. Tribal Consultation

HUD's policy is to consult with Indian tribes early in the process on matters that have tribal implications. Accordingly, on November 19, 2014, HUD sent letters to all tribal leaders participating in HUD programs, informing them of the nature of this forthcoming rulemaking. HUD received no comments in response to those letters. Tribal leaders are welcome to provide public comments on this proposed rule.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by OMB in accordance with the requirements of the order. This proposed rule meets the principles of Executive Order 13563 in that its implementation of Executive Order 13559 harmonizes HUD's proposed regulations with those of the other Federal agencies, but does not rise to the level of significant regulatory action as defined in Executive Order 12866. This proposed rule clarifies existing principles and policies applicable to faith-based and neighborhood organizations participating in Federally funded programs. In addition, this proposed rule underwent extensive review by the Office of Faith-Based Neighborhood Partnerships and the Working Group.

With respect to the principles of Executive Order 13563, this proposed rule, as discussed above, would further provide for the equal participation of faith-based organizations in HUD's programs, and clarify the rights of entities participating in HUD programs and the beneficiaries they serve. This proposed rule would also add the following provisions that HUD believes will likely impose costs on the regulated community: (1) That faith-based organizations that carry out an activity with direct Federal financial assistance from HUD must give beneficiaries and prospective beneficiaries written notice of the protections listed at § 5.109(g)(1) of this proposed rule, and (2) that if a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization must make reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection. To minimize compliance costs on these recipients, this proposed rule includes a sample written notice that a faith-based organization can provide to a beneficiary or prospective beneficiary. An estimate of the cost of providing this notice is discussed in the Paperwork Reduction Act section of this proposed rule.

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This proposed rule does not impose a Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

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

This proposed rule would provide more access for entities to participate in HUD programs by clarifying requirements for participation in HUD programs. In addition, the proposed rule requires that faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance must give beneficiaries and prospective beneficiaries written notice of the protections listed at § 5.109(g)(1) of this proposed rule. This includes notification that the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, if the beneficiary objects to the religious character of the organization. The organization must inform the beneficiary or prospective beneficiary in writing and, if a referral is made, the organization would be required to notify HUD or the intermediary.

As described above, HUD has made every effort to ensure that the written notice and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing a sample notice that organizations may provide to beneficiaries informing them of the protections listed at § 5.109(g)(1) of this proposed rule and by not prescribing a specific format for making referrals through this proposed rule. HUD estimates it will take no more than 2 hours for service providers to familiarize themselves with the notice requirements of this proposed rule and print and duplicate an adequate number of written notices for prospective beneficiaries. Using the May 2013 Bureau of Labor Statistics hourly mean wage of $22.81 for a Training and Development Specialist, the labor cost is approximately $45.62 per service provider for preparing the notice. In addition, HUD estimates an upper limit of $100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every faith-based organization that carries out an activity under a HUD program with direct

Federal financial assistance, HUD believes that a substantial number of small entities will be affected by this provision. However, HUD does not believe that a compliance cost of less than $200 per service provider per year is a significant percentage of any service provider's total revenue. In addition, HUD notes that, after the first year, the labor costs associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.

In addition, HUD does not foresee that the cost to comply with effective communication requirements pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 24 CFR 8.6 will exceed the estimated cost of $200 per service provider. However, HUD specifically invites comments on whether there would be additional costs to make this accommodation.

The rule will also require faith-based organizations, upon a beneficiary's objection, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. HUD estimates that each referral will require 2 hours of a Training and Development Specialist's time to process at a labor cost of $22.81 per hour. Although HUD does not have any way to determine the number of referrals that will occur in any 1 year, HUD does not believe that referral costs will be significant for small service providers. HUD invites interested parties to provide data on which HUD can formulate better estimates of the compliance costs associated with the written notice and referral requirements of this proposed rule.

Notwithstanding HUD's determination that this proposed rule would not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives and the principles in Executive Order 13559, as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive order.

Paperwork Reduction Act

The proposed rule includes a new information collection section. Section 5.109(g) would impose requirements on faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in this proposed rule; beneficiaries can provide a written response that may impose a burden under the Paperwork Reduction Act (PRA); and faith-based organizations must provide a referral if a beneficiary or prospective beneficiary objects to the religious character of the organization. This rule also requires the retention of records to show that the referral requirements in this rulemaking have been met.

HUD estimates that a faith-based organization would need 2 minutes to distribute to each beneficiary the notice required in these proposed regulations. This estimate takes into consideration the likelihood that, in one-on-one interactions between a staff member and a beneficiary, providing the notice might take longer than a minute. Conversely, providing notice to a group of beneficiaries at the same time would take significantly less than a minute for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group.

HUD estimates that in cases where a beneficiary objects to the religious character of a faith-based organization, the time required for the faith-based organization to make a reasonable effort to identify an alternative provider and refer a beneficiary to that provider would be about 2 hours. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs to the one under which the beneficiary is being served by the faith-based organization. The estimate also includes the time required to determine whether one of the alternative providers is acceptable to the beneficiary. Also, depending on whether the beneficiary asked the faith-based organization to follow up either with the beneficiary or the alternative service provider to determine whether the referral is successful, this estimate includes the time required to do the follow-up.

The Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), implemented a similar referral requirement in its 2003 final rule, Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition From Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding From SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants (SAMHSA Program Rule), 68 FR 56430. Since SAMHSA implemented the referral requirement, the SAMHSA program office has received no reports of requests for an alternative provider. Because faith-based organizations are required to provide a written notification of the beneficiary's rights under this proposed rule, requests for referrals may be more likely. However, given SAMHSA's experience, HUD estimates that 0.10 percent of beneficiaries and potential beneficiaries would request referrals to alternative providers. HUD will monitor its programs to assess whether this estimate is accurate.

HUD is not estimating the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations. HUD has recordkeeping requirements included in information collection instruments for HUD programs. Those collection instruments cover burdens imposed by program and administrative requirements that exist under current, OMB-approved, information collection instruments and each of those collections has an OMB-assigned information collection control number.

The recordkeeping burden that this proposed rule would add to those program-specific information collection instruments is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the recordkeeping burden associated with these proposed regulations is large enough to be measurable, that burden will be calculated under the recordkeeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of recordkeeping burden in this PRA analysis.

The new information collection requirements contained in this proposed

rule have been submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

24 CFR Section	Number of respondents in covered programs						Number of responses	Estimated average response time	Estimated annual burden (in hours)
	CPD	FHEO	Housing	OLHCHH	PD&R	PIH			
5.109(g) (Written Notice of Rights).	196,487	400	30,400	250	3,141	495,375	1 per beneficiary	2 minutes per beneficiary.	24,202
5.109(g) (Referral) ...	198	1	30	1	3	495	1 per beneficiary	2 hours per beneficiary.	1,456
Total Burden (for all HUD programs covered by this rulemaking).	.....	.....	.....	.....	.....	.....	.....	.....	25,658

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; for example, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposed rule by name and docket number (FR–5781–P–01) and must be sent to: HUD Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Email: *oira_submissions@omb.eop.gov*, Fax: 202–395–6947 and

Colette Pollard, Reports Liaison Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2204, Washington, DC 20410–7000.

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Catalog of Federal Domestic Assistance

The regulatory amendments contained in this proposed rule apply to all HUD assistance programs for which faith-based organizations are eligible to participate. The Catalog of Federal Domestic Assistance (CFDA) number for a particular HUD program may be found on the CFDA Web site at: *http://www.cfda.gov.*

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 92

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs-education, Grant programs-housing and community development, Guam, Indians, Loan programs-housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Island Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 574

Community facilities, Grant programs-housing and community development, Grant programs-social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 578

Community facilities, Continuum of Care, Emergency solutions grants, Grant programs-housing and community development, Grant programs-social programs, Homeless, Rural housing, Reporting and recordkeeping requirements, Supportive housing programs- housing and community development, Supportive services.

24 CFR Part 582

Civil rights, Community facilities, Grant programs-housing and community development, Grant programs-social

programs, Homeless, Individuals with disabilities, Mental health programs, Nonprofit organizations, Rental subsidies, Reporting and recordkeeping requirements.

24 CFR Part 583

Civil rights, Community facilities, Employment, Grant programs-housing and community development, Grant programs-social programs, Homeless, Indians, Individuals with disabilities, Mental health programs, Nonprofit organizations, Reporting and recordkeeping requirements, Technical assistance.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs-housing and community development, Grant programs- Indians, Indians, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 5, 92, 570, 574, 576, 578, 582, 583 and 1003 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for 24 CFR part 5 is revised to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109–115, 119 Stat. 2936, Sec. 607, Pub. L. 109–162, 119 Stat. 3051, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258, and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273.

■ 2. In § 5.109:
■ a. The section heading is revised;
■ b. Paragraphs (a), (b), (c), (d), (f), (g), and (h) are revised;
■ c. Paragraph (e) is redesignated as paragraph (i);
■ d. New paragraph (e) is added; and
■ e. Paragraphs (j) and (k) are added, to read as follows:

§ 5.109 Equal participation of Faith-based Organizations in HUD programs.

(a) *Purpose.* Consistent with Executive Order 13279 (issued on December 12, 2002, 67 FR 77141), entitled ''Equal Protection of the Laws for Faith-Based and Community Organizations,'' as amended by Executive Order 13559 (issued on November 17, 2010, 75 FR 71319), entitled ''Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,'' this section describes requirements for ensuring the equal participation of faith-based organizations in HUD programs. These requirements apply to all HUD programs, including all of HUD's Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD programs authorizing statutes.

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

Direct Federal financial assistance means Federal financial assistance provided when a Federal Government agency or an intermediary, as defined in this section, selects the provider and either purchases services from that provider (*i.e.,* via a contract) or awards funds to that provider to carry out an activity (*e.g.,* via grant, sub-grant, sub-award, or cooperative agreement). The recipients of sub-grants or sub-awards that receive Federal financial assistance through State-administered programs (*e.g.,* flow-through programs) are considered recipients of direct Federal financial assistance. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance.

Federal financial assistance means assistance that non-Federal entities receive or administer in the forms of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

Indirect Federal financial assistance means Federal financial assistance provided when the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

Intermediary means an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government, that accepts Federal financial assistance and distributes that assistance to other entities that, in turn, carry out activities under HUD programs.

(c) *Equal participation of faith-based organizations in HUD programs.* Faith-based organizations are eligible, on the same basis as any other organization, to participate in HUD programs. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program, shall discriminate against an organization on the basis of the organization's religious character or affiliation. In addition, decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

(d) *Separation of explicitly religious activities from direct Federal financial assistance.*

(1) A faith-based organization that applies for, or participates in, a HUD program supported with Federal financial assistance retains its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance that it receives (*e.g.,* via contract, grant, sub-grant or sub-award or cooperative agreement) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law.

(2) A faith-based organization that receives direct Federal financial assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) *Explicitly religious activities.* If an organization engages in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), the explicitly religious activities must be offered separately, in time or location, from the activities supported by direct Federal financial assistance and participation must be voluntary for the beneficiaries of the activities that receive direct Federal financial assistance.

(f) *Intermediary responsibilities to ensure equal participation of faith-based organizations in HUD programs.* If an intermediary—acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that is administering a program supported by Federal financial assistance—is given the authority to select a nongovernmental organization to receive Federal financial assistance under a contract, grant, sub-grant, sub-award, or cooperative agreement, the intermediary must ensure that such organization complies with the requirements of this section. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) *Beneficiary protections.* Faith-based organizations that receive direct Federal financial assistance to carry out activities under a HUD program must give written notice to beneficiaries and prospective beneficiaries of the program describing certain protections available to them, as provided in this subsection. In addition, if a beneficiary or prospective beneficiary objects to the religious character of the organization carrying out activities under the HUD program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

(1) *Written notice.* The written notice must be given in a manner prescribed by HUD, and state that:

(i) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(ii) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate, in time or location, any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(iv) If a beneficiary objects to the religious character of the organization, the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no such objection; and

(v) Beneficiaries may report violations of these protections to HUD (or the intermediary, if applicable).

(2) *Timing of notice.* The written notice must be given to prospective beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, the organization providing the services with direct Federal financial assistance must provide written notice to beneficiaries of their protections at the earliest available opportunity.

(3) *Referral requirements.* (i) If a beneficiary or prospective beneficiary of a program that receives direct Federal financial assistance from HUD objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

(ii) A referral may be made to another faith-based organization, if the beneficiary or prospective beneficiary has no objection to that provider based on the provider's religious character. But if the beneficiary or prospective beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(iii) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(iv) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify HUD (or the intermediary, if applicable). If the organization is unable to identify an alternative provider, HUD (or the intermediary, if applicable) shall determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from HUD.

(h) *Nondiscrimination requirements.* No recipient of Federal financial assistance may discriminate against a beneficiary or prospective beneficiary of a HUD program on the basis of religion or religious belief in carrying out activities with Federal financial assistance.

* * * * *

(j) *Acquisition, construction, and rehabilitation of structures.* Direct Federal financial assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program. Where a structure is used for both eligible and explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), direct Federal financial assistance may not exceed the cost of the share of acquisition, construction, or rehabilitation attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program. However, acquisition, construction, or rehabilitation of sanctuaries, chapels, or other rooms that a HUD-funded faith-based organization uses as its principal place of worship, may not be paid with direct Federal financial assistance. Disposition of real property after use for the authorized purpose, or any change in use of the property from the authorized purpose, is subject to Governmentwide regulations governing real property disposition (see, *e.g.,* 2 CFR part 200).

(k) *Commingling of Federal and State, tribal, and local funds.* If a State, tribal, or local government voluntarily contributes its own funds to supplement direct Federal financial assistance for an activity, the State, tribal or local government has the option to segregate those funds or commingle them with the direct Federal financial assistance. However, if the funds are commingled, the requirements of this section apply to all of the commingled funds. Further, if a State, tribal, or local government is required to contribute matching funds to supplement direct Federal financial assistance for an activity, the matching funds are considered commingled with the direct Federal financial assistance and, therefore, subject to the requirements of this section. Some HUD programs' requirements govern any activity assisted under those programs. Accordingly, recipients should consult with the appropriate HUD program office to determine the scope of applicable requirements.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 3. The authority citation for 24 CFR part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 4. Revise § 92.257 to read as follows:

§ 92.257 Equal participation of Faith-Based Organizations.

The HUD program requirements in § 5.109 of this subtitle apply to the HOME program.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 5. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 6. In § 570.200 revise paragraph (j) to read as follows:

§ 570.200 General policies.

* * * * *

(j) *Equal participation of Faith-Based Organizations.* The HUD program requirements in § 5.109 of this title apply to the CDBG program.

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 7. The authority citation for 24 CFR part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901–12912.

■ 8. In § 574.300, revise paragraph (c) to read as follows:

§ 574.300 Eligible activities.

* * * * *

(c) *Equal participation of Faith-Based Organizations.* The HUD program requirements in § 5.109 of this title apply to the HOPWA program.

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

■ 9. The authority citation for 24 CFR part 576 continues to read as follows:

Authority: 42 U.S.C. 11371 *et seq.,* 42 U.S.C. 3535(d).

■ 10. Revise § 576.406 to read as follows:

§ 576.406 Equal participation of Faith-Based Organizations.

The HUD program requirements in § 5.109 of this title apply to the ESG program.

PART 578—CONTINUUM OF CARE PROGRAM

■ 11. The authority citation for 24 CFR part 578 continues to read as follows:

Authority: 42 U.S.C. 11371 *et seq.,* 42 U.S.C. 3535(d).

■ 12. In § 578.87, revise paragraph (b) to read as follows:

§ 578.87 Limitation on use of funds.

* * * * *

(b) *Equal participation of Faith-Based Organizations.* The HUD program requirements in § 5.109 of this title apply to the Continuum of Care program.

* * * * *

PART 582—SHELTER PLUS CARE

■ 13. The authority citation for 24 CFR part 582 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11403–11407b.

■ 14. In § 582.115, revise paragraph (c) to read as follows:

§ 582.115 Limitations on assistance.

* * * * *

(c) *Equal participation of Faith-Based Organizations.* The HUD program requirements in § 5.109 of this title apply to the S+C program.

* * * * *

PART 583—SUPPORTIVE HOUSING PROGRAM

■ 15. The authority citation for 24 CFR part 583 continues to read as follows:

Authority: 42 U.S.C. 11389 and 3535(d).

■ 16. In § 583.150, revise paragraph (b) to read as follows:

§ 583.150 Limitations on use of assistance.

* * * * *

(b) *Equal participation of Faith-Based Organizations.* The HUD program requirements in § 5.109 of this title apply to the Supportive Housing Program.

* * * * *

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

■ 17. The authority citation for 24 CFR part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

■ 18. Revise § 1003.600 to read as follows:

§ 1003.600 Equal participation of Faith-Based Organizations.

The HUD program requirements in § 5.109 of this title apply to the ICDBG program.

Dated: May 27, 2015.

Julián Castro,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

WRITTEN NOTICE OF BENEFICIARY RIGHTS

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate, in time or location, any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to HUD [or the intermediary, if applicable].

We must give you this written notice before you enroll in our program or receive services from the program, as required by [Insert Federal Agency's regulations].

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

( ) Please check if you want to be referred to another service provider.

Please provide the following information if you want us to follow up with you:

Your Name:

Best way to reach me (phone/address/email):

Please provide the following information if you want us to follow up with the service provider only.

Your Name:

You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the service provider about your referral.

( ) Please check if you do not want follow-up.

FOR STAFF USE ONLY

1. Date of Objection: ____/ ____/ ____

2. Referral (check one):

( ) Individual was referred to (name of alternative provider and contact information):

( ) Individual left without a referral

( ) No alternative service provider is available—summarize below what efforts you made to identify an alternative (including reaching out to HUD or the intermediary, if applicable):

3. Follow-up date: ____/ ____/ ____

( ) Individual contacted alternative provider

( ) Individual did not contact alternative provider

4. Staff name and initials:

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Part XI

Department of Justice

28 CFR Part 38

Partnerships With Faith-Based and Other Neighborhood Organizations; Proposed Rule

DEPARTMENT OF JUSTICE

28 CFR Part 38

[Docket No. OAG 149; AG Order No. 3541–2015]

RIN 1105–AB45

Partnerships With Faith-Based and Other Neighborhood Organizations

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Proposed rule.

SUMMARY: The rule proposes to amend Department of Justice (Department) regulations on the equal treatment for faith-based or religious organizations and to implement Executive Order 13559 (Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations). This rule proposes to revise Department regulations pertaining to prohibited religious uses of direct Federal financial assistance to provide clarity about the rights and obligations of faith-based and religious groups participating in Department programs and to provide protections for beneficiaries of those programs. The Department seeks public comments only on the proposed revisions that are being made to implement Executive Order 13559.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before October 5, 2015. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: To ensure proper handling of comments, please reference [Docket No. OAG 149] on all electronic and written correspondence. The Department encourages the electronic submission of all comments through *http://www.regulations.gov* using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that Web site. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to *http://www.regulations.gov* will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Eugene Schneeberg, Director, Center for Faith-Based & Neighborhood Partnerships, U.S. Department of Justice, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Eugene Schneeberg, Director, Center for Faith-based & Neighborhood Partnerships, U.S. Department of Justice, Washington, DC 20531. Phone: (202) 307–0588.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on *http://www.regulations.gov.* Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and other community organizations.

On January 21, 2004, the Department of Justice promulgated 28 CFR part 38. That rule implemented the executive branch policy that, within the framework of constitutional church-state guidelines, religious (or faith-based) organizations should be able to compete on an equal footing with other organizations for the Department's funding. It revised Department regulations to remove barriers to the participation of faith-based or religious organizations in Department programs and to ensure that these programs are consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 5, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to make, among other things, recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/*

microsites/ofbnp-council-final-report.pdf). The Advisory Council Report included recommendations to amend Executive Order 13279 to strengthen the constitutional and legal footing of partnerships and to offer a new set of fundamental principles to guide agency decision-making in administering Federal social service programs in partnership with faith-based and other neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319. Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to, among other things:

- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);
- state that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;
- state that the Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- clarify that organizations engaging in explicitly religious activity must (i) perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance, (ii) separate these activities in time or location from programs supported with direct Federal financial assistance, and (iii) ensure that participation in any such activities must be voluntary for the beneficiaries of the social service program supported with Federal financial assistance;
- emphasize that religious providers should be eligible to compete for social service funding from the Government and to participate fully in social service programs supported with Federal financial assistance, and that such organizations may do so while maintaining their religious identities;
- require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations and to post online a list of entities receiving such assistance; and
- clarify that the principles set forth apply to subawards as well as prime awards.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies, and to submit a report to the President on amendments, changes, or additions necessary to ensure that regulations and guidance documents associated with the distribution of Federal financial assistance for social service programs would be consistent with the fundamental principles set forth in the Executive Order. The Executive Order mandated that this report include a model set of regulations and guidance documents for the agencies to adopt in a number of areas, including, among other things, prohibited uses of direct Federal financial assistance and separation requirements, protections for religious identity, the distinction between ''direct'' and ''indirect'' Federal financial assistance, and protections for beneficiaries of social service programs.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB noted the Working Group's recommendations and instructed specified agency heads that Executive Order 13559 required them to amend existing agency regulations, guidance documents, and policies that have implications for faith-based and religious grounds to ensure they are consistent with the fundamental principles set forth in the Order. The Department is accordingly issuing guidance on the applicability of the Executive Order and this rule to particular programs.

III. Overview of Proposed Rule

The regulation proposes to amend Part 38 to implement Executive Order 13559, change the title of current Part 38, and rearrange the current regulations to conform to the existing regulatory structure of the Executive Order. This restructuring sets forth some original text from Part 38 so that readers can understand the overall context of the rule, but eliminates the repetition of language under § 38.1, Discretionary grants, contracts, and cooperative agreements, and § 38.2, Formula grants, which presently have the same provisions. Among other things, the Department specifically proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' In addition, the proposed rule distinguishes between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. The Department also proposes regulatory language to clarify the responsibilities of intermediaries. The proposed rule provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. Finally, the proposed rule provides protections for beneficiaries and includes provisions for assurances and enforcement.

Proposed amendments to Part 38.

Part 38. Partnerships With Faith-Based and Other Neighborhood Organizations

A. Prohibited Uses of Direct Federal Financial Assistance

Part 38 of title 28 of the Code of Federal Regulations and Executive Order 13279 prohibit organizations that receive direct Federal financial assistance from the Department (*e.g.,* formula or discretionary grants, contracts, subgrants, subcontracts, and cooperative agreements) from engaging in ''inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department.'' 28 CFR 38.1(b)(1). The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in

ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, although the Supreme Court has sometimes used the term ''inherently religious,'' it has never established it as the test for what the Government may not subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution may prohibit. For example, some might not consider teaching an individual to read the English language using the Bible or another religious text an ''inherently religious'' act. On the other hand, one could also argue that the term ''inherently religious'' is too broad. For example, some might consider the provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Supreme Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, J.J., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance may not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing, or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions, for example, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons or detention facilities through social service programs. Where there is extensive government control over the environment of the federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicitly religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the government program did not orchestrate or encourage such comments.

The Department, therefore, proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and to define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These proposed changes in language would provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These proposed restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names; select board members on a religious basis; include religious references in mission statements and other organizational documents; and post religious art, messages, scriptures, and symbols in buildings where they deliver federally funded services and benefits.

B. Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that the model regulations proposed by the Working Group should distinguish between ''direct'' and ''indirect'' Federal financial assistance. This distinction is vital because the limitation on Federal financial assistance supporting explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. To clarify this distinction, the proposed rule provides definitions of these terms. Under the proposed rule, programs would be understood to be supported with ''direct'' Federal financial assistance when either the Government or an intermediary (as identified in this proposed rule) selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of the beneficiary before the Government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Government could allow the beneficiary to secure the needed service independently. Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective

beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Government-provided certificate. Either way, the Government empowers the beneficiaries to choose for themselves whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the Government may fund the program if, among other things, it places the benefit in the hands of individuals who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the Government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of ''indirect financial assistance.''

C. Intermediaries

The Department also proposes regulatory language that would clarify the responsibilities of intermediaries. The terms ''intermediary'' and ''pass-through entity'' may be used interchangeably. 2 CFR 200.74. An intermediary is an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide Government-funded social services. Each intermediary must abide by all statutory and regulatory requirements by, for example, not engaging in any explicitly religious activities as part of the programs or services funded by direct Federal financial assistance. The intermediary also has the same duties as the Government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. Although intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to monitor effectively the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and subgrant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

D. Protections for Beneficiaries

Executive Order 13559 provides a variety of valuable protections for social service beneficiaries. These protections are intended to ensure that programs receiving direct Federal financial assistance do not discriminate against, coerce, or otherwise burden beneficiaries on the basis of their religious beliefs or practices, or lack thereof, and to make beneficiaries aware of their protections, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The Executive Order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or subawards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also requires faith-based or religious organizations administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available. When the nature of the service provided or exigent circumstances makes it impracticable to provide such written notice in advance of the actual service (*e.g.,* crisis intervention services by hotline), service providers must advise beneficiaries of their protections at the earliest available opportunity. If a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must refer the beneficiary to an alternative provider when available. More specifically, the proposed rule states that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection. *See* Appendix A for the proposed model Written Notice of Beneficiary Protections and Beneficiary Referral Request.

An organization may refer the beneficiary to another religiously affiliated provider if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then the organization must refer the beneficiary to that provider.

The rule proposes to specify that, except for services provided by telephone, Internet, or similar means, the referral must be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients. Under the proposed rule, if a federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify the awarding entity, and the awarding entity should determine whether there are any other suitable alternative providers to which the beneficiary may be referred. Further, Executive Order 13559 requires (and the proposed rule so provides) the relevant awarding entity to ensure that appropriate and timely referrals are made to an alternative provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. In some instances the awarding entity may be unable to identify a suitable alternative provider.

E. Political or Religious Affiliation

Although this proposed rule does not affect the existing eligibility of faith-based or religious organizations to participate in Department programs for which they are otherwise eligible, it provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. The awarding entity is required to instruct participants in the awarding process to refrain from taking religious affiliation or non-religious affiliation into account in this process (*i.e.,* under the proposed rule, an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion). When selecting peer reviewers for the review of grant applications, the awarding entity should never ask about religious affiliation or take religious affiliation into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

IV. Regulatory Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA at 5 U.S.C. 605(b) allows an agency not to prepare an analysis if it certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. Furthermore, under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) at section 212(a), an agency is required to produce compliance guidance for small entities if a final rule will have a significant economic impact on a substantial number of small entities. 5 U.S.C. 601 note. The RFA defines small entities as small business concerns, small nonprofit enterprises, or small governmental jurisdictions. 5 U.S.C. 601(6).

The proposed rule requires a faith-based or religious organization administering a program that is supported by direct Federal financial assistance to give written notice to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available and, when requested, to refer the beneficiary to an alternative provider. The provider must inform the beneficiary or prospective beneficiary in writing and maintain a record of where the beneficiary is referred.

The Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation. The proposed rule includes a model notice with the required language, which providers must give beneficiaries to inform them of their rights and protections. The Department estimates it will take no more than two hours for providers to familiarize themselves with the notice requirements and print and duplicate an adequate number of disclosure notices for potential beneficiaries. Relying upon the May 2013 Bureau of Labor Statistics hourly mean wage for a staff person, such as a Training and Development Specialist, of $22.81 per hour, the Department estimates that the labor cost to prepare the notice will be approximately $45.62 per service provider. In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, and toner) to print multiple copies of the notices. Although these costs will be borne by faith-based or religious organizations, some of which may be small service providers, the Department does not believe that a substantial number of small entities will be affected by this provision. Further, the Department does not believe that a compliance cost of less than $200 per provider per year is a significant percentage of a provider's total revenue. In addition, the Department notes that, after the first year, the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements. Accordingly, the Attorney General has reviewed this regulation and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities.

The proposed rule requires faith-based or religious organizations that provide social services, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. Although the Department does not have any way to determine the number of referrals that will occur in any one year, the Department does not believe that referral costs will be appreciable for small faith-based or religious organizations. The Department invites interested parties to provide data on which it can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

Executive Orders 12866 and 13563—Regulatory Review

The Department has drafted and evaluated this proposed rule in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, Improving Regulation and Regulatory Review, section 1(b), General Principles of Regulation. These Executive Orders direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and

promoting flexibility. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely and materially affect 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) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are (1) the requirement that faith-based or religious recipients, which provide services or benefits, give beneficiaries a written notice informing them of their religious protections when seeking or obtaining services or benefits supported by direct Federal financial assistance from the Department; and (2) the requirement that, at the beneficiary's request, the recipient make reasonable efforts to refer the beneficiary to an alternative provider to which the beneficiary has no objection. To minimize compliance costs on these recipients, the proposed rule includes the notice language. An estimate of the cost of providing this notice to beneficiaries is discussed in the Paperwork Reduction Act section of this proposed rule.

To estimate the cost of the referral provision, the Department would need to know the number of faith-based or religious organizations that provide social services or benefits that are funded annually by the Department, the number of beneficiaries who would ask for a referral, and the costs of making and notifying relevant parties of the referral. The Department estimates that there are approximately 150 organizations that may be affected by the requirement, based on data maintained by two components of the Department. Unfortunately, the Department has limited or no data on the other variables and invites interested parties to provide data on which to base compliance cost estimates. This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), The Principles of Regulation. The Department of Justice has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by OMB.

Executive Order 13132—Federalism

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy will have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies may implement a regulation limiting the policymaking discretion of the States only if constitutional or statutory authority permits the regulation and the regulation is appropriate in light of the presence of a problem of national significance.

This proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Furthermore, constitutional and statutory authority supports the proposed rule, and it is appropriate in light of the presence of a problem of national significance.

Executive Order 12988—Civil Justice Reform

Executive Order 12988 provides that agencies shall draft regulations that meet applicable standards to avoid drafting errors and ambiguity, minimize litigation, provide clear legal standards for affecting conduct, and promote simplification and burden reduction. This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that a Federal agency determine whether a regulation proposes a Federal mandate that would result in the increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any single year. If a regulation would result in increased expenditures in excess of $100 million, UMRA requires the agency to prepare a written statement containing, among other things, a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate. The Department has reviewed this proposed rule in accordance with UMRA and determined that the total cost to implement the proposed rule in any one year will not meet or exceed $100 million. This proposed rule does not include any Federal mandate that may result in increased expenditure by State, local, and tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million. Accordingly, UMRA does not require any further action.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* was enacted to minimize the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507. Specifically, a Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection of information under the PRA, and the collection of information must display a currently valid OMB control number. Notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. 44 U.S.C. 3512.

The proposed rule includes two new paperwork requirements. Section 38.6(c) would require faith-based or religious organizations to give beneficiaries (or prospective beneficiaries) notice informing them of their rights and protections under this regulation. Section 38.6(d) would require faith-

based or religious organizations to make reasonable efforts to identify and refer beneficiaries requesting referrals to alternative service providers. The content of the notice and the actions the faith-based or religious organizations must take if a beneficiary objects to the religious character of the organization are described in the preamble. The burdens of providing notice to beneficiaries and identifying and referring a beneficiary to an alternative service provider are estimated in this section.

Faith-based or religious organizations that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. If an organization provides paper notice and uses the model form in Appendix A, it can meet the recordkeeping requirements in these proposed regulations by retaining the bottom portion of the form. If an organization provides notice electronically, the notice would have to include a means for beneficiaries to request an alternative provider and follow-up, if desired—that is recorded, so that the organizations may retain evidence of compliance with these proposed regulations. The Department has not included an estimate of the burden of maintaining the records needed to demonstrate compliance with the recordkeeping requirements because the Department already uses information-collection instruments to comply with the recordkeeping requirements in existing Department programs. Those collection instruments are approved by OMB and each collection has an OMB-assigned information-collection control number. The burden that would be added by these proposed regulations is so small as to not be measurable, given all the program and administrative requirements and the existing program collection instruments. Therefore, the Department has not included any estimate of recordkeeping burden in this analysis.

In calculating the burden that the notice and referral requirements would impose on faith-based or religious organizations, the Department has made several assumptions. As indicated in the discussion below, where there is no source for data, the Department has relied on conversations with other Federal agencies that have regulations requiring notices and referrals, for data based on their experiences. For example, the Department estimates that an organization would need approximately one minute to distribute the required notice to a beneficiary. This estimate assumes that there may be instances during which less or more time may be necessary, depending on the number of beneficiaries seeking the services or benefits from the organization. Accordingly, the Department estimates that the amount of time needed to give the notice (T) will be equal to one (1) minute.

The Department acknowledges that estimating the number of faith-based or religious organizations that provide services or benefits under Department programs is challenging. To obtain this estimate, the Department relied upon information from two of its grantmaking components: The Office on Violence Against Women (OVW) and the Office of Justice Programs (OJP). OVW estimates that there are approximately 100 grantees and subgrantees that would have to provide the notice to beneficiaries. OJP estimates that there may be fewer than 50 grantees and subgrantees subject to the notice requirement, based on three years of information related to legal name, application for funding, and use of special conditions that is maintained in its Grants Management System. Accordingly, the Department estimates that the total number of organizations that must give notice (N) will be approximately 150.

Under the proposed regulations, faith-based or religious organizations are required to make reasonable efforts to refer beneficiaries seeking a referral to an alternate provider. We are not aware of any instances in which a beneficiary of a program of the Department has objected to receiving services from a faith-based or religious organization. When beneficiaries start receiving notices of their right to request referral to an alternative service provider, more may raise objections. Our estimate of the number of referrals is based on the experience of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles VI and XIX of the Public Health Service Act, 42 U.S.C. 290aa *et seq.* and 42 U.S.C. 300x–21 *et seq.* These programs require faith-based or religious organizations that receive assistance under the Public Health Service Act to provide notice to beneficiaries of their right under statute to request an alternative service provider. 42 U.S.C. 290kk–1(f), 300x–65(e); 42 CFR 54a.8. Recipients of assistance must also report all referrals to the appropriate Federal, State, or local government agency that administers the program. 42 CFR 54a.8(d). To date, SAMHSA has not received any reports of referral by recipients or subrecipients.

Despite that information, the Department will err on the high side and estimate that the number of requests for referrals will be one per month for each faith-based or religious organization. Accordingly, the Department estimates that the number of beneficiaries or potential beneficiaries who request referrals (Z) will be twelve (12) per year.

Because the Department has presumed that each faith-based or religious organization may receive one request per month, it must estimate the amount of time needed by an organization for a reasonable effort to identify and make a referral. Based on other Federal agencies' experiences, the Department estimates that the number of hours required for an organization to make reasonable efforts to identify and refer a beneficiary (R) will be two (2) hours.

Based on the information provided, the total estimated annual burden hours (B) can be calculated using the following equation:

$$B = T \times N \times Z \times R,$$

Where

T = the time needed to give the notice = 1 minute = 1/60 hour;
N = the number of faith-based or religious organizations = 150;
Z = the number of annual requests for a referral = 12 per year; and
R = the number of hours needed to identify and make a referral = 2 hours.

Accordingly, the Department estimates that the Total Estimated Annual Burden Hours (B) will be $1/60 \times 150 \times 12 \times 2$, or 60 hours per year.

The Department will submit an information-collection request (ICR) to OMB to obtain PRA approval for the information-collection formatting requirements contained in this notice of proposed rulemaking (NPRM). Draft control number XXXX will be used for public comment.

Title of Collection: Written Notice of Beneficiary Protections.

OMB ICR Reference Number Control Number: XXXX.

Affected Public: State and local governments, nonprofit organizations.

Abstract: The recipient provider will be required to complete a referral form, notify the awarding entity, and maintain information only if a beneficiary requests a referral to an alternate provider.

For additional information, please contact Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution

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List of Subjects in 28 CFR Part 38

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements, Nonprofit organizations.

For the reasons stated in the preamble, the Department proposes to revise part 38 of title 28 of the Code of Federal Regulations to read as follows:

PART 38—PARTNERSHIPS WITH FAITH-BASED AND OTHER NEIGHBORHOOD ORGANIZATIONS

Sec.
38.1 Purpose.
38.2 Applicability and scope.
38.3 Definitions.
38.4 Policy.
38.5 Responsibilities.
38.6 Procedures.
38.7 Assurances.
38.8 Enforcement.

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141 (Dec. 12, 2002), 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 42 U.S.C. 14045b; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Public Law 109–162, 119 Stat. 2960; 42 U.S.C. 3751, 3753, 3762b, 3782, 3796dd–1, 3796dd–7, 3796gg–1, 3796gg–0b, 3796gg–3, 3796h, 3796ii–2, 3797u–3, 3797w, 5611, 5672, 10604; E.O. 13559, 75 FR 71319 (Nov. 17, 2010), 3 CFR, 2010 Comp., p. 273.

§ 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279 and Executive Order 13559.

§ 38.2 Applicability and scope.

(a) A faith-based or religious organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or subaward, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered ''explicitly religious activities'' that are subject to direct Federal financial assistance restrictions.

§ 38.3 Definitions.

As used in this part:

(a)(1) *Direct Federal financial assistance* or *Federal financial assistance provided directly* refers to situations where the Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via a grant or cooperative agreement). In general, and except as provided in paragraph (a)(2) of this section, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

(2) Recipients of subgrants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of ''direct Federal financial assistance'' (or recipients of ''Federal funds provided directly'').

(b) *Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* refers to situations where the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered ''indirect'' when:

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

(2) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and

(3) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(c)(1) *Intermediary* or *pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(2) When an intermediary, such as a State administering agency, distributes Federal financial assistance to other organizations, it replaces the Department as the awarding entity. The intermediary remains accountable for the Federal financial assistance it disburses and, accordingly, must ensure that any providers to which it disburses Federal financial assistance also comply with this part.

(d) *Department program* refers to a grant, contract, or cooperative agreement funded by a discretionary, formula, or block grant program administered by or from the Department.

(e) *Grantee* includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(f) The *Office for Civil Rights* refers to the Office for Civil Rights in the Department's Office of Justice Programs.

§ 38.4 Policy.

(a) *Grants (formula and discretionary), contracts, and cooperative agreements.* Faith-based or religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(b) *Political or religious affiliation.* Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

§ 38.5 Responsibilities.

(a)(1) Organizations that receive direct financial assistance from the Department may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such explicitly religious activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(2) Where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to

religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties, or to any other activity that can be publicly funded under the Establishment Clause, these activities would not be considered ''explicitly religious activities'' that are subject to direct Federal financial assistance restrictions.

(b) A faith-based or religious organization that participates in the Department-funded programs or services will retain its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a faith-based or religious organization that receives financial assistance from the Department may use space in its facilities without removing scriptures or religious art, icons, messages, scriptures, or symbols. In addition, a faith-based or religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(c) Any organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering financial assistance from the Department shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. All organizations, including religious ones, that participate in Department programs must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(e) *Exemption from Title VII employment discrimination requirements.* A faith-based or religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a), is not forfeited when the organization receives direct or indirect financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(f) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) In general, the Department does not require that a grantee, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(h) Grantees should consult with the appropriate Department program office to determine the applicability of this part in foreign countries or sovereign lands.

§ 38.6 Procedures.

(a) *Effect on State and local funds.* If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply to indirect Federal financial assistance.

(c) *Beneficiary protections: Written notice.* (1) Faith-based or religious organizations providing social services to beneficiaries under a program

supported by direct Federal financial assistance from the Department must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by the Office for Civil Rights. This notice must state the following:

(i) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(ii) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(iv) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(v) Beneficiaries may report an organization's violation of these protections or file a written complaint of any denials of services or benefits by an organization with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(2) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(3) The notice that a faith-based or religious organization may use to notify beneficiaries or prospective beneficiaries of their protections under paragraph (c)(1) of this section is available at *http://ojp.gov/fbnp/index.htm.*

(d) *Beneficiary protections: Referral requirements.* (1) If a beneficiary or prospective beneficiary of a social service program supported by the Department objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection based on the organization's religious character. *See* Written Notice of Beneficiary Protections, available at *http://ojp.gov/fbnp/index.htm.*

(2) An organization may refer a beneficiary or prospective beneficiary to another faith-based or religious organization that provides comparable services, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(3) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(4) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify and maintain a record for review by the awarding entity. If the organization is unable to identify an alternative provider, the awarding entity shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from the Department.

§ 38.7 Assurances.

(a) Every application submitted to the Department for direct Federal financial assistance subject to this part must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with this part.

(b) Every intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that the intermediary will comply with this part and effectively monitor the actions of its recipients.

§ 38.8 Enforcement.

(a) The Office for Civil Rights may review the practices of recipients of direct Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights may investigate any allegations of noncompliance with this part.

(c) Recipients of direct Federal financial assistance determined to be in violation of any provisions of this part are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws.

(d) An allegation of any violation or discrimination by an organization, based on this part, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

Dated: July 16, 2015.

Loretta E. Lynch,

Attorney General.

Note: The following Appendix will not appear in the Code of Federal Regulations.

APPENDIX A

WRITTEN NOTICE OF BENEFICIARY PROTECTIONS

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that we offer, and your participation in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights or to [name of agency that awarded grant].

We must give you this written notice before you enroll in our program or receive services from the program.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider.

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me or the service provider to which I was referred.

Name:

Best way to reach me (phone/address/email):

( ) Please do not follow up.

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Part XII

Department of Labor

29 CFR Part 2

Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 2

RIN 1290–AA29

Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries

AGENCY: Office of the Secretary, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The United States Department of Labor (DOL or the Department) proposes to amend its general regulations regarding the equal treatment of religious organizations in Department of Labor programs and the protection of religious liberty for Department of Labor social service providers and beneficiaries. Specifically, this proposed rule would: Clarify the definition of direct and indirect financial assistance, replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization,'' require faith-based organizations administering a program supported with direct DOL financial assistance to provide beneficiaries with a written notice informing them of their religious liberty rights, including the right to a referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and based on merit. These changes are necessitated by the issuance in November 2010, of Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations.*

DATES: Comments must be submitted (postmarked, sent, or received) by October 5, 2015.

ADDRESSES: You may submit comments concerning the NPRM, identified by RIN number 1290–AA29, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on-line for submitting comments.
- *Email: cfbnp@dol.gov.* Include RIN number 1290–AA29 in the subject line of the message.
- *Fax:* (202) 693–6091 (for comments of 10 pages or less).
- *Mail, hand delivery, express mail, messenger, or courier service:* Phil Tom, Director, Center for Faith-Based and Neighborhood Partnerships (CFBNP), U.S. Department of Labor, 200 Constitution Ave. NW., Room C–2318, Washington, DC 20210.

Instructions: Please submit your comments by only one method. Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning (202) 693–6017. All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received, including any personal information provided, are considered part of the public record and available for public inspection online at *http://www.regulations.gov* and during normal business hours at Room C–2318, 200 Constitution Avenue NW., Washington, DC 20210. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection. Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this NPRM will be made available in the following formats: Large print, electronic file on computer disc, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, contact CFBNP at (202) 693–6017.

FOR FURTHER INFORMATION CONTACT: Phil Tom, Director, Center for Faith-Based and Neighborhood Partnerships (CFBNP), U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave. NW., Room C–2318, Washington, DC 20210; telephone: (202) 693–6017. Please note this is not a toll-free number. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

This proposal concerns and implements two Executive Orders: Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations,* issued on December 12, 2002, 67 FR 77141 (Dec. 16, 2002) and Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* issued on November 17, 2010, 75 FR 71319 (Nov. 22, 2010), which amends Executive Order 13279. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On July 12, 2004, the Department of Labor issued regulations through notice and comment rulemaking implementing Executive Order 13279 at 29 CFR part 2, subpart D, *Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries* (''Equal Treatment Regulations''), which apply to all providers that implement DOL-supported social service programs. 69 FR 41882. These regulations clarify that faith-based and community organizations may participate in the Department's social service programs without regard to the organizations' religious character or affiliation, and are able to apply for and compete on an equal footing with other eligible organizations to receive DOL support. 29 CFR 2.30. In addition, these regulations ensure that the Department's social service programs are implemented in a manner consistent with the Constitution, including the Religion Clauses of the First Amendment. *Id.*

The current Equal Treatment Regulations are divided into seven sections. Section 2.30 sets forth the purpose of the regulations as explained in the previous paragraph. Section 2.31 provides definitions for certain terms

used in the regulations, including ''Federal financial assistance,'' ''social service program,'' ''DOL,'' ''DOL-supported social service program'', ''DOL social service program'', ''DOL social service provider,'' ''DOL social service intermediary provider,'' and the term ''DOL support.'' Section 2.32 clarifies that religious organizations receiving DOL support may continue to carry out their religious activities provided that no direct DOL support is used to support inherently religious activities. Specifically, religious organizations that receive DOL support need not remove religious signs or symbols from their facilities offering DOL-supported services and may continue to select their board members and otherwise govern themselves on a religious basis.

Currently, DOL social service providers, including State and local governments and other intermediaries administering DOL support, have certain responsibilities as recipients of DOL support. Section 2.33 of the Equal Treatment Regulations sets forth these responsibilities, namely that as providers of DOL support, they must not discriminate for or against a current or prospective beneficiary on the basis of religion or religious belief. In addition, they must ensure that no direct DOL support is used to support inherently religious activities, except in very limited circumstances, which are explained in paragraph (b)(3) of this section. As a general rule, if a provider engages in inherently religious activities, such activities must be offered separately, in time or location, from the social service programs receiving direct DOL financial assistance, and participation must be voluntary for the beneficiaries of DOL social service programs. Paragraph (c) of § 2.33 clarifies that these responsibilities do not apply to social service programs where DOL support is provided to a religious organization indirectly. Religious and other non-governmental organizations will be considered to have received support indirectly, for example, if as a result of a program beneficiary's genuine and independent choice the beneficiary redeems a voucher, coupon, or certificate that allows the beneficiary to choose the service provider, or some other mechanism is provided to ensure that beneficiaries have a genuine and independent choice among providers or program options.

Section 2.34 of the existing Equal Treatment Regulations addresses the application of the regulations to State and local funds. This section clarifies that if a State or local government contributes its own funds (voluntarily or in accordance with a matching funds program) to supplement Federal funds that support DOL social service programs, the State or local government has the option to segregate the Federal funds or commingle them. If the funds are commingled, the regulations apply to both the Federal and the State or local funds.

Section 2.35 clarifies that receipt of DOL support does not cause religious organizations to forfeit their exemption from title VII of the Civil Rights Act of 1964's prohibitions on employment discrimination on the basis of religion. However, the Equal Treatment Regulations do not alter the effect of other statutes which may require recipients of certain types of DOL support to refrain from religious discrimination.

Finally, § 2.36 of the current rule establishes alternative mechanisms by which organizations can prove they are nonprofit, which is sometimes an eligibility requirement for receiving DOL support. Such mechanisms, however, do not apply where a statute requires a specific method for establishing nonprofit status.

Shortly after taking office, President Obama signed Executive Order 13498, *Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships,* 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of social services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a revised set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* on November 17, 2010. 75 FR 71319 (available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf*). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;
- clarify (i) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, (ii) that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance, and (iii) that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- direct agencies to adopt regulations and guidance that distinguish between ''direct'' and ''indirect'' Federal financial assistance;
- clarify that the standards in these proposed regulations apply to sub-awards as well as prime awards;
- require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;
- state that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program); and

• state that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies. Executive Order 13559, § 1(c) (amending § 3 of Executive Order 13279).

The Executive Order also required OMB, in coordination with the Department of Justice, to issue guidance to agencies on the implementation of the Order following receipt of the Working Group's report. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order to the extent such regulations and guidance do not exist and to amend any existing regulations and guidance to ensure that they are consistent with the requirements set forth in Executive Order 13559. Memorandum from Sylvia M. Burwell, Director, on Implementation of Executive Order 13559 to Heads of Executive Departments and Agencies (Aug. 2, 2013) (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf*. Pursuant to the August 2, 2013 OMB Memo, the Department is hereby publishing this proposed rule amending its existing regulations to ensure they are consistent with Executive Order 13279 as amended by Executive Order 13559.

As explained below, the Department's existing Equal Treatment Regulations at 29 CFR part 2, subpart D meet many of the provisions of Executive Order 13559. However, a few provisions will need to be revised or proposed in order to meet the requirements of Executive Order 13279 as amended. Existing sections §§ 2.30 and 2.32 of the Equal Treatment Regulations emphasize that religious providers are eligible on the same basis as any other organization to seek DOL support or participate in DOL programs for which they are otherwise eligible. Section 2.32 also clarifies that religious providers retain their independence and religious identity. Section 2.33 prohibits discrimination against beneficiaries on the basis of religion or religious belief and sets forth the requirements related to inherently religious activities in DOL-supported social service programs. Specifically, § 2.33 prohibits organizations from using direct DOL support for inherently religious activities, such as worship, religious instruction, or proselytization, and requires DOL social service providers to take certain steps to separate out in time or location their inherently religious activities from the services that they offer with direct DOL support. This provision also clarifies that the restrictions on inherently religious activities do not apply where DOL support is provided indirectly to organizations, or where there is extensive government control over the environment of a DOL-supported social service program, such that affirmative steps must be taken by the social service provider to ensure that beneficiaries are able to exercise freely their religion. And finally, the current Equal Treatment Regulations already apply to both prime and sub-awards. *See* 29 CFR 2.31(f) (defining term ''DOL social service intermediary provider''); *see also* 29 CFR 2.33 (enumerating responsibilities of DOL providers, including intermediary providers and State and local governments administering DOL support).

II. Overview of Proposed Rule

A. Purpose of the Proposed Rule

Consistent with Executive Order 13559, this proposed rule would revise the Department's Equal Treatment Regulations to: (1) clarify the distinction between direct and indirect Federal financial assistance as well as the rights and obligations of DOL social service providers; (2) replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization,'' (3) require faith-based organizations administering a program supported with direct DOL financial assistance to provide beneficiaries with a written notice informing them of their religious liberty rights, including the right to a referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and (4) add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and made based on merit. These changes will ensure the Department's regulations implement all of the requirements of Executive Order 13279 as amended.

B. Proposed Amendments to DOL Equal Treatment Regulations

DOL proposes to amend its Equal Treatment Regulations at 29 CFR part 2, subpart D to address the areas identified below.

1. Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. Executive Order 13559, § 1(c) (amending § 3(b) of Executive Order 13279).

Programs are supported with direct Federal financial assistance when either the government or an intermediary, as identified in these proposed rules, selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Federal government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a Federal agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Federal government-provided certificate, *e.g.* through the use of Individual Training Accounts. Either way, the Federal government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Federal government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. *See Freedom From Religion Found.* v.

McCallum, 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options.

The Department's Equal Treatment Regulations currently note this distinction between direct and indirect financial assistance at paragraphs (b)(1) and (b)(3) of § 2.33. The current regulations do not, however, provide explicit definitions for the terms ''direct Federal financial assistance'' and ''indirect Federal financial assistance,'' which might help to clarify the distinction. Accordingly, the Department proposes to add definitions of these terms to paragraph (a) of § 2.31, the section containing the definition of certain terms used in the Equal Treatment Regulations. Paragraph (a) defines the term ''*Federal financial assistance.*'' Consistent with Executive Order 13559's mandate to adopt regulations on ''the distinction between 'direct' and 'indirect' Federal financial assistance,''[1] the proposed rule adds language to paragraph (a) indicating that *Federal financial assistance* may be direct or indirect. Proposed paragraph (a)(1) provides a definition for the term ''*direct Federal financial assistance*'' or ''*Federal financial assistance provided directly*'' and defines it to mean that the Government or an intermediary selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via a grant or cooperative agreement). In general, Federal financial assistance will be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly.*

Proposed paragraph (a)(2) provides a definition for the term ''*indirect Federal financial assistance*'' or ''*Federal financial assistance provided indirectly*'' and defines it to mean that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered ''indirect'' when (1) the government funded program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; (2) the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and (3) the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment. Proposed paragraph (a)(3) notes that recipients of sub-awards that receive Federal financial assistance through programs administered by states or other intermediaries are not considered recipients of indirect Federal financial assistance.

2. Inherently Religious Activities

Existing agency regulations and Executive Order 13279 prohibits non-governmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Supreme Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. Secular activity also includes the study or acknowledgement of religion as a historical or cultural reality.

The Department, therefore, proposes to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' throughout the Equal Treatment Regulations and to define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language are consistent with the use of the term ''explicitly religious activities'' in Executive Order 13559 and will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

3. Intermediaries

The Department also proposes to add regulatory language at proposed

[1] Executive Order 11246, § 3(b)(iii), as amended by Executive Order 13559, § 1.75 FR at 71321.

§ 2.33(d) that will clarify the rights and responsibilities of intermediaries. An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The intermediary also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

4. Protections for Beneficiaries

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

Both section 2(d) of Executive Order 13279 as amended and the Department's current Equal Treatment Regulations make clear that all organizations that receive Federal financial assistance for the purpose of delivering social services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Executive Order 13559, § 1(b) (amending § 2(d) of Executive Order 13279); 29 CFR 2.33. Both also state that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). Executive Order 13559, § 1(b) (amending § 2(f) of Executive Order 13279); 29 CFR 2.33. In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by direct Federal financial assistance.

To strengthen the protections provided to beneficiaries, Executive Order 13559 requires that organizations administering a program that is supported by direct Federal financial assistance must give written notice in a manner prescribed by the Department to beneficiaries and prospective beneficiaries of their religious liberty rights, including the right to be referred to an alternative provider when available. If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the social service program must refer the beneficiary to an alternative provider. Accordingly, the proposed rule supplements existing beneficiary protections in the Equal Treatment Regulations by adding two new sections to the regulations—one addressing the written notice requirement at proposed § 2.34 and the other addressing the referral requirement at proposed § 2.35. In light of the addition of these two new sections, the existing sections discussing the application to State and local funds at § 2.34, the effect of DOL support on title VII employment nondiscrimination requirements and on other existing statutes at § 2.35, and the status of nonprofit organizations at § 2.36 are redesignated as §§ 2.36, 2.37, and 2.38 respectively.

a. Written Notice

Executive Order 13279, as amended by Executive Order 13559, requires that the Secretary of Labor, among other agency heads, establish policies and procedures designed to ensure that each beneficiary of a social service program receives written notice of their religious liberty rights. Executive Order 13279, § 2(h)(ii) as amended by Executive Order 13559, § 1.75 FR at 71320–21. Consistent with this mandate, proposed § 2.34 requires DOL social service providers with a religious affiliation to give beneficiaries written notice of their religious liberty rights when seeking or obtaining services supported by direct DOL financial assistance. The notice is set forth in proposed paragraph (a) and informs beneficiaries that:

(1) the organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) the organization may not require beneficiaries to attend or participate in any explicitly religious activities, and any participation by beneficiaries in such activities must be purely voluntary;

(3) the organization must separate out in time or location any explicitly religious activities from activities supported with direct DOL support;

(4) if a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(5) beneficiaries may report violations of these enumerated religious liberty rights to the Civil Rights Center, Room N–4123, 200 Constitution Avenue NW., Washington, DC 20210, *CivilRightsCenter@dol.gov*.

The purpose of the notice is to make beneficiaries aware of their religious liberty rights and helps to ensure that beneficiaries are not coerced or pressured along religious lines in order to obtain DOL-supported social service programs. Paragraph (a) provides that DOL social service providers may post and distribute exact duplicate copies of the notice, including through electronic means. Paragraph (b) requires that the notice be given to beneficiaries before they enroll in the program or receive

services from such programs. However, when the nature of the service provided—such as a one-time emergency hotline call—or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, DOL social service providers are to advise beneficiaries of their protections at the earliest available opportunity.

b. Referral Requirements

Proposed § 2.35 implements Executive Order 13559's requirement that a beneficiary be referred to an alternative provider when he or she objects to the religious character of an organization that provides services under the federally-financed program. Executive Order 11246, § 2(h)(i) as amended by Executive Order 13559, § 1. 75 FR at 71320. Accordingly, paragraph (a) of proposed § 2.35 provides that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

Paragraph (b) states that a referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

Paragraph (c) of proposed § 2.35 specifies that, except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients. If a Federally-supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no Federally-supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under paragraph (d) of proposed § 2.35 to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Paragraph (e) notes that a DOL social service intermediary provider may request assistance from the Department in identifying an alternative service provider. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted, however, that in some instances, the awarding entity may also be unable to identify a suitable alternative provider. The Department requests specific comment on proposed § 2.35 and the referral requirement.

5. Political or Religious Affiliation

Consistent with § 2(j) of Executive Order 11246 as amended by § 1 of Executive Order 13559, the proposed rule adds a new provision at proposed § 2.39 to require that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made based on merit, not on the basis of religion or religious belief. This requirement will increase confidence that the rules applicable to federally funded partnerships are actually being observed and that decisions about government grants are made on the merits of proposals, not on political or religious considerations. The awarding entity must instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political and professional diversity among reviewers by advertising for these positions in a wide variety of venues.

6. Miscellaneous Provisions

The proposed rule would also modify the following provisions:

a. Definition of DOL Social Service Intermediary Provider

The proposed rule would modify the definition of the term ''DOL social service intermediary provider'' in § 2.31(f) by adding that the term encompasses non-governmental organizations. This change clarifies that non-governmental organizations have the same obligations as governmental intermediary providers, such as state agencies.

b. Protection of Religious Organizations' Independence

Consistent with Section 2(g) of Executive Order 13559, the proposed rule would modify § 2.32(b) by adding the term ''development'' to indicate that the development of religious beliefs is protected for faith-based organizations that apply for, or participate in, a social service program supported with Federal financial assistance.

III. Regulatory Procedures

Executive Orders 12866 and 13563

Executive Orders (E.O.) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects 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) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are the requirements that DOL social service providers with a religious affiliation: (1) Give beneficiaries a written notice informing them of their religious liberty rights when seeking or obtaining services supported by direct DOL financial

assistance, (2) at the beneficiary's request, make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, and (3) document such action. To minimize compliance costs on DOL social service providers, the proposed rule provides the language of the notice directly within the proposed rule.

An estimate of the cost of providing this notice and referring beneficiaries is discussed in the Paperwork Reduction Act section of this proposed rule. To minimize compliance costs and allow maximum flexibility in implementation, the Department has elected not to establish a specific format for the referrals required when beneficiaries request an alternative provider. To estimate the cost of the referral provision, the Department would need to know the number of religious direct social service providers funded by DOL annually, the number of beneficiaries who would ask for a referral, the costs of making the referral and notifying relevant parties of the referral.

Unfortunately, at this time, there is no known source of information to quantify precisely the numbers or proportions of program beneficiaries who will request referral to alternative providers. We are not aware of any instances in which a beneficiary of a program of the Department has objected to receiving services from a faith-based organization. There is a possibility that because of this rule, when beneficiaries start receiving notices of their right to request referral to an alternative service provider, more of them may raise objections. However, our estimate of the number of referrals is also informed by the experience of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa, *et seq.* and 42 U.S.C. 300x–21 *et seq.* Specifically, 42 U.S.C. 290kk–1 and 300x–65, require faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their right under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate federal, state, or local government agency that administers the SAMHSA program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients. The Department invites interested parties to provide data on which to base estimates of the number of beneficiaries who will request referral to an alternative service provider and the attendant compliance cost service providers may face.

Notwithstanding the absence of concrete data, the Department believes that this proposed rule is not significant within the meaning of the Executive Order because the annual costs associated with complying with the written notice and referral requirements will not approach $100 million.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis which will describe the impact of the proposed rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Furthermore, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact on a substantial number of small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions. As described above, the Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing in the rule the notice for providers to give beneficiaries informing them of their rights and by not proscribing a specific format for making referrals. The Department estimates it will take no more than two minutes for providers to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries. Using the May 2013 Bureau of Labor Statistics hourly mean wage for a Training and Development Specialist of $29.22 results in an estimate of the labor cost per service provider of preparing the notice of approximately $0.97. In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every small service provider with a religious affiliation, the Department believes that a substantial number of these small entities may be affected by this provision. However, the Department does not believe that a compliance cost of less than $200 per provider per year is a significant percentage of a provider's total revenue. In addition, we note that after the first year, the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.

The rule will also require religious social service providers, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. If an organization is unable to identify an alternative provider, the organization is required to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. A DOL social service intermediary may request assistance from the Department in identifying an alternative service provider. The Department estimates that each referral request will require no more than two hours of a Training and Development Specialist's time to process at a labor cost of $29.22 per hour. Although we do not have any way to determine the number of referrals that will occur in any one year, the Department does not believe that referral costs will be appreciable for small service providers. The Department invites interested parties to provide data on which we can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512). This rule proposes a new information collection.

Section 2.34 would impose requirements on religious social service providers to give beneficiaries (or potential beneficiaries) a standardized notice instructing (potential) beneficiaries of their rights and requiring an occasional written response that may impose a burden under the PRA. The Department has determined this notice is not a collection of information subject to OMB clearance under the PRA because the Federal Government has provided the exact text that a provider must use. *See* 5 CFR 1320.3(c)(2). The beneficiary's response, however, is subject to OMB clearance under the PRA. Care has been taken to limit the information to simply obtaining minimal identifying information and providing check boxes for material responses.

Section 2.35 would require that when a beneficiary or prospective beneficiary of a social service program supported by direct DOL financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider. The referral process could entail collections of information subject to PRA clearance, specifically, informing the beneficiary of a referral to an alternative provider. If an organization is unable to identify an alternative provider, the organization is required under paragraph (d) of proposed § 2.35 to notify the awarding entity and that awarding entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Paragraph (e) notes that a DOL social service intermediary provider may request assistance from the Department in identifying an alternative service provider. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations.

Religious social service providers that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. (The religious social service provider will be required to complete the referral form, notify the awarding entity, and maintain information only if a beneficiary requests a referral to an alternate provider.) In the case of paper notices, religious social service providers could meet the record-keeping requirements in these proposed regulations by keeping the bottom portion of the notice. For those religious social service providers that provide notice electronically, the notices would have to include a means for beneficiaries to request an alternative placement—and follow-up, if desired—that is recorded so the religious social service providers may retain evidence of compliance with these proposed regulations. We do not include an estimate of the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on religious social service providers. The record-keeping burden that these proposed regulations would add is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the record-keeping burden associated with these proposed regulations is large enough to be measurable, that burden will be calculated under the record-keeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of record-keeping burden in this PRA analysis.

Concurrent with publication of this NPRM, the Department is submitting an information collection request (ICR) to the OMB to obtain PRA approval for the proposed information collection requirements. A copy of this ICR with applicable supporting documentation including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

As part of its continuing effort to reduce paperwork burdens, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on collections of information in accordance with the PRA. 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 requirements on respondents can be properly assessed. A comment to the Department about the information collection requirements may be submitted in the same way as any other comment for this rulemaking. In addition to having an opportunity to file comments with the Department, written comments under the PRA about the information collection requirements may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the DOL–OS, Office of Management and Budget, Room 10235, Washington, DC 20503. You can also submit comments to OMB by email at *OIRA_submission@omb.eop.gov*. The OMB will consider all written comments it receives within 30 days of publication of this information collection.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of IT (*e.g.,* permitting electronic submission of responses.

The burden for the information collection provisions of this NPRM can be summarized as follows:

Agency: DOL–OS.

Title of Collection: Grant Beneficiary Referrals.

OMB ICR Reference Number Control Number: 1291–0NEW.

Affected Public: State and local governments; Private Sector—not-for-profit institutions; and Individuals or Households.

Frequency of Response: On occasion.

Total Estimated Number of Respondents: 38.

Total Estimated Number of Responses: 38.

Total Estimated Annual Burden Hours: 9.

Total Estimated Other Costs: $0.

Executive Order 13132

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct

effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

This proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of Government, within the meaning of the Executive Order 13132. Any action taken by a State as a result of the proposed rule would be at its own discretion as the rule imposes no requirements.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (Reform Act). Under the Reform Act, a Federal agency must determine whether a regulation proposes a Federal mandate that would result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any single year. The Department has determined this proposed rule does not include any Federal mandate that may result in increased expenditure by State, local, and Tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Effect on Family Life

The Department certifies that this proposed rule has been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), for its effect on family well-being. It will not adversely affect the well-being of the nation's families. Therefore, the Department certifies that this proposed rule does not adversely impact family well-being.

List of Subjects in 29 CFR Part 2

Administrative practice and procedure, Claims, Courts, Government employees, Religious Discrimination.

For the reasons set forth in the preamble, the Department of Labor amends part 2 of title 29 of the Code of Federal Regulations as set forth below.

PART 2—GENERAL REGULATIONS

Subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries

■ 1. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258; Executive Order 13559, 75 FR 71319, 3 CFR 2011 Comp., p. 273.

■ 2. Amend § 2.31 by revising paragraphs (a) and (f) to read as follows:

§ 2.31 Definitions.

* * * * *

(a) The term *Federal financial assistance* means assistance that non-Federal entities (including State and local governments) receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, direct appropriations, or other direct or indirect assistance, but does not include a tax credit, deduction or exemption. Federal financial assistance may be *direct* or *indirect.*

(1) The term *direct Federal financial assistance* or *Federal financial assistance provided directly* means that the Government or a DOL social service intermediary provider under this part selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly.*

(2) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered *indirect* when:

(i) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion;

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

(3) The recipient of sub-awards received through programs administered by States or other intermediaries that are themselves recipients of Federal financial assistance (*e.g.,* local areas that receive within-state allocations to provide workforce services under title I of the Workforce Innovation and Opportunity Act) are not considered recipients of *indirect Federal financial assistance* or recipients of *Federal financial assistance provided indirectly* as those terms are used in Executive Order 13559. These recipients of sub-awards are considered recipients of direct Federal financial assistance.

* * * * *

(f) The term *DOL social service intermediary provider* means any DOL social service provider, including a non-governmental organization, that, as part of its duties, selects subgrantees to receive DOL support or subcontractors to provide DOL-supported services, or has the same duties under this part as a governmental entity.

■ 3. Amend § 2.32 by revising paragraph (b) introductory text and paragraph (c) to read as follows:

§ 2.32 Equal participation of religious organizations.

* * * * *

(b) A religious organization that is a DOL social service provider retains its independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, subject to the provisions of § 2.33. Among other things, such a religious organization must be permitted to:

* * * * *

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require only religious organizations to provide assurances that they will not use direct DOL support for explicitly religious activities (including activities that involve overt religious content, such as worship, religious instruction, or proselytization). Any such requirements must apply equally to both religious and other organizations. All organizations, including religious ones, that are DOL social service providers must carry out

DOL-supported activities in accordance with all applicable legal and programmatic requirements, including those prohibiting the use of direct DOL support for explicitly religious activities (including activities that involve overt religious content, such as worship, religious instruction, or proselytization). A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, have a religious character or affiliation, or lack a religious component.

■ 4. Amend § 2.33 by revising paragraph (b)(1) and paragraph (b)(3) introductory text, and adding a new paragraph (d) to read as follows:

§ 2.33 Responsibilities of DOL, DOL social service providers and State and local governments administering DOL support.

* * * * *

(b)(1) DOL, DOL social service intermediary providers, DOL social service providers, and State and local governments administering DOL support must ensure that they do not use direct DOL support for explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). DOL social service providers must be permitted to offer explicitly religious activities so long as they offer those activities separately in time or location from social services receiving direct DOL support, and participation in the explicitly religious activities is voluntary for the beneficiaries of social service programs receiving direct DOL support. For example, participation in an explicitly religious activity must not be a condition for participating in a directly-supported social service program.

* * *

(3) Notwithstanding the requirements of paragraph (b)(1) of this section, and to the extent otherwise permitted by Federal law (including constitutional requirements), direct DOL support may be used to support explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), and such activities need not be provided separately in time or location from other DOL-supported activities, under the following circumstances:

* * *

(d) If an intermediary, acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal government, the intermediary must ensure compliance with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance, by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

* * * * *

§§ 2.34, 2.35, and 2.36 [Redesignated as §§ 2.36, 2.37, and 2.38]

■ 5. Redesignate §§ 2.34, 2.35, and 2.36 as § 2.36, § 2.37, and § 2.38, respectively.

■ 6. Add new § 2.34 and § 2.35 to subpart D to read as follows:

§ 2.34 Beneficiary protections: Written notice.

(a) *Contents.* Religious organizations providing social services to beneficiaries under a DOL program supported by direct Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by DOL, and state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) The organization may not require beneficiaries to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that are offered by our organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate out in time or location any privately-funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization must make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. The organization cannot guarantee, however, that in every instance, an alternative provider will be available; and

(5) Beneficiaries may report violations of these protections to the U.S. Department of Labor (or, the intermediary, if applicable). The required language of the notice is set forth below and may be downloaded from the Center for Faith-Based and Neighborhood Partnerships' Web site at *http://www.dol.gov/cfbnp.* DOL social service providers may post and distribute exact duplicate copies of the notice, including through electronic means:

NOTICE OF BENEFICIARY RELIGIOUS LIBERTY PROTECTIONS

Name of Organization:

Name of Program:

Contact information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion or religious belief;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that are offered by our organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) We must separate out in time or location any privately-funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) If you object to the religious character of an organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternative provider will be available; and

(5) You may report violations of these protections to the U.S. Department of Labor's Civil Rights Center, 200 Constitution Ave. NW., Room N–4123, Washington, DC 20210, or by email to *CivilRightsCenter@dol.gov.* This written notice must be given to you prior to the

time you enroll in the program or receive services from such programs, unless the nature of the service provided or urgent circumstances makes it impracticable to provide such notice in advance of the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider. If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me or the other service provider.

Name:

Best way to reach me (phone/address/email):

( ) Please do not follow up.

(b) *Timing of notice.* This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, DOL social service providers must advise beneficiaries of their protections at the earliest available opportunity.

§ 2.35 Beneficiary protections: Referral requirements.

(a) If a beneficiary or prospective beneficiary of a social service program supported by direct DOL financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

(b) A referral may be made to another religious organization, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) Except for services provided by telephone, internet, or similar means, the referral must be to an alternative Federally-financed provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by that organization. The alternative provider also must have the capacity to accept additional clients. Where there is no Federally-financed alternative provider available, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

(d) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify the awarding entity. If the organization is unable to identify an alternative provider, the awarding entity shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred.

(e) An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from DOL.

■ 7. Add new § 2.39 to subpart D to read as follows:

§ 2.39 Political or religious affiliation.

Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

Dated: February 12, 2015.

Thomas E. Perez,

Secretary of Labor.

[FR Doc. 2015–18260 Filed 8–5–15; 8:45 am]

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Part XIII

Department of Veterans Affairs

38 CFR Parts 50, 61, and 62

Equal Protection of the Laws for Faith-Based and Community Organizations; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 50, 61, and 62

RIN 2900–AP05

Equal Protection of the Laws for Faith-Based and Community Organizations

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its existing regulations concerning VA Homeless Providers Grant and Per Diem Program (GPD) and Supportive Service for Veterans Families Program (SSVF) and to establish a new part. More specifically, VA proposes to revise provisions that apply to religious organizations that receive financial assistance from VA in order to more clearly distinguish between ''direct'' and ''indirect'' financial assistance, amend VA's regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'', and establish new provisions that provide valuable protections for beneficiaries, provide guidance to VA employees and faith-based and other neighborhood organizations that receive ''direct'' or ''indirect'' VA financial assistance, and provide clear and uniform instructions on the fundamental principles that apply to their awards.

DATES: Comments must be received on or before October 5, 2015.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to ''RIN 2900–AP05-Equal Protection of the Laws for Faith-Based and Community Organizations.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen B. Dillard, Deputy Director Faith-based and Neighborhood Partnership (00FB), Office of the Secretary, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420, (202) 461–7689. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 sets forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On September 26, 2003, VA codified 38 CFR part 61, governing the Homeless Provider Grant and Per Diem Program, as a final rule. Section 61.64 ensures that VA programs, under this part, are open to all qualified organizations, regardless of their religious character and establishes instructions for the proper uses of direct Federal financial assistance.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

In March 2010, the Advisory Council issued its recommendations in a report entitled, ''A New Era of Partnerships: Report of Recommendations to the President'' (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

On November 17, 2010, President Obama signed Executive Order 13559, ''Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations.'' 75 FR 71319 (available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf*). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

(1) Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);

(2) State that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;

(3) State that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;

(4) Clarify (i) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, (ii) that participation in any explicit religious activity cannot be subsidized with

direct Federal financial assistance, and (iii) that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

(5) Emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;

(6) Require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;

(7) Clarify that the standards in these proposed regulations apply to sub-awards as well as prime awards; and

(8) Direct agencies to adopt regulations and guidance that distinguish between ''direct'' and ''indirect'' Federal financial assistance.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. On November 10, 2010, VA published a final rule promulgating 38 CFR part 62, regulations implementing 38 U.S.C. 2044 by establishing an SSVF Program. 75 FR 68979. Through this program, VA offers grants identified in the regulations, that provide supportive services to very low-income veterans and families who are at risk for becoming homeless or who, in some cases, have recently become homeless. 38 CFR 62.62 describes that religious or faith-based organizations are eligible for supportive services grants and contains certain conditions on the use of supportive services grant funds as it relates to religious activities.

Overview of Proposed Rule

We propose that the regulation incorporate the provisions of *Executive Order 13279, as amended by* Executive Order 13559, by adding a new Part 50 concerning religious and community organizations and amending existing Parts 61 and 62. Specifically we propose to amend the regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as including activities that involve overt religious content such as worship, religious instruction, or proselytization. We would also include regulatory language to distinguish between direct and indirect Federal financial assistance; clarify the responsibilities of intermediaries; provide valuable protections for beneficiaries and ensure that beneficiaries are aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation; and provide guidance that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference.

Proposed Amendments to Title 38 CFR

Prohibited Uses of Direct Federal Financial Assistance

VA's current regulations, 38 CFR 61.64 and 62.62, prohibit nongovernmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for inherently religious activities, such as worship, religious instruction, and proselytization. The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content. Accordingly, we propose to replace the term ''inherently religious activities'' with a term that will more accurately describe the restriction on direct Federal financial assistance.

The Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); id. at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance would not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance would not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, would not be considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions; for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because where there is extensive government control over the environment of the Federally-financed social service

program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment to ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, in proposed § 50.1(a), we would provide that services that can be publically funded under the Establishment clause, such as chaplaincy services, would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, the administrator of the government program did not orchestrate or encourage such comments.

The Department, therefore, proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' in 38 CFR 61.64 and 62.62. We would also provide a parenthetical explanation of ''explicitly religious activities'' in 38 CFR 50.1(a) specifically stating that the term ''includ[es] activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language would provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. This distinction is confirmed in proposed § 50.1(a). To clarify this distinction, proposed § 50.1(b) provides definitions of these terms.

In proposed § 50.1(b)(1), we would define direct Federal financial assistance or Federal financial assistance provided directly to mean that the government or an intermediary, as identified in proposed § 50.1(d), selects the service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity. In addition, in proposed § 50.1(b)(1), we would note that Federal financial assistance shall be treated as direct unless it meets the definition of indirect Federal financial assistance in § 50.1(b)(2). We would also amend §§ 61.64(b)(2) and 62.62(b)(2) to conform to the above noted proposed definition.

In proposed § 50.1(b)(2), we would define indirect Federal financial assistance or Federal financial assistance provided indirectly to mean that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. For example, the government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either way, the government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of ''indirect financial assistance.''

Intermediaries

We also propose regulatory language that would clarify the responsibilities of intermediaries. An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each intermediary would be required to select any providers to receive direct financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries

would have to ensure that any providers to which they disburse Federal financial assistance also comply with these rules. We would also provide that, if the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

Protections for Beneficiaries

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The Executive Order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also requires faith-based organizations administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. In proposed § 50.3(a), we would provide that, if a beneficiary or prospective beneficiary of a social service program supported by VA financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary must be referred to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a social service program supported by direct VA financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

In proposed § 50.3(b), we would provide that a referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. We would also provide that if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

In proposed § 50.3(c), we would specify that, except for services provided by telephone, internet, or similar means, the referral must be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. We would also provide that the alternative provider also must have the capacity to accept additional clients. If a VA-funded alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no VA-funded alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive VA financial assistance but does meet these requirements and is acceptable to the beneficiary.

If the organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify VA and VA would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the executive order requires VA to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted, however, that in some instances, VA may also be unable to identify a suitable alternative provider.

Political or Religious Affiliation

In proposed § 50.4, we provide that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief. The awarding entity would be expected to instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' requiring review by

OMB, unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www.va.gov/orpm* by following the link for VA Regulations Published from FY 2004 through FYTD.

Paperwork Reduction Act

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA 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. Proposed § 50.2 contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; email to *www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AP05-Equal Protection of the Laws for Faith-Based and Community Organizations.''

OMB is required to make a decision concerning the collection of information contained in this proposed 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. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections 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.

The collection of information contained in 38 CFR 50.2 is described immediately following this paragraph, under its title.

Title: Written Notice of Beneficiary Rights.

- *Summary of collection of information:* The new collection of information in proposed 38 CFR 50.2 would require faith-based or religious organizations that receive VA financial assistance in providing social services to beneficiaries to provide to beneficiaries (or prospective beneficiaries) written notice informing them of certain protections.
- *Description of need for information and proposed use of information:* The collection(s) of information is necessary to (1) Allow beneficiaries to obtain services from non-faith based organizations; (2) Allow beneficiaries to report violation of VA procedures regarding faith-based organizations.
- *Description of likely respondents:* Veterans and family members.
- *Estimated number of respondents:* 190,700.
- *Estimated frequency of responses:* We estimate that 0.1% of beneficiaries would request alternative placements: 1,907 beneficiaries.
- *Estimated average burden per response:* 2 minutes.
- *Estimated total annual reporting and recordkeeping burden:* 64 hours.

VA plans to use the following form as our notice of beneficiary rights:

WRITTEN NOTICE OF BENEFICIARY RIGHTS

U.S. DEPARTMENT OF VETERANS AFFAIRS

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

_____

_____

_____

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the [awarding entity].

We must give you this written notice before you enroll in our program or receive services from the program.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With

your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check all that apply:

( ) I want to be referred to another service provider.

( ) Please follow up with me or the service provider to which I was referred.

Name:

Best way to reach me (phone/address/email):

( ) Please do not follow up.

This information will be used by VA National Grant & Per Diem Program Office, to identify those beneficiaries who object to the religious character of the faith-based organization providing services; and to provide them with services from another faith-based or community organization. Once the beneficiaries complete and submit this form to the faith-based organization, then the form will be submitted to VA National Grant & Per Diem Program Office, 10770 N. 46th Street, Suite C–200 Tampa, FL 33617. The VA National Program Office will notify the faith-based organization that the form has been received via email or U.S Mail. This form will be kept on internal file at VA for the purpose identifying the beneficiaries' treatment location and for data collection/metrics.

The Paperwork Reduction Act: This information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. Public reporting burden for this collection of information is estimated to average ~~10~~ 2 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. The purpose of this data collection is to determine eligibility for benefits.

Beneficiary Name (print):

_____

Beneficiary Name (sign)

Date:

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Although small entities participating in VA's GPD and SSVF programs would be affected by this proposed rule, any economic impact would be minimal. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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 (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.024, VA Homeless Providers Grant and Per Diem Program; 64.033, VA Supportive Services for Veteran Families Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on January 15, 2015, for publication.

List of Subjects

38 CFR Part 50

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 61

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs—health, Grant programs—social services, Grant programs—transportation, Grant programs—veterans, Grants—housing and community development, Heath care, Homeless, Housing, Housing assistance payments, Indian—lands, Individuals with disabilities, Low and moderate income housing, Manpower training program, Medicare, Medicaid, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental security income (SSI), Travel and transportation expenses, Unemployment compensation, Veterans.

Dated: July 23, 2015.

Michael P. Shores,

Chief Impact Analyst, Office of Regulation and Policy Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, the Department of Veterans Affairs proposes to add 38 CFR part 50 and to amend Parts 61 and 62 as follows:

■ 1. Add Part 50 to read as follows:

PART 50—RELIGIOUS AND COMMUNITY ORGANIZATIONS: PROVIDING BENEFICIARY PROTECTIONS TO POLITICAL OR RELIGIOUS AFFILIATION

Sec.
50.1 Religious organizations; general provisions.
50.2 Beneficiary protections; written notice.
50.3 Beneficiary protections; referral requirements.
50.4 Political or religious affiliation.

Authority: 38 U.S.C. 501 and as noted in specific sections.

§ 50.1 Religious organizations; general provisions.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance that it receives (including through a prime or sub-award) to support or engage in any

explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, are not be considered explicitly religious activities that are subject to direct Federal financial assistance restrictions.

(b)(1) Direct Federal financial assistance or Federal financial assistance provided directly means that the government or an intermediary as defined in paragraph (d) of this section selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance or Federal financial assistance provided indirectly in paragraph (b)(2) of this section.

(2) Indirect Federal financial assistance or Federal financial assistance provided indirectly means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment.

(3) Federal financial assistance provided to an organization is considered indirect when:

(i) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government funded payment is neutral toward religion;

(ii) The organization receives the Federal financial assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(c) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of indirect Federal financial assistance (or recipients of Federal funds provided indirectly) as those terms are used in Executive Order 13559.

(d) Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. In these regulations, the terms intermediary and pass-through entity may be used interchangeably.

(Authority: 2 CFR 200.74)

(e) If an intermediary, acting under a contract, grant, or other agreement with VA or with a State or local government that is administering a program supported by VA financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by VA, the intermediary must select any providers to receive direct financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief and ensure compliance with the provisions of *Executive Order 13279, as amended by* Executive Order 13559, and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

§ 50.2 Beneficiary protections; written notice.

(a) Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by direct VA financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by VA. The notice will state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct VA financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to VA.

(b) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–XXXX.)

§ 50.3 Beneficiary protections; referral requirements.

(a) If a beneficiary or prospective beneficiary of a social service program supported by VA objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

(b) A referral may be made to another faith-based organization if the beneficiary has no objection to that provider. If the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(d) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify VA. If the organization is unable to identify an alternative provider, VA shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from VA.

§ 50.4 Political or religious affiliation.

Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and

must be made on the basis of merit, not on the basis of religion or religious belief.

(Authority: 38 U.S.C. 501)

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

Subpart F—Awards, Monitoring, and Enforcement of Agreements

■ 2. The authority citation for part 61 continues to read as follows:

Authority: 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2061, 2064.

■ 3. Amend § 61.64 by:

■ a. In paragraph (b)(1)(i), removing ''Inherently'' and adding, in its place, ''Explicitly''.

■ b. In paragraphs (c), (d), and (g), removing all references to ''inherently'' and adding, in each place, ''explicitly''.

■ c. In paragraph (b)(2), revising the last sentence to read as follows:

§ 61.64 Religious organizations.

* * * * *

(b) * * *

(2) * * * ''Direct financial assistance'' means that VA or an intermediary as defined in 38 CFR 50.1(d) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

* * * * *

PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

■ 4. The authority citation for part 62 continues to read as follows:

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections.

■ 5. Amend § 62.62 by:

■ a. In paragraph (b)(1)(i), removing ''Inherently'' and adding, in its place, ''Explicitly''.

■ b. In paragraphs (c), (d), and (g), removing all references to ''inherently'' and adding, in each place, ''explicitly''.

■ c. In paragraph (b)(2), revising the last sentence to read as follows:

§ 62.62 Religious organizations.

* * * * *

(b) * * *

(2) * * * ''Direct financial assistance'' means that VA or an intermediary as defined in 38 CFR 50.1(d) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

* * * * *

[FR Doc. 2015–18492 Filed 8–5–15; 8:45 am]

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Part XIV

Department of Transportation

Federal Railroad Administration

49 CFR Part 232

Securement of Unattended Equipment; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 232

[Docket No. FRA–2014–0032, Notice No. 2]

RIN 2130–AC47

Securement of Unattended Equipment

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA amends the brake system safety standards for freight and other non-passenger trains and equipment to strengthen the requirements relating to the securement of unattended equipment. Specifically, FRA codifies many of the requirements already included in its Emergency Order 28, Establishing Additional Requirements for Attendance and Securement of Certain Freight Trains and Vehicles on Mainline Track or Mainline Siding Outside of a Yard or Terminal. FRA amends existing regulations to include additional securement requirements for unattended equipment, primarily for trains transporting poisonous by inhalation hazardous materials or large volumes of Division 2.1 (flammable gases), Division 3 (flammable or combustible liquids, including crude oil and ethanol), and Class 1.1 or 1.2 (explosives) hazardous materials. For these trains, FRA also provides additional communication requirements relating to job briefings and securement verification. Finally, FRA requires all locomotives left unattended outside of a yard to be equipped with an operative exterior locking mechanism. Attendance on trains is required on equipment not capable of being secured in accordance with the proposed and existing requirements.

DATES: This final rule is effective October 5, 2015. Petitions for reconsideration must be received on or before September 25, 2015. 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 November 9, 2015.

ADDRESSES: *Petitions for reconsideration and comments on petitions for reconsideration:* Any petitions for reconsideration or comments on petitions for reconsideration related to this docket may be submitted by any of the following methods:

- *Web site:* 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: Steven Zuiderveen, Railroad Safety Specialist, Motive & Power Equipment Division, Office of Safety Assurance and Compliance, Federal Railroad Administration, RRS–14, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6337); Jason Schlosberg, Trial Attorney, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–207, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6032).

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Executive Summary
II. Background
A. Lac-Mégantic Derailment
1. Facts
2. Response
B. Safety Concerns Arising Out of the Lac-Mégantic Derailment and Other Train Incidents Involving Flammable Liquids and Gases and Poison Inhalation Hazard Materials.
C. Current Securement Regulations and Related Guidance
D. Emergency Order 28 and Related Guidance
E. RSAC Overview
F. NPRM and Comments
III. Rescinding Emergency Order 28
IV. Section-by-Section Analysis
V. Regulatory Impact and Notices
A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures
Regulatory Flexibility Act and Executive Order 13272
B. Paperwork Reduction Act
C. Federalism
D. International Trade Impact Assessment
E. Environmental Assessment
F. Unfunded Mandates Reform Act of 1995
G. Energy Impact
H. Privacy Act
I. Executive Order 12898 (Environmental Justice)
J. Executive Order 13175 (Tribal Consultation)

I. Executive Summary

Purpose of the Regulatory Action

While FRA's existing securement regulations have been successful in mitigating risks associated with the unintended movement of unattended equipment, FRA recognizes that—particularly in light of certain incidents like the 2013 accident in Lac-Mégantic, Quebec, Canada—additional requirements are warranted when such equipment includes certain hazardous materials that can contribute to high-consequence events. To address these concerns, FRA issued Emergency Order 28, 78 FR 48218, Aug. 7, 2013, engaged in proceedings with the Railroad Safety Advisory Committee to draft recommended regulations, and issued a responsive notice of proposed rulemaking (NPRM) and this instant final rule. FRA is issuing this final rule pursuant to the authority granted to the Secretary of Transportation in 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–20302, 21304; 28 U.S.C. 2461, note; which the Secretary has delegated to the Administrator of FRA pursuant to 49 CFR 1.89.

Summary of the Major Provisions of the Regulatory Action

In this proceeding, FRA issues requirements to ensure that each locomotive left unattended outside of a yard is equipped with an operative exterior locking mechanism and that such locks be applied on the controlling locomotive cab door when a train is transporting tank cars loaded with certain hazardous materials. This rule provides that such hazardous materials trains may only be left unattended on a main track or siding if justified in a plan adopted by the railroad, accompanied by an appropriate job briefing, and proper securement is made and verified. This rule also requires additional verification of securement in the event that a non-railroad emergency responder

may have been in a position to have affected the equipment.

Costs and Benefits of the Proposed Regulatory Action

In this rule, the benefits ($1,163,669 at a 7% discount, $1,579,240 at a 3% discount) outweigh the costs ($86,685 at a 7% discount, $99,909 at a 3% discount), with total net benefits over 20 years of $1,076,984 at a 7% discount (or $95,009 annualized) and $1,478,331 at a 3% discount (or $96,538 annualized).

Discounted values	Discounted value	
	Discount factor	
	7%	3%
Costs		
Attending Trains	$36,685	$49,909
Installing Locks	50,000	50,000
Total Costs	86,685	99,909
Benefits		
Reduced Vandalism	180,873	250,666
Reduced Recordkeeping	982,786	1,328,573
Total Benefits	1,163,669	1,579,240

Discounted values net benefits	Discounted value	
	Discount factor	
	7%	3%
Total	$1,076,984	$1,479,331
Annualized	95,009	96,538

II. Background

In 2001, FRA issued regulations governing the securement of unattended equipment. 66 FR 4104, Jan. 17, 2001. These regulations have been effective in protecting against the risk of rolling equipment. Over the last few years, there has been a significant increase in the volume of rail traffic for certain types of commodities, such as petroleum crude oil (crude oil) and ethanol, both of which are highly flammable and often transported in large unit or ''key'' trains, as defined in the industry by the Association of American Railroads (AAR). *See* AAR Circular No. OT–55–N (Aug. 5, 2013), *available at http://www.boe.aar.com/CPC-1258%20OT-55-N%208-5-13.pdf.*

Since 2009, there have been a number of serious rail accidents involving the transportation of large quantities of flammable liquids. A number of these accidents involved trains transporting large quantities of ethanol. However, since 2011, there has been significant growth in the rail transport of flammable crude oil, and FRA has seen a number of accident-related releases of crude oil in that time. One significant accident involving tank cars loaded with crude oil was the July 6, 2013, derailment in the town of Lac-Mégantic, Quebec, Canada. After reviewing the facts related to this derailment, FRA concluded that additional action was necessary to eliminate an immediate hazard of death, personal injury, or significant harm to the environment, particularly in instances where certain hazardous materials are involved. Thus, FRA issued Emergency Order 28 requiring railroads to implement additional procedures to ensure the proper securement of equipment containing certain types and amounts of hazardous materials when left unattended. *See* 78 FR 48213, Aug. 7, 2013. Subsequent to the issuance of Emergency Order 28, FRA also enlisted the assistance of the Railroad Safety Advisory Committee (RSAC) to develop recommendations regarding the attendance and securement of railroad equipment transporting certain hazardous materials when left unattended in light of the requirements contained in Emergency Order 28.

A. Lac-Mégantic Derailment

1. Facts

On July 6, 2013, in the town of Lac-Mégantic, Quebec, Canada, an accident involving tank cars loaded with petroleum crude oil occurred on track owned by Montreal, Maine & Atlantic Railway (MMA), a company incorporated in the United States.

The Transportation Safety Board (TSB) of Canada issued a report at the conclusion of its investigation into the incident, and the following is a summary of the TSB's factual findings.[1] On July 5, 2013, a locomotive engineer was operating freight train MMA–002 on the Sherbrooke Subdivision from Farnham (milepost 125.60) and at around 10:50 p.m. stopped near Nantes, Quebec (milepost 7.40) on its way to its destination, Brownville Junction, Maine. The train was approximately 4,700 feet long, weighed over 10,000 tons, and included a locomotive consist of 5 head-end locomotives and one VB car (which served as a type of special-purpose caboose), one box car (buffer car), and 72 tank cars loaded with approximately 7.7 million liters of petroleum crude oil (UN 1267). The locomotive engineer parked train MMA–002 on the main line, on a descending grade of 1.2%, attempted to secure the train—including setting the independent brake, but not the automatic brake—and departed by automobile, leaving the train unattended. At around 11:40 p.m., a local resident reported a fire on the train. The local fire department was called and responded with another MMA employee. At approximately

[1] Railway Investigative Report R13D0054, TSB, July 6, 2013, *available at http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/R13D0054/R13D0054.pdf.*

midnight, the controlling locomotive was shut down and the fire extinguished. After the fire was extinguished, the fire department and the MMA employee left the site.

At approximately 1:00 a.m. the next day (the early morning of July 6th), the train began rolling and picking up speed down the descending grade toward the town of Lac-Mégantic, Quebec, located 7.2 miles away and approximately 30 miles from the United States-Canada border. At about 1:15 a.m., near the center of town, the train derailed. The locomotive consist, which separated from the train, did not derail and traveled an additional ½ mile before stopping.

The derailment caused a release of 6 million liters of petroleum crude oil, resulting in a large fire with multiple explosions and 47 fatalities.[2] There was also extensive damage to the town, and approximately 2,000 people were evacuated from the surrounding area.

2. Response

In response to this accident, Transport Canada—the Canadian government department responsible for regulating transportation safety in Canada—issued an emergency railroad directive on July 23, 2013.[3] While Transport Canada explained in the emergency directive that the cause of the accident in Lac-Mégantic remained unknown, the emergency directive stated that, ''in light of the catastrophic results of the Lac-Mégantic accident and in the interest of ensuring the continued safety and security of railway transportation, there is an immediate need to clarify the regime respecting unattended locomotives on main track and sidings and the transportation of dangerous goods in tank cars using a one person crew to address any threat to the safety and security of railway operations.'' As such, Transport Canada exercised its statutory emergency directive authority to order railroad companies in Canada to comply with certain requirements related to unauthorized entry into locomotive cabs, directional controls on locomotives, the application of hand brakes to cars left unattended for more than one hour, setting of the automatic brake and independent brake on any locomotive attached to cars that are left unattended for one hour or less, attendance related to locomotives attached to loaded tank cars transporting dangerous goods on main track, and the number of crew members assigned to a locomotive attached to loaded tank cars transporting dangerous goods on a main track or siding.

Also on July 23, 2013, Transport Canada issued an accompanying order pursuant to paragraph 19(a)(1) of the Canadian Railway Safety Act directing railroad companies in Canada to formulate or revise certain railroad operating rules, respecting the safety and security of unattended locomotives, uncontrolled movements, and crew size requirements.[4] The order provides that rules should be based on an assessment of safety and security risks, and shall at a minimum ensure that the cab(s) of unattended controlling locomotives are secure against unauthorized entry; ensure that the reverse levers (commonly referred to as a ''reversers'') of unattended locomotives are removed and secured; prevent uncontrolled movements of railway equipment by addressing the application of hand brakes; ensure the security of stationary railway equipment transporting dangerous goods; and provide for minimum operating crew requirements considering technology, length of train, speeds, classification of dangerous goods being transported, and other risk factors.

The Railway Association of Canada submitted proposed operating rules to Transport Canada on November 20, 2013. Transport Canada accepted the proposed rules submitted on December 26, 2013, making the operating rules applicable to all railway companies operating in Canada. *See* TC O 0–167. As a result, railroads operating in Canada are now required to comply with Canadian Rail Operating Rules (CROR) CROR 112, as amended.

CROR 62 pertains to ''Unattended engines.'' The term ''unattended'' is now defined in the CROR as ''when an employee is not in close enough proximity to take effective action.'' The new Canadian requirements, applicable to each engine left unattended outside of an attended yard or terminal, requires cab securement to prevent unauthorized entry and removal of the reverser from the engine when it does not have a high idle feature and not in sub-zero temperatures. *See* CROR 62 (TC O 0–167). Transport Canada also approved expansive revisions to CROR 112, which now provides minimum requirements, acceptable methods, and factors to consider for securing equipment while switching en route or left unattended. *See* CROR 112 (TC O 0–167).

In direct response to the Lac-Mégantic derailment, DOT began taking actions consistent with Transport Canada to ensure the safe transportation of products by rail in the United States, with a particular focus on certain hazardous materials that present an immediate danger for communities and the environment in the event of a train accident. In Emergency Order 28, FRA sought to address the immediate dangers that arise from unattended equipment that is left unsecured on mainline tracks.

FRA has decided that Emergency Order 28 will sunset on the effective date of this final rule. AAR and the American Short Line and Regional Railroad Association (ASLRRA) concur in their comments. Until such time, however, Emergency Order 28 will remain in effect, as amended by FRA's August 27, 2013, letter approving with conditions a joint petition for relief from the AAR and the ASLRRA. Railroads are required to comply with Emergency Order 28, as amended, in addition to 49 CFR 232.103(n). As further discussed below, once Emergency Order 28 sunsets upon the effective date of this final rule, the requirements of the Emergency Order that are not promulgated in this final rule will no longer apply. Emergency Order 28, as amended, contains six securement-related requirements governing when, where, and how certain hazardous materials tank cars may be left unattended, including certain communication requirements:

(1) A railroad must not leave equipment unattended on a mainline outside of a yard or terminal when the equipment includes a minimum number of loaded tank cars containing certain types of hazardous materials, referred to as ''Appendix A Materials''—5 or more tank cars containing materials poisonous by inhalation (PIH), including anhydrous ammonia and ammonia solutions and/or 20 rail car loads of flammable gases or liquids (*e.g.,* crude oil and ethanol)—until the railroad develops, adopts, and complies with a plan that identifies specific locations and circumstances when such equipment may be left unattended.[5]

(2) A railroad must develop a process for securing unattended equipment containing Appendix A Materials that includes: (a) Locking the controlling locomotive cab or

[2] *See id.; see also* Statistical Summary Railway Occurrences 2013, TSB, pp. 2, 5, *available at http://www.tsb.gc.ca/eng/stats/rail/2013/ssro-2013.pdf.*

[3] *See* Emergency Directive Pursuant to Section 33 of the Railway Safety Act, Safety and Security of Locomotives in Canada, July 23, 2013, available at *http://news.gc.ca/web/article-en.do?nid=829609; see also* Rail Safety Advisor Letter—09/13, Securement of Equipment and Trains Left Unattended, Transport Canada (July 18, 2013), *available at http://www.tsb.gc.ca/eng/medias-media/sur-safe/letter/rail/2013/r13d0054/r13d0054-617-09-13.asp.*

[4] Railroads operating within Canada were at the time of the Lac-Mégantic derailment, and are currently, required to comply with the Canadian Rail Operating Rules that have been approved by Transport Canada.

[5] AAR has voluntarily applied Emergency Order 28 to trains that have a single PIH materials tank car.

removing and securing the reverser and (b) communication of pertinent securement information to the dispatcher for recordation.

(3) Each railroad must review and verify, and adjust, as necessary, existing procedures and processes related to the number of hand brakes to be set on all unattended trains and equipment.

(4) Each railroad must require a job briefing addressing securement for any job that will impact or require the securement of any equipment in the course in the course of the work being performed.

(5) Each railroad must ensure that a qualified railroad employee inspects all equipment that any emergency responder has been on, under, or between for proper securement before the train or vehicle is left unattended.

(6) Each railroad must provide notice to all employees affected by Emergency Order 28.

See 78 FR 48224, Aug. 7, 2013. Following a request from AAR and ASLRRA, FRA granted partial relief from Emergency Order 28's dispatcher communication requirement in certain limited situations. FRA's relief letter provides that a railroad employee may leave equipment unattended on a mainline or siding without contacting the train dispatcher when the employee is actively engaged in switching duties as long as the employee ensures that there is an emergency application of the air brakes, hand brakes are set in accordance with 49 CFR 232.103(n), and the employee has demonstrated knowledge of FRA and railroad securement requirements. *See* Letter from Robert C. Lauby, Acting Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, to Michael J. Rush, Associate General Counsel, AAR, and Keith T. Borman, Vice President and General Counsel, ASLRRA, (Aug. 27, 2013), *available at https://rsac.fra.dot.gov/meetings/20130829.php.*

Additionally, FRA and the Pipeline and Hazardous Materials Safety Administration (PHMSA) jointly issued a Safety Advisory to railroads and commodity shippers detailing eight recommended actions the industry should take to better ensure the safe transport of hazardous materials. *See* Federal Railroad Administration Safety Advisory 2013–06, Lac-Mégantic Railroad Accident and DOT Safety Recommendations, 78 FR 48224, Aug. 7, 2013, *available at http://www.fra.dot.gov/eLib/details/L04720.* These recommendations include: Reviewing the details and lessons learned from the Lac Mégantic accident; reviewing crew staffing levels; removing and securing the train's ''reverser'' when unattended; review of all railroad operating procedures, testing and operating rules related to securing a train; reviewing Transport Canada's directives to secure and safely operate a train; and conducting a system-wide assessment of security risks when a train is unattended and identify mitigation efforts for those risks. Additionally, the Safety Advisory recommends testing and sampling of crude oil for proper classification for shipment, as well as a review of all shippers' safety and security plans. FRA also convened an emergency meeting of FRA's RSAC to begin the deliberative process with FRA's stakeholders, including railroad management, railroad labor, shippers, car owners, and others, as the agency considers requirements in Emergency Order 28 and recommendations in the Safety Advisory that should be made a part of its regulations.[6]

On August 19, 2014, the TSB released its Railway Investigation Report R13D0054, citing 18 causal and contributing factors, plus an additional 16 findings as to risk, concerning the accident at Lac-Mégantic. FRA believes that it is taking—or has already taken—action concerning each of those factors. The TSB notably included in its list of factors the MMA's weak safety culture and ineffective oversight on train securement. The report also identified factors relating directly to train securement such as insufficient hand brakes and improper hand brake test applications. The requirements in this final rule intend to enhance safety culture and oversight that addresses train securement. For instance, as further discussed below, FRA is mandating by regulation the implementation of operating rules and practices requiring that securement be part of all relevant job briefings. This final rule also requires verification with a qualified person that equipment is adequately and effectively secured in accordance with the regulations before being left unattended. These requirements aim to increase the safety dialog between railroad employees and to provide enhanced oversight within the organization. In doing so, these communications should better ensure that crew members apply the proper number of hand brakes, and more correctly apply hand brake tests, on unattended equipment. Also notable was the report's findings as to risk that states: ''If trains are left unattended in easily accessible locations, with locomotive cab doors unlocked and the reverser handle available in the cab, the risk of unauthorized access, vandalism, and tampering with locomotive controls is increased.'' This final rule directly addresses this concern with requirements relating to the installation and use of locomotive exterior door locks and reverser removal.

B. Safety Concerns Arising Out of the Lac-Mégantic Derailment and Other Train Incidents Involving Flammable Liquids and Gases and Poison Inhalation Hazard Materials

The vast majority of hazardous materials shipped by rail each year arrive at their destinations safely and without incident. Indeed, in calendar year 2013, there were only 18 accidents in which a hazardous material was released (involving a total of 78 cars) out of approximately 1.6 million shipments of hazardous material transported in rail tank cars in the United States. However, the Lac-Mégantic incident demonstrates the substantial potential for danger that exists when an unattended train rolls away and derails resulting in the sudden release of hazardous materials into the environment. Although the Lac-Mégantic incident occurred in Canada, the freight railroad operating environment in Canada is similar to that in the United States, and a number of railroads operate in both countries.[7] Freight railroads in the United States also transport a substantial amount and variety of hazardous materials, including PIH materials, also known as materials toxic by inhalation (TIH), and explosive materials. Moreover, an increasing proportion of the hazardous materials transported by rail is classified as flammable.[8]

[6] The RSAC was given three tasks. In addition to developing securement recommendations, it was also tasked with developing recommendations addressing issues relating to train crew size and hazardous materials such as identification and classification of hazardous materials, operational controls, and handling of certain hazardous materials shipments. The RSAC hazardous materials working group was able to reach consensus on amending the definitions of ''residue'' and ''key train'' and clarifying the jurisdiction concerning loading, unloading, and storage of hazardous materials before and during transportation. These recommendations have been provided to PHMSA, which has regulatory authority over hazardous materials shipments.

[7] As an example, MMA formerly operated in both the United States and Canada, with approximately 510 miles of track in Maine, Vermont, and Quebec, and the tank cars transporting the crude oil that derailed in Lac-Mégantic originated in the Williston Basin of North Dakota. A discussion concerning the applicable Canadian securement requirements can be found above in the section titled ''2. Response,'' which addresses the actions taken by the United States and Canada in direct response to the Lac-Mégantic incident.

[8] PHMSA prescribes a comprehensive regulatory safety system that categorizes hazardous materials into nine hazard classes based on the type of hazards presented by the materials. *See* 49 CFR parts 172 and 173. Under PHMSA's regulations, crude oil, in most forms, meets the definition of a

Continued

The MMA train in the Lac-Mégantic incident was transporting 72 carloads of crude oil with five locomotives, a VB car, and a loaded box car. A similar type of train consist is commonly found on rail lines in the United States, because crude oil is often transported in solid blocks or by a unit train consisting entirely of tank cars containing crude oil. Crude oil is generally classified by an offeror as a Class 3 flammable liquid; per PHMSA's Hazardous Materials Regulations (HMR), however, its packing group can be I, II, or III depending on the blend of constituent crude oils.[9] According to the AAR, crude oil traffic increased 68-fold in the United States between 2005 and 2013. Much of this growth has occurred because of developments in North Dakota, as the Bakken formation in the Williston Basin has become a major source for oil production in the United States. Texas also has contributed to the growth of crude oil shipments by rail. As a result, carloads of crude oil increased from approximately 81,452 in 2011 to approximately 485,384 in 2013. The Bakken crude oil from North Dakota is primarily shipped via rail to refineries located near the U.S. Gulf Coast—particularly in Texas and Louisiana—or to pipeline connections, most notably to connections located in Oklahoma. Crude oil is also shipped via rail to refineries on the East Coast and West Coast, and to a lesser extent, refineries in other regions of the U.S.[10]

All indications from the U.S. Department of Energy's U.S. Energy Information Administration (EIA) are that rail capacity for Bakken crude oil from the Williston Basin will continue to expand to meet production.[11] Rail shipments from the North Dakota region are forecast to increase over the next two years (as are pipeline shipments). Much of the near-term growth in rail originations is a function of how quickly rail car manufacturers can meet the demand by producing new tank cars, primarily for transporting Bakken crude oil. The rise in rail originations in crude oil is subject to changes in the number of tank cars available, price of crude oil, overall production of crude oil in that region; and if, or how quickly, additional pipeline capacity from that region comes online. However, for the foreseeable future, all indications are for continued growth of rail originations of crude in that region as new tank car fleets come online to meet demand.

As demonstrated by the Lac-Mégantic derailment, in a high-consequence incident, crude oil is problematic when released because it is flammable. This risk is compounded because it is commonly shipped in large unit trains. Subsequent to the Lac-Mégantic derailment, the United States has seen at least three major rail-related incidents involving crude oil unit trains that evidence the dangerous results that can occur when crude oil is not transported safely. FRA recognizes that none of these three derailments resulted from a roll-away situation that would have been addressed by this rule.

On April 30, 2014, there was derailment near downtown Lynchburg, Virginia, of an eastbound CSX Transportation, Inc. (CSX) unit train consisting of 105 tank cars loaded with crude oil. Seventeen of the train's cars derailed. One of the tank cars was breached, leading to a crude oil fire. Emergency responders were forced to evacuate approximately 400 individuals and 20 businesses from the immediate area. Additionally, three of the derailed tank cars came to rest in the adjacent James River, causing up to 30,000 gallons of crude oil to be spilled into the river. The National Transportation Safety Board (NTSB) and DOT both investigated this accident and determined that it was caused by a sudden rail failure under the moving train.

On December 30, 2013, a westbound grain train derailed 13 cars near Casselton, North Dakota, fouling main track 2.[12] Simultaneously, an eastbound crude oil unit train was operating on main track 2. The crude oil unit train reduced its speed and collided with a derailed car that was fouling, resulting in the derailment of the head-end locomotives and the first 21 cars of the crude oil unit train. Eighteen of the 21 derailed tank cars ruptured, releasing an estimated 400,000 gallons of crude. The ruptured tank cars ignited causing an explosion. There were no reported injuries by either train crew, nor were there any injuries to the public; however, about 1,400 people were evacuated. Damages from the derailment are estimated at $6.1 million.[13]

Also, on November 8, 2013, a 90-car crude oil train derailed in a rural area near Aliceville, Alabama. The crude oil shipment had originated in North Dakota and was bound for Walnut Hill, Florida, to be transported by a regional pipeline to a refinery in Saraland, Alabama. More than 20 cars derailed and at least 11 cars ignited, resulting in an explosion and fire. Although there were no reported injuries, an undetermined amount of crude oil escaped from derailed cars and fouled a wetlands area near the derailment site.

The dangers related to crude oil trains are not necessarily unique. They also exist with other hazardous materials such as ethanol, which is another flammable liquid that is commonly transported in large quantities by rail. In 2012, more carloads of ethanol were transported via rail than any other hazardous material. The railroads experienced an increase in ethanol traffic of 442 percent between 2005 and 2010. Although in 2013 the number of carloads dropped by 10 percent from 2010 levels, there were still approximately 297,000 carloads transported by rail. Since 2009, there have been at least six major mainline derailments resulting in the breach of tank cars containing ethanol. While FRA recognizes that none of these six derailments resulted from a roll-away situation, they are instructive on the destructive potential of a derailment involving tank cars containing flammable products:

- On August 5, 2012, in Plevna, Montana, a BNSF Railway Co. train derailed 18 cars while en route from Baker, Montana. Seventeen of the 18 cars were tank cars loaded with denatured alcohol, a form of ethanol. Five of the cars caught on fire resulting in explosions, the burning of surrounding property not within the railroad's right-of-way, and the evacuation of the immediate area.
- On July 11, 2012, in Columbus, Ohio, a Norfolk Southern Railway Co. train derailed while operating on main track. Thirteen tank cars containing ethanol derailed resulting in a fire and

"Class 3" hazardous material, which signifies that it is a flammable liquid. Ethanol, discussed below, also is a Class 3 hazardous material. PIH materials, referenced above, include "Class 2 and Division 2.3" gases and "Class 6, and Division 6.1" poisons other than gases. Chlorine gas and anhydrous ammonia are two examples of PIH materials (Division 2.3) that are commonly transported by rail.

[9] PHMSA uses packing groups to categorize hazardous materials according to the danger presented. Hazardous materials in Packing Group I present great danger; Packing Group II present medium danger; and Packing Group III presents minor danger. *See* 49 CFR 171.8.

[10] *See* AAR's May 2013 paper "Moving Crude Oil by Rail", available online at: *https://www.aar.org/safety/Documents/Assets/Transportation_of_Crude_Oil_by_Rail.pdf.*

[11] *See* EIA reports "Bakken crude oil price differential to WTI narrows over last 14 months," available online at: *http://www.eia.gov/todayinenergy/detail.cfm?id=10431;* and "Rail delivery of U.S. oil and petroleum products continues to increase, but pace slows," available online at: *http://www.eia.gov/todayinenergy/detail.cfm?id=12031.*

[12] This derailment currently is being investigated by the National Transportation Safety Board (NTSB), and information regarding this incident can be found at the NTSB Web site. *See http://www.ntsb.gov/doclib/reports/2014/Casselton_ND_Preliminary.pdf.*

[13] *See id.*

the evacuation of 100 people within a one-mile radius of the derailment.

• On February 6, 2011, in Arcadia, Ohio, a Norfolk Southern Railway Co. train operating on single main track derailed 33 tank cars loaded with ethanol. The derailment caused a major fire and forced the evacuation of a one-mile radius around the derailment.

• On June 19, 2009, in Cherry Valley, Illinois, a Canadian National Railway train derailed 19 tank cars loaded with ethanol. Thirteen of the 19 derailed cars caught fire, and there were reports of explosions. One person died, and there were 9 reported injuries related to the fire. Additionally, approximately 600 residences were evacuated within a ½-mile radius of the derailment.

• On October 7, 2011, at about 2:14 a.m. CDT, at milepost 121.8 on the No. 1 Subdivision near Tiskilwa, Illinois, an eastbound Iowa Interstate Railroad (IAIS) freight train No. RI–BI–06—with two locomotives and 131 cars—derailed its head 26 cars. The derailed cars included ten cars of ethanol, several of which were breached and lost a substantial amount of their product, resulting in a fire and an evacuation of about 800 residents. The emergency responses began almost immediately and were supported by surrounding local fire and police departments to control and suppress the fire and execute the evacuation. The fire suppression was sustained over two and half days. There were no injuries or fatalities.

• On February 4, 2015, in Dubuque, Iowa, a Canadian Pacific Railway unit train—with 13 of its 80 tank cars containing denatured alcohol—derailed, with at least one of the cars falling into the Mississippi River. Three of the cars caught fire and there was a release of an unknown quantity of denatured alcohol into the river. Officials established a half-mile evacuation zone, but there were no occupied structure in that area.

While these accidents were serious, their results had potential for higher-consequence outcomes. The higher-consequence releases created the potential for additional deaths, injuries, property damage, and environmental damage.

There are other hazardous materials that have similar potential for higher-consequence danger. For example, accidents involving trains transporting other hazardous materials, including PIH materials such as chlorine and anhydrous ammonia, can also result in serious consequences as evidenced by the following accidents:

• On January 6, 2005, in Graniteville, South Carolina, a Norfolk Southern Railway Co. train collided with another Norfolk Southern Railway Co. train that was parked on a customer side track, derailing both locomotives and 16 cars of the moving train. The accident was caused by a misaligned switch. Three tank cars containing chlorine derailed, one of which was punctured. The resulting chlorine exposure caused 9 deaths, approximately 554 people were taken to local hospitals, and an additional 5,400 people within a one-mile radius of the site were evacuated by law enforcement personnel. FRA's analysis of the total cost of the accident was $126 million, including fatalities, injuries, evacuation costs, property damage, environmental cleanup, and track out of service.

• On June 28, 2004, near Macdona, Texas, a Union Pacific Railroad Co. train passed a stop signal and collided with a BNSF Railway Co. train. A chlorine car was punctured, and the chlorine gas that was released killed three and injured 32.

• On January 18, 2002, a Canadian Pacific Railway train containing 15 tank cars of anhydrous ammonia derailed half a mile from the city limits of Minot, North Dakota due to a breaking of the rail at a joint. Five of these tank cars ruptured, which resulted in an ammonia vapor that spread 5 miles downwind over an area where 11,600 people lived. The accident caused one death, 11 serious injuries, and 322 minor injuries. Environmental cleanup costs reported to the NTSB were $8 million.

• On July 18, 2001, 11 of 60 cars in a CSX Transportation, Inc. freight train derailed while passing through the Howard Street Tunnel in downtown Baltimore, Maryland. The train included 8 tank cars loaded with hazardous material; 4 of these were among the cars that derailed. A leak in a tank car containing tripropylene resulted in a chemical fire. A break in a water main above the tunnel flooded both the tunnel and the streets above it with millions of gallons of water.

FRA recognizes that these four incidents did not result from a roll-away situation. However, they illustrate the destructive potential of PIH materials' derailments.

While train accidents involving hazardous materials are caused by variety of factors, nearly one-half of all accidents are related to railroad human factors or equipment defects. FRA's data shows that since 2009, human factors have been the most common cause of reportable train accidents. Based on FRA's accident reporting data for the period from 2010 through May 2014, approximately 34 percent of reported train accidents/incidents, as defined by 49 CFR 225.5, were human factor-caused.[14] With regard to the securement of unattended equipment, specifically, FRA accident/incident data indicates that approximately 8.7 percent of reported human factor-caused train accidents/incidents from calendar year 2010 until May 2014 were the result of improper securement, which means that improper securement is the cause of approximately 2.9 percent of all reported accidents/incidents.[15] The types of securement errors that typically lead to accidents/incidents include failing to apply any hand brakes at all, failing to apply a sufficient number of hand brakes, and failing to correctly apply hand brakes. Emergency Order 28 and this final rule intends to address some of the human factors failures that may cause unattended equipment to be improperly secured to protect against a derailment situation similar to that which occurred in Lac-Mégantic.

C. Current Securement Regulations and Related Guidance

As previously noted, FRA has existing regulations—issued years before the accident at Lac-Mégantic and promulgation of Emergency Order 28—designed to ensure that trains and vehicles are properly secured before being left unattended. *See* 49 CFR 232.103(n). In FRA's view, if existing regulations are followed, the risk of movement of unattended equipment is substantially reduced. Despite the demonstrated effectiveness of FRA's current securement regulations, FRA has determined that the increased shipments of hazardous materials such as crude oil and ethanol, combined with the potential for higher-consequences from any accident that might occur due to improper securement, particularly on mainline track and mainline sidings outside of a yard, proper securement has become a serious and immediate safety concern. Therefore, FRA established additional securement measures in Emergency Order 28 to ensure the continued protection of the health and safety of railroad employees, the general public, and the environment. In this final rule, FRA establishes permanent rules to strengthen the current regulations and ensure public safety by adopting the necessary and effective

[14] FRA estimates that there were a total of approximately 8976 accidents/incidents reported during that time period. Approximately 3030 of those accidents/incidents were caused by human factors, and 906 involved equipment that was placarded as containing hazardous materials.

[15] There were a total of approximately 264 reported accidents/incidents that were caused by securement errors. Of those 264 accidents/incidents, approximately 98 involved equipment that was placarded as containing hazardous materials.

securement measures FRA included in Emergency Order 28 as part of its immediate response to the Lac-Mégantic derailment.

The current regulations define ''unattended equipment'' as ''equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person.'' *Id.* Section 232.103(n) generally addresses the securement of unattended equipment by stating that a train's air brakes must not be depended on to hold equipment standing unattended on a grade. More specifically, § 232.103(n) also requires that the railroad apply a sufficient number of hand brakes to hold the equipment with the air brakes released and that the brake pipe pressure be reduced to zero with the angle cock opened on one end of a cut of cars when not connected to a locomotive or other compressed air source. The existing regulations also require railroads to develop a process or procedure for verifying that the hand brakes applied are sufficient to hold the equipment with the air brakes released. When dealing with locomotives and locomotive consists, § 232.103(n)(3) establishes specific additional requirements:

- All hand brakes must be fully applied on all locomotives in the lead consist of an unattended train.
- All hand brakes must be fully applied on all locomotives in an unattended locomotive consist outside of yard limits.
- The minimum requirement for an unattended locomotive consist within yard limits is that the hand brake must be fully applied on the controlling locomotive.
- Railroads must develop, adopt, and comply with procedures for securing any unattended locomotive that is not equipped with an operative hand brake.

Additionally, FRA continues to require each railroad to adopt and comply with instructions addressing each unattended locomotive's position of the throttle, generator field switch, isolation switch, and automatic brake valve and the status of its reverser and independent brakes. *See* 49 CFR 232.103(n)(4).

FRA has also issued guidance documents interpreting these regulations. For instance, on March 24, 2010, FRA issued Technical Bulletin MP&E 2010–01, Enforcement Guidance Regarding Securement of Equipment with Title 49 Code of Federal Regulations Section 232.103(n) (TB 10–01), *available at http://www.fra.dot.gov/eLib/details/L02394.* While FRA continues to believe that the securement requirements of § 232.103 are not met where there is a complete failure to apply even a single hand brake on unattended equipment, FRA also recognizes that there are times when it is necessary to have unsecured equipment, such as during switching activities when assembling and disassembling trains within classification yards. Therefore, TB 10–01 has provided guidance regarding alternative forms of securement in such instances. For example, TB 10–01 notes that FRA will allow a train crew cutting away from a cut of cars to initiate an emergency brake application on the cut of cars, and then close the angle cock, if the crew is taking a locomotive consist directly to the opposite end of the cut of cars to in order to couple the locomotive consist to the cars or to open the angle cock at the other end and leave the angle cock open and vented to the atmosphere, as required under 49 CFR 232.103(n)(2). Additionally, TB 10–01 makes clear that FRA will allow the use of skates and retarders in hump classification yards, classification yards with bowl tracks, or flat switching yards if the retarders and skates are used within their design criteria and as intended. In the NPRM to this proceeding, FRA considered codifying TB 10–01 by amending the rule at the final rule stage of this proceeding. The final rule makes the amendment considered and codifies the existing guidance contained in TB 10–01. This particular amendment does not include any additional requirements from the original guidance issued in the technical bulletin and is further explained below.

Also notable is that in 2013 and 2014, FRA and PHMSA undertook nearly two dozen actions to enhance the safe transport of crude oil. This comprehensive approach included near- and long-term steps such as the following: launching ''Operation Classification'' in the Bakken region to verify that crude oil is properly classified; issuing safety advisories, alerts, emergency orders and regulatory updates; conducting special inspections; aggressively moving forward with a rulemaking to enhance tank car standards; and reaching agreement with railroad companies on a series of immediate voluntary actions including reducing speeds, increasing inspections, using new brake technology and investing in first responder training. Most of those actions have been well outside the scope of securement. However, FRA references these actions here to help place this rulemaking in the broader context of DOT's wide-ranging response to the safety issues created by these trains. For a summary of these actions, *see* Federal Railroad Administration's Action Plan for Hazardous Materials Safety, Federal Railroad Administration (May 20, 2014) *available at http://www.fra.dot.gov/eLib/details/L04721.*

Additionally, in August 2014, PHMSA, in coordination with FRA, published an NPRM proposing enhanced tank car standards and operational controls for high-hazard flammable trains, which is defined as a single train carrying 20 or more tank cars of a Class 3 flammable liquid in a continuous block or a single train carrying 35 or more tank cars of a Class 3 flammable liquid throughout the train consist. *See* ''Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,'' 79 FR 45015, Aug. 1, 2014. PHMSA recently issued that final rule including operational controls considered in the PHMSA NPRM such as speed restrictions and enhanced braking systems for HHFTs. *See* 80 FR 26643, May 8, 2015. FRA expects that the operational controls contemplated in that PHMSA final rule will work in concert with the securement requirements that FRA is implementing in this final rule.

D. Emergency Order 28 and Related Guidance

On August 2, 2013, FRA issued Emergency Order 28 establishing additional requirements on the treatment of securement of unattended equipment. On the same date, FRA issued a related Safety Advisory and announced an emergency RSAC meeting. *See* Federal Railroad Administration Safety Advisory 2013–06, Lac-Mégantic Railroad Accident and DOT Safety Recommendations, 78 FR 48224, Aug. 7, 2013, *available at http://www.fra.dot.gov/eLib/details/L04720.* FRA also subsequently issued guidance related to Emergency Order 28 and granted partial relief from Emergency Order 28 to the AAR and ASLRRA. *See* Guidance on Emergency Order 28 (Aug. 21, 2013), *available at https://rsac.fra.dot.gov/meetings/20130829.php;* Letter from Robert C. Lauby, Acting Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, to Michael J. Rush, Associate General Counsel, AAR, and Keith T. Borman, Vice President and General Counsel, American Short Line and Regional Railroad Association, (Aug. 27, 2013), *available at https://rsac.fra.dot.gov/meetings/20130829.php.*

E. RSAC Overview

In March 1996, FRA established the RSAC, which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway & Transportation Officials (AASHTO);
- American Chemistry Council (ACC);
- American Petroleum Institute (API);
- American Public Transportation Association (APTA);
- ASLRRA;
- American Train Dispatchers Association (ATDA);
- AAR;
- Association of State Rail Safety Managers (ASRSM);
- Association of Tourist Railroads and Railway Museums (ATRRM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employes Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- Federal Transit Administration (FTA);*
- Fertilizer Institute;
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers (IAM);
- 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 (NRC);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB);*
- Railway Passenger Car Alliance (RPCA)
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte;*
- SMART Transportation Division (SMART TD);
- Transport Canada;*
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/Brotherhood of Railway
- Carmen (TCIU/BRC);
- Transportation Security Administration (TSA).

* Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

The RSAC convened an emergency session on August 29, 2013, in response to the accident at Lac-Mégantic, to brief members on the preliminary findings of the accident, to discuss the safety issues related to the accident, and to discuss Emergency Order 28. At that meeting, the RSAC accepted Task No. 13–03 to refer to the Securement Working Group (SWG) the responsibility of ensuring that ''appropriate processes and procedures are in place to ensure that any unattended trains and vehicles on mainline track or mainline sidings outside of a yard or terminal are properly secured against unintended movement, and as appropriate, such securement is properly confirmed and verified.'' In doing so, the SWG was tasked with reviewing: The standards for the securement of unattended equipment under 49 CFR 232.103(n) and its concomitant regulatory guidance published in TB 10–01; the requirements of Emergency Order 28; and the recommendations contained in Federal Railroad Administration Safety Advisory 2013–06—Lac-Mégantic Railroad Accident Discussion and DOT Safety Recommendations. The SWG was also tasked with identifying any other issues relevant to FRA's regulatory treatment of securement of equipment to prevent unintended movement. While the RSAC also tasked the SWG with reviewing operational testing, the SWG concluded that no changes were necessary to the regulations relating to operational testing. FRA notes that, in its comments, NTSB suggested that more emphasis should be made on observations by railroad supervisors, as part of operational testing programs, to ensure unattended equipment is properly secured. While FRA does not contest this suggestion, it is outside the scope of this rulemaking, since FRA declined to consider operational testing.

In addition to FRA, the following organizations contributed members to the SWG:

- AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Genesee & Wyoming Inc. (GNWR), Kansas City Southern Railway (KCS), Long Island Rail Road (LIRR), Metro-North Railroad (MNCW), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), Railway Association of Canada, and Union Pacific Railroad Company (UP);
- Amtrak;
- API;
- APTA, including members Keolis North America, Massachusetts Bay Commuter Railroad Company, LLC (MBCR); and North County Transit District (NCTD);
- ASLRRA, including members from Anacostia Rail Holdings, Central California Traction Company (CCT), OmniTRAX, Rio Grande Pacific

Corporation, and WATCO Companies, Inc. (WATCO);

- ASRSM, including members from California Public Utilities Commission (CPUC);
- ATDA;
- BLET;
- BMWED;
- BRS;
- IAM;
- NRC, including members from Herzog Transit Services (Herzog);
- NTSB;
- PHMSA;
- RSI;
- SMART TD;
- TCIU/BRC;
- Transport Canada; and
- TWU.

The SWG convened subsequently on October 30, 2013, December 17, 2013, January 28, 2014, and March 4, 2014, in Washington, DC to respond to these tasks and voted to approve the recommendation on March 4, 2014. The SWG presented its recommendation to the full RSAC, which voted by electronic ballot between March 25 and March 31, 2015, to accept the recommendations. On April 2, 2014, the RSAC announced that by majority vote the recommendations had been approved and would become its recommendation to the Administrator.

The recommendation of the RSAC included amendments to 49 CFR 232.103(n) that would do the following: (1) Provide additional requirements for the securement of unattended equipment carrying certain hazardous materials; (2) mandate the implementation of operating rules and practices requiring that securement be part of all relevant job briefings; and (3) require adoption and compliance with procedures to secure equipment subsequent to an emergency response. The RSAC recommendation also included amendments to 49 CFR 232.105 that would require equipping locomotives with exterior locking mechanisms.

F. NPRM and Comments

On September 9, 2014, FRA issued the NPRM in this proceeding. *See* 79 FR 53356, Sept 9, 2014. Subsequent to the issuance of the NPRM, FRA received comments from: Amsted Rail Company, Inc. (Amsted), BLET, CPUC, NTSB, the North America Freight Car Association (NAFCA), Riverkeeper, Inc. (Riverkeeper), and the State of New York Department of Transportation (NYSDOT). AAR and ASLRRA also filed a joint comment on behalf of their member railroads. These comments are addressed in detail in the section-by-section analysis contained below.

III. Rescinding Emergency Order 28

This final rule codifies the requirements of Emergency Order 28 that FRA believes are necessary to ensure the safe securement of the types of trains and equipment identified in the Emergency Order. Once this final rule becomes effective, FRA believes that the unsafe condition or practices identified in the Emergency Order will be addressed by the provisions of this final rule. Accordingly, Emergency Order 28 is rescinded on the effective date of this final rule.

IV. Section-by-Section Analysis

Unless otherwise noted, all ''part'' and ''section'' references below refer to provisions either in title 49 of the CFR or proposed to be in title 49 of the CFR.

Before entering into specific analysis of each section, it is important to make clear that this final rule, which like Emergency Order 28 provides more restrictive securement requirements for specific types of equipment than the existing regulations, does not affect FRA's policy concerning the Federal hours of service requirements. FRA continues to believe that a railroad may not require or allow a train employee with an accumulated time on duty of 12 hours or more to remain on a train for the sole purpose of meeting the securement requirements, including those proposed here. A train employee may, however, remain on an unsecured train, if that employee is legitimately waiting for deadhead transportation from duty to a point of final release, performs no covered or commingled service,[16] and is free to leave the equipment when deadhead transportation arrives. In this case, time spent waiting for and in deadhead transportation is treated as neither time on duty nor time off duty.

In its comment, BLET expressed concern about FRA's discussion in the NPRM of the hours of service implications of the proposed rule. BLET particularly objected to the reference in the directly preceding footnote regarding employees ''remaining sufficiently alert to respond to unattended movement,'' which it viewed as potentially establishing a new requirement. To reduce confusion, and as there was no intention to establish a new requirement, FRA has eliminated that language in this preamble to the final rule. FRA's intention was merely to provide an example of the application of the hours of service laws in the NPRM for the benefit and convenience of the reader. This final rule does not in any way change the application of the hours of service laws to the time that employees may spend waiting for deadhead transportation aboard an unsecured train.

FRA also notes that this final rule does not include the portion of Emergency Order 28 that requires railroads to review, verify, and adjust, as necessary, existing requirements and instructions related to the number of hand brakes to be set on unattended trains and vehicles, and to review and adjust, as necessary, the procedures for verifying that the number of hand brakes is sufficient to hold the train or vehicle with the air brakes released. As stated in the NPRM, it was FRA's concern that existing railroad processes and procedures related to setting and verifying hand brakes on unattended trains and equipment were not sufficient to hold all trains and vehicles in all circumstances. FRA believes that the railroads have fulfilled this requirement and thus there is no need to include it in this final rule.

NAFCA has expressed concern with the elimination of the requirement in Emergency Order 28 that the railroads review, verify, and adjust their existing requirements and instructions related to the number of hand brakes to be set on unattended trains and vehicles and to ensure that such a number is sufficient to hold the train or vehicle with the air brakes released. While NAFCA recognizes that FRA believes that the railroads have already fulfilled this requirement, it contends that FRA is eliminating a salutary safety measure that is not unduly burdensome to the railroad. NAFCA recommends that the requirement remain in place while FRA and the industry gain more experience

[16] A person is considered by the hours of service laws to be neither on duty nor off duty during periods they are either waiting for or in deadhead transportation to their point of final release (*i.e.,* have completed their time on duty and are waiting for or in transportation to end their duty tour). In order to be considered ''waiting for'' deadhead transportation, the person must not be required to perform other duties. Merely being on a train is not inherently performing a duty; being on or with the train is a necessary element of waiting for transportation from the train. This is true even when the railroad receives the benefit of having the train attended while employees aboard wait for transportation. Such time is considered ''limbo time'' and is not contingent upon the train's securement status. *See BLET* v. *Atchison Topeka and Santa Fe Railway,* 516 U.S. 152 (1996) (holding that the time waiting for deadhead transportation under the hours of service laws must be counted as ''limbo time''). However, should the employee be required to perform some activity to prevent the movement of the equipment or to secure the train prior to departing with deadhead transportation, then the time spent performing the activity and any intervening time spent waiting would be considered covered and commingled service respectively. *See* 49 CFR part 228, app. A. Thus, whether a train is secured or unsecured when an employee is waiting for deadhead transportation, that waiting time will count as limbo time, so long as no covered activities are performed.

with the Class 3 flammable liquid transportation issues and consider removing the requirement at a later time.

NYSDOT concedes that periodic review, verification and adjustment of those processes and procedures are an inherent obligation of the railroads, citing the existing and continuing requirement under § 232.103(n)(1) that ''[r]ailroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released.'' Given FRA's expressed confidence that the railroads have fulfilled the requirement in Emergency Order 28 to review, verify, and adjust, as necessary, those requirements, NYSDOT agrees that it is unnecessary to include it in this final rule.

FRA declines to postpone elimination of this specific requirement, which was designed as a one-time requirement to emphasize the need following the Lac-Mégantic derailment for each railroad to review their securement policy and procedures to ensure that it had sufficient measures in place. It is unclear to FRA the benefits of maintaining a requirement that has already been fulfilled and NAFCA does not explain what benefits could be gained with additional experience beyond the years in which the securement regulations have already been in place. Moreover, FRA's existing regulations already require railroads to have procedures in place and comply with those procedures to ensure that unattended equipment is properly secured. Thus, retention of a duplicate provision would not be in the interest of regulatory economy.

Amendments to 49 CFR Part 232

Section 232.5 Definitions

In this final rule, FRA is including a new defined term, ''mechanical securement device''. ''Mechanical securement device'' means a device, other than the air brake, that provides at least the equivalent securement that a sufficient number of hand brakes would provide in the same situation. In TB 10–01, further analyzed below, FRA contemplated the proper use of skates, retarders, or inert retarders to secure equipment in certain circumstance and within classification yards. FRA recognizes, however, that other current and future securement technologies could perhaps be utilized for the same purpose. By using the more generalized, performance-based term, mechanical securement device, FRA intends to provide additional flexibility, and to ''future proof'' the regulation, to allow the use of other sufficient securement technologies in the same circumstances and locations. By definition, FRA understands mechanical securement devices to include current examples such as skates, retarders, and inert retarders; which are also further discussed below.

In the 2001 rule, the definition of ''unattended equipment'' was included in § 232.103(n). As further discussed below, this final rule includes a new paragraph (h) for § 232.105, which also makes use of the definition for ''unattended equipment.'' Since the term would be used in multiple sections, this final rule moves the definition to the more broadly applicable definitions in § 232.5. Doing so allows FRA to rephrase paragraph (n) for clarity purposes, as discussed further below. Placement of the definition in § 232.5 does not change its meaning and is solely for applicability and clarity purposes. FRA received no comments on this organizational change and is amending § 232.5 accordingly.

FRA is also changing the term ''yard limits'' to ''yard'' without any change to its definition, with concurrent changes from ''yard limits'' to ''yard'' in § 232.103(n). FRA is also including the term ''yard'' in its new § 232.105(h). As currently defined in part 232, a yard limit is ''a system of tracks, not including main tracks and sidings, used for classifying cars, making-up and inspecting trains, or storing cars and equipment.'' But in part 218, yard limits are described as a railroad-designated operating territory that is established by yard limit signs; and timetable, train orders, or special instructions. *See* 49 CFR 218.35(a). Making this change minimizes the risk of ambiguity and confusion by clarifying that specific securement practices are connected to the physical presence of a yard, and not to an operating practices description of yard limits, which could potentially encompass an entire railway system.

NTSB concurred with this change removing the word ''limits'' from the term ''Yard limits.'' According to NTSB, this distinction will appropriately define the intent of the rule to include only those main tracks that are connected to the physical presence of a yard and will avoid the operating practices description of yard limits that could potentially encompass an entire railway system. FRA received no negative comments on this clarifying change and is amending § 232.5 accordingly.

Section 232.103 General Requirements for all Train Brake Systems

As previously noted, FRA is moving the definition of ''unattended equipment'' to § 232.5, creating an opportunity to rephrase and clarify the introductory language of paragraph (n). Part of this rephrasing includes moving the opening sentence of paragraph (n)—''A train's air brake shall not be depended upon to hold equipment standing unattended on a grade (including a locomotive, a car, or a train whether or not locomotive is attached)''—to paragraph (n)(2). The remaining introductory language of paragraph (n) would become more succinct and clear.

While it is not an RSAC recommendation, FRA is also amending paragraph (n)(1) to make more clear its existing expectation that in most circumstances at least one hand brake must be applied to hold unattended equipment. Although this has been stated in earlier rulemakings and guidance documents (*see, e.g.,* TB 10–01), there has been some confusion about whether the use of wheel chocks, skates, or other securement devices is sufficient to hold unattended equipment. FRA's longstanding interpretation is that at least one hand brake is required to hold unattended equipment except in certain limited situations. For instance, in a hump classification yard, an alternative form of securement, such as skates and retarders, may be allowed provided they are used within their design criteria and as intended. FRA believes adding explicit language to the regulatory text is warranted in order to formally address the requirement to set at least one hand brake in most instances. Further changes to the rule to incorporate TB 10–01 are discussed further below.

NAFCA encourages FRA to harmonize its changes to § 232.103 in the final rule with the Emergency Directive Pursuant to Section 33 of the Railway Safety Act—Securement of Railway Equipment—issued by Transport Canada on October 29, 2014. In this Emergency Directive, the Canadian government replaced the ''sufficient number of hand brakes'' requirement with a requirement that trains have a specific number of hand brakes, determined by the weight of the train and the slope of the track. NAFCA favors the increased specificity of the Canadian approach and urges FRA to develop harmonized rules with Canada that are prescriptive, based on sound engineering, and incorporate factors such as train consist/weight, terrain,

environmental, and other considerations. According to NAFCA, it is critically important that the two countries' respective efforts be harmonized, given the closely integrated nature of the North American railroad system. NAFCA asserts that anything less than full harmonization of the two regulatory regimes will significantly disrupt the current flow of rail cars, particularly the tank cars that are the primary topic of the regulatory efforts, between Canada and the United States.

NYSDOT agrees with FRA's clarification that at least one hand brake must be applied except in limited circumstances, such as when skates or retarders are applied in a classification yard. However, similar to NAFCA, NYSDOT states that a more uniform approach to ensuring that unattended trains are left with a sufficient number of hand brakes could be accomplished by codifying in regulation the appropriate number of hand brakes required given the weight, number of cars, and track gradient. According to NYSDOT, this would ensure uniformity amongst all railroads, and would allow inspectors the ability to verify that unattended trains are left with the required amount of hand brakes applied.

When FRA initially drafted the securement rule, it purposefully developed a performance-based requirement in order to permit a railroad to develop appropriate operating rules to verify the sufficiency of the hand brakes applied which can be tailored to the specific territory and equipment operated by the railroad. *See* 66 FR 4104, 4157, Jan. 17, 2001. When drafting the rule, FRA did not limit such operating rules to a matrix format and stated that the number of hand brakes required to be applied depends on a wide variety of factors not easily captured in a matrix format and that a matrix approach might result in either too few or too many hand brakes being applied. While the commenters listed a few variables—such as the weight, number of cars, and track gradient—FRA does not believe that such a list is definitely exhaustive. FRA also does not presume to know all location and equipment configurations; a regulatory matrix may result in inadvertently ignoring certain other variables to which the railroads may be more intimately aware and cognizant. Moreover, FRA has not found the existing performance requirement to be insufficient; its concern relates primarily to its application, compliance, and enforcement. For the same reasons, in this instance and at this time, FRA does not support developing a technical-based regulation to apply a uniform regulatory procedure. FRA recognizes that Canada is a strong partner in maintaining cross-border railroad safety and FRA continues to believe that harmonization between Canadian and United States rail safety regulations is beneficial, particularly when differences in regulations create barriers to cross-border transportation, and should be maximized to the extent possible. Therefore, FRA traditionally seeks out and incorporates the views of Canada in developing its safety regulations. FRA, for instance, has actively engaged Canada as a member of RSAC. However, there is no requirement that FRA harmonize each of its requirements with those in Canada and, in light of the aforementioned reasons, FRA believes in this instance that a uniform technical standard is not ideal and that its performance-based securement measures better and more appropriately capture the variables presented by the different rail systems throughout the United States. Further, FRA does not see the absence of harmonization as potentially establishing barriers to cross-border train movements; first, because the operational issue of securement can easily be handled differently on either side of the border, and, second, because in many instances there will not be an actual difference in the number of hand brakes applied to secure similarly situated unattended equipment.

In its comments, BLET indicated that another component of rail securement is derail protection. While BLET acknowledges that this was not discussed in detail in the RSAC SWG, derail protection would reduce the risk of a more serious accident by preventing inadvertently rolling equipment from moving further and gaining speed and momentum. This particular means of securement was not discussed in the NPRM, and FRA is not convinced that this is the safest securement practice. Nevertheless, FRA will continue to monitor the safety efficacy of derail protection as it is applied by regulation in Canada.

As previously mentioned, paragraph (n)(2) now includes language originally placed in the introduction of paragraph (n), which prohibits a train's air brake from being ''depended upon to hold equipment standing unattended *on a grade* (including a locomotive, a car, or a train whether or not locomotive is attached).'' (Emphasis added.) This final rule also removes the phrase ''on a grade,'' as such a requirement is arguably superfluous and confusing. In its comments, Amsted indicated its support for this change. Perfectly level track is rare, and there is still a risk of unattended movement caused by numerous factors, such as a mistake in the location or length of the level track, the effect of extreme weather, or an impact from other equipment. Moreover, the phrase ''on a grade'' has led some to the erroneous conclusion that hand brakes must only be applied if the equipment is left on a grade. While grade is likely a factor in determining the number of hand brakes that would sufficiently hold unattended equipment, it is not a factor in determining whether hand brakes should be applied at all. Accordingly, this final rule makes clearer that the hand brake application requirement is not contingent upon the existence of a grade.

Proposed paragraphs (n)(6) through (n)(8) address the aforementioned heightened concerns relating to the securement of unattended equipment carrying certain hazardous materials. Paragraph (n)(6) defines the type of equipment covered by these requirements and is intended to ensure that proposed paragraphs (n)(7) and (n)(8) apply only to equipment that includes loads. Specifically, paragraph (n)(6) provides that the substantive requirements of paragraphs (n)(7) and (n)(8) apply to:

(1) Any loaded tank car containing PIH material, including anhydrous ammonia and ammonia solutions; or

(2) twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of PIH materials (including anhydrous ammonia and ammonia solutions), or any flammable gas, flammable or combustible liquid, explosives, or a hazardous substance listed at § 173.31(f)(2) of this title.

FRA notes that this language is broader than the language used in PHMSA's NPRM on Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains (HHFTs). *See* 79 FR 45016, Aug. 1, 2014. In that rule, PHMSA proposed certain new requirements for HHFTs, which it defines as ''a train comprised of 20 or more carloads of a Class 3 flammable liquid and ensures that the rail requirements are more closely aligned with the risks posed by the operation of these trains.'' 79 FR at 45017. Paragraph (n)(6) includes new securement requirements that cover a single PIH tank car. Moreover, where the proposed PHMSA rule would only cover trains with 20 or more carloads of flammable liquids, paragraph (n)(6) covers situations where there are 20 or more loaded tank cars or loaded intermodal portable tanks of PIH materials,

flammable gases, flammable or combustible liquids, explosives, other hazard substances listed at § 173.31(f)(2), or any combination thereof.

FRA sought comment on this proposal and on whether a defined term should be used for equipment covered under paragraph (n)(6).

From the standpoint of public safety, NYSDOT supports FRA's broadening the language of this rule to include the securement of unattended equipment transporting hazardous materials beyond those defined as HHFTs in PHMSA's earlier NPRM. NYSDOT also suggests using a ''defined term'' for the equipment covered under paragraph (n)(6), which it says would provide a simple way to differentiate it from those defined elsewhere in regulation (*e.g.* HHFTs).

AAR and ASLRRA expressed concern that this requirement in Emergency Order 28 applied to a ''loaded tank car,'' but that the proposed rule applies to a ''loaded freight car.'' AAR and ASLRRA assert that this change could potentially and inadvertently affect a much larger number of rail cars, including those intermodal shipments of miscellaneous items such as cleaning supplies and swimming pool chemicals. Accordingly, AAR and ASLRRA recommend that the final rule retain the original language from Emergency Order 28.

FRA recognizes the merit in AAR's and ASLRRA's comment and is reverting to the language that was originally proposed at the RSAC level. As for using a defined term to capture the types of equipment delineated in paragraph (n)(6), FRA declines. FRA recognizes and appreciates the benefits of using a more elegantly defined term. However, no such term was offered and FRA is unaware of any appropriate term to use at this time.

The regulatory text exempts residue cars from consideration. Residue cars are defined by PHMSA under the HMR. *See* 49 CFR 171.8. FRA will continue to rely on the HMR for this definition, even if amended. FRA does not believe the train placement requirements in that PHMSA rulemaking will affect the securement regulations we are adopting in the instant proceeding. Nevertheless, the labor representatives have expressed concerns that such inconsistent use may foster confusion or be ''pitted against one another.'' FRA sought further comment explaining how such confusion or conflict may manifest itself.

NYSDOT believes that exempting residue cars from the requirements of this rule would appear contradictory to the language contained throughout the HMR, which have been written from a perspective that a packaging containing residue remains potentially hazardous. Although FRA does not believe that any resulting train placement regulation would affect the securement regulations we are considering, it is not clear to NYSDOT what particular advantage is gained by granting this exception for residue cars. From a risk perspective, NYSDOT believes it would seem reasonable to treat all placarded residue cars as potentially hazardous until such time that they are cleaned and purged, including for the purposes of securement. In order to avoid the potential for confusion in terms of interpreting the HMR, NYSDOT contends that the provisions that apply to residue cars should remain consistent throughout. Therefore, NYSDOT recommends that the exclusion outlined in 232.103(n)(6)(ii) not be included in the final rule.

Riverkeeper believes that residue cars are still inherently dangerous and should be covered by the regulation. According to Riverkeeper, cars carrying crude oil such as heavy, sinking tar sands oils, are expected to become more regularly shipped and, if spilled, could cause equally significant economic and environmental damage.

When considering whether to apply the applicable requirements to residue cars, FRA made an effort to balance the associated risks with the cost of compliance. While FRA recognizes that certain residue tank cars may still pose inherent danger in the event of a release, experience has shown that the magnitude of the results are significantly less than those from an event releasing the contents of a loaded tank car. Further, loaded tank cars are generally treated more rigorously by existing Federal safety regulations. *See, e.g.,* 49 CFR 172.204(b)(2), 174.14, and 174.86(b). Given the cost of compliance, FRA believes that regulatory relief is warranted here. Moreover, FRA notes that all of its existing securement requirements contained in paragraph (n) apply to trains and cars containing residue cars. Nevertheless, FRA will continue to monitor accidents involving residue tank cars and will continue to dialog with PHMSA to determine whether further action will become necessary in the future.

Paragraph (n)(7) provides certain conditions under which such equipment may be left unattended, including the development of a plan identifying locations where such equipment may be left unattended. Paragraph (n)(8) includes specific requirements regarding the securement of such equipment. The following chart attempts to quickly summarize the requirements of paragraphs (n)(7) and (n)(8).

SECUREMENT OF UNATTENDED EQUIPMENT DEFINED BY § 232.103(N)(6)

Paragraph	Equipment	Track location	Requirement
(7)(i)	All	Main track or siding outside and not adjacent to a yard.	Plan.
(7)(ii)	Freight train	In or adjacent to yard	Verify (8)(i) and Apply Lock (8)(ii).
(8)(i)	Freight train or standing freight car or cars.	Main line outside yard	Verify (8)(i) and Apply Lock (8)(ii).
(8)(ii)	Controlling locomotive cab	Everywhere	Apply Lock.
(8)(iii)	Locomotive	In or adjacent to yard	Exception to applying lock if locomotive not equipped with lock, or if lock not operable and reverser not removable.

Emergency Order 28 prohibits each railroad from leaving trains or vehicles that are transporting certain hazardous materials on mainline track or mainline siding outside of a yard or terminal unless the railroad adopts and complies with a plan that identifies the specific locations and circumstances for which it is safe and suitable for leaving such trains or vehicles unattended. According to Emergency Order 28, the plan must contain sufficient analysis of the safety risks and any mitigating circumstances the railroad has considered in making its determination. FRA expressed its intent not to formally grant approval to any plan. However, it does monitor such plans, and, in the

event that FRA determines that adequate justification is not provided, the railroad is required to ensure that trains and equipment are attended until appropriate modifications are made to the railroad's plan.

In paragraph (n)(7)(i), FRA continues these requirements by regulation. While FRA continues to believe that it is not necessary to provide approval for each plan, which could take considerable resources, FRA must ensure proper enforcement and oversight. Accordingly, paragraph (n)(7)(i) also requires that the railroad notify FRA when it modifies its existing plan and provide FRA with a copy of the plan upon request. For similar reasons, FRA will also retain the right to require modifications to any insufficient plan.

Riverkeeper notes that the equipment defined under paragraph (n)(6) can be left unattended if a justification is provided to FRA, characterizing this allowance as a ''loophole.'' Riverkeeper also criticizes FRA's decision to reserve the right to review any plan as an ''abrogation of responsibility'' and asserts that railroads should not be left to develop their own plans without FRA review.

FRA disagrees with Riverkeeper's characterization. The existing regulations have always allowed equipment to be left unattended and provided that certain actions be taken to secure equipment in such instances. From an economic perspective, this would be extremely burdensome. From a safety perspective, there would only be a marginal benefit to require at all times attendance on a train defined by § 232.103(n)(6) when it has been properly secured in accordance with the provisions in this final rule. The ''justification'' referenced by Riverkeeper is not a ''loophole'' because it relates solely to the new requirement that the railroads identify locations where equipment may be left unattended. Moreover, FRA's decision to not require FRA approval of each plan is also consistent with the principles of regulatory economy and FRA's budget and personnel capabilities. The plans, which concern appropriate and safe locations, do not necessarily include any additional safety requirements per paragraph (n)(7). Thus, FRA does not believe that prior FRA approval is absolutely necessary here. Nevertheless, FRA has reserved the right to access, review, and require modification of the plan in the event it determines a location is insufficiently safe to leave equipment unattended.

In relation to the requirement that the railroad must notify FRA when it modifies its existing plan and provide FRA with a copy of the plan upon request, CPUC requests that such authority extend to all State Safety Participation personnel. CPUC also requests that FRA and its state partners have access upon request to the underlying research that validates these plans as safe to provide for ''validating oversight.''

FRA believes that the modification proposed by CPUC is unnecessary because state inspectors that have the authority to inspect for part 232 compliance would be entitled to independently receive the plan directly from a railroad as long as it is requested in the course of a safety inspection and it is necessary for determining compliance with the relevant section in part 232. While state inspectors have faced difficulties with railroad responsiveness, FRA inspectors have experienced the same problems. The agency has engaged AAR on this issue to ensure that railroads are providing requested materials in a timely manner. *See* Letter to Edward R. Hamberger, President, AAR, from Joseph C. Szabo, Administrator, FRA (April 4, 2013). If FRA or state inspectors are unable to obtain such documentation, they should contact the appropriate FRA Railroad System Oversight Manager (RSOM) or FRA Regional personnel for assistance.

Paragraph (n)(7)(i) differs from Emergency Order 28 in one manner. The final rule allows a railroad to leave a train or equipment unattended on mainline track that is running through a yard or on mainline track that is adjacent to the yard without covering the location in the railroad's plan. This change is based on feedback received during the SWG meetings, which voted unanimously to adopt the language in paragraph (n)(7)(i), with the recommendation of the full RSAC to move forward with the regulatory provision.

In Emergency Order 28, FRA made a decision that it was not necessary to include mainline tracks and mainline sidings that run through a yard in a railroad's plan for leaving equipment unattended. FRA's rationale for this decision was that a yard was defined space where the railroad performed a particular set of tasks (classifying cars, making-up and inspecting trains, or storing cars and equipment). As a result of the tasks performed there, yards tend to have appropriate geographic characteristics, sufficient railroad activity, and a population of railroad personnel in close proximity that make them appropriate places for leaving equipment unattended. In FRA's view, mainline track that runs through a yard shares those characteristics with the yard tracks surrounding it. As a result, it is often used as a *de facto* ''yard'' track to assist with classifying cars and with making-up and inspecting trains. As such, FRA did not see a need when drafting Emergency Order 28 for railroads to identify mainline tracks within a yard in the railroad's securement plan before a railroad would be allowed to leave equipment unattended on the mainline track that is surrounded by a yard.

The feedback received through the RSAC process was that tracks adjacent to the yard share many of the same characteristics as mainline tracks that run through a yard. Therefore, this final rule, as proposed in the NPRM, treats mainline track that is adjacent to the yard in the same manner that it is currently treating mainline track that runs through a yard under Emergency Order 28. This requirement intends only to cover those tracks that are immediately adjacent to the yard and that are in close enough proximity to the yard that the adjacent tracks share the characteristics of the yard.

NAFCA contests this requirement as proposed, believing that such a change should be postponed until after more experience with observing multi-car train movements of Class 3 flammable liquids. According to NAFCA, the requirement in Emergency Order 28 is not unduly burdensome to the railroad. FRA declines to postpone treating the identified adjacent tracks as mainline yard tracks. NAFCA does not explain what benefits could be gained with additional experience and does not provide quantifiable or qualified information to support its position that such a postponement would not be unduly burdensome to the railroads.

Given that there are vast differences in surrounding population densities and in the amount of railroad activity that takes place at different rail yards, NYSDOT believes that there should be no differentiation in plan requirements simply because the mainline tracks go through or are adjacent to rail yards. According to NYSDOT, there are many railroad yards located in rural areas of New York State with limited rail operation activity, low population density and in which ambient lighting may be poor or nonexistent. In a letter to President Obama dated September 23, 2014, Governor Cuomo recently outlined New York's safety concerns in and around the areas in which crude-by-rail trains dwell. NYSDOT believes that sufficient analysis of the safety risks and any mitigating circumstances should be part of a railroad's plan for all mainline tracks and sidings irrespective of

whether those tracks go through or are adjacent to a rail yard.

Similarly, Riverkeeper contends that FRA is assuming that trains are inherently more secure in and around yards to the point that they do not need to be included in these securement regulations, because rail yards and sidings generally have more activity than lone, far-flung mainline track. Riverkeeper asserts that this conclusion is not supported by any presented facts and ignores the risks of unsecured trains rolling out of yards, or sidings, or mainlines near yards, potentially toward imminent and significant disaster. According to Riverkeeper, FRA's decision to treat yard-adjacent tracks the same as mainline tracks within the yard arbitrarily relies on nonspecific ''railroad'' activity and the assumption that rail yard workers would be able to respond to a runaway train in time to avoid disaster. Riverkeeper concludes that any final rule on securement must apply to all unattended trains, regardless of where they are left.

As discussed previously, the yard exception in paragraph (n)(7)(i) is due to FRA's assessment that yards overwhelming tend to have appropriate geographic characteristics for leaving equipment unattended and that there is a higher likelihood of qualified people being present and switching operations occurring. FRA believes that some commenters misunderstand the purpose of the plan, which is merely to identify locations where equipment may be left unattended. The plan requirement does not exempt the railroads from any securement requirements under § 232.103(n). In other words, securement of unattended equipment is required regardless of location—except as subject to certain switching-related exceptions, including those relating to TB 10–01—and paragraph (n)(7)(i) does not affect those requirements. To the extent that those commenting on paragraph (n)(7)(i) are concerned that the plan would exempt railroads from complying with the hand brake and other mechanical securement requirements, FRA assures them that this is not the case.

Paragraph (n)(7)(ii) establishes new requirements for those trains that are left unattended on mainline track that is running through a yard or on mainline track that is adjacent to the yard. It applies aspects of Emergency Order 28 to these tracks by requiring verification that securement has been completed in accordance with the railroad's process and procedures (*see* discussion below concerning paragraph (n)(8)(i)), and that the locomotive cab is locked or the reverser is removed from the control stand and placed in a secured location (*see* discussion below concerning paragraph (n)(8)(ii)), unless the exception contained in paragraph (n)(8)(iii) is applicable.

Emergency Order 28 requires railroads to develop specific processes for employees responsible for securing any unattended train or vehicles transporting certain hazardous materials that must be left on mainline track or a mainline siding outside of a yard. FRA believes that this requirement should continue in regulation. This final rule allows a railroad to leave a paragraph (n)(6) train unattended on mainline track or a siding outside of a yard where the railroad has a plan in place and on mainline tracks that are in or adjacent to yards. In doing so, paragraph (n)(8)(i) requires the employee responsible for the securement of the equipment to verify securement and paragraph (n)(8)(ii) requires the train crew to lock the controlling locomotive cab or remove and secure the reverser from the control stand.[17]

NYSDOT expresses confusion as to the consistency of cross-referencing language in paragraphs (n)(7)(ii) and (n)(8)(i). Paragraph (n)(7)(ii) refers to trains described in paragraph (n)(6) that are ''left unattended on a main track or siding that *runs through, or is directly adjacent to a yard,''* and states that the requirements of paragraph 8(i) and 8(ii) ''*shall apply.''* (Emphases NYSDOT's.) However, paragraph (n)(8)(i) states, ''Where a freight train or standing freight car or cars as described in paragraph (n)(6) of this section is left unattended on a main track or siding *outside of a yard, and not directly adjacent to a yard,* an employee responsible for securing the equipment shall verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures.'' (Emphasis NYSDOT's.) According to NYSDOT, the wording ''shall apply'' would seem to render the provisions of paragraph (n)(7)(ii) moot, since it appears to default to the provisions of paragraphs (n)(8)(i) and (n)(8)(ii) for all trains left unattended, irrespective of their location relative to a yard.

FRA understands that NYSDOT is expressing confusion in that paragraph (n)(7)(ii) applies to trains in or adjacent to a yard must follow paragraph (n)(8)(i), which actually applies to trains outside a yard. FRA would like to clarify that the distinction here is that (n)(7)(ii) limits the applicability of (n)(8) only to trains left unattended in yards or adjacent to them, whereas the provisions of (n)(8) apply to both trains and cars left outside of yards. In other words, in context with one another, these paragraphs require securement verification and lock application on all unattended freight trains defined under paragraph (n)6), regardless of whether they are located inside or outside of a yard, and on all standing freight cars defined under paragraph (n)6) on a main line outside of a yard. The implication is that these requirements do not apply to standing freight cars inside and adjacent to yards. FRA intends the above chart to act as a visual aid to communicate these similarities and differences.

NYSDOT is in agreement with the requirement that an employee responsible for securing the equipment shall verify with another qualified person that the equipment is secured in accordance with railroad procedures for all trains left unattended. Based upon its interpretation as written, NYSDOT suggests that paragraph (n)(7)(ii) be omitted and that the language of paragraph (n)(8)(i) be changed to: ''Where a freight train or standing freight car or cars as described in paragraph [(n)(6)] of this section is left unattended on a main track or siding, an employee responsible for securing the equipment shall verify [. . .] etc.''

Paragraph (n)(8)(i) requires that an employee responsible for securing equipment defined by paragraph (n)(6) verify securement with another qualified person. This is similar to Emergency Order 28, which requires employees to verify proper securement with a qualified railroad employee. This may be done by relaying pertinent securement information (*i.e.,* the number of hand brakes applied, the tonnage and length of the train or vehicle, the grade and terrain features of the track, any relevant weather conditions, and the type of equipment being secured) to the qualified railroad employee. The qualified railroad employee must then verify and confirm with the train crew that the securement meets the railroad's requirements. However, paragraph (n)(8)(i) does not contain a requirement that the railroad maintain a record of the verification of proper securement.

FRA believes that the type of verification requirement in paragraph (n)(8)(i) will serve to ensure that any employee who is responsible for securing equipment containing hazardous materials will follow appropriate procedures because the

[17] The reverser is the directional control for the locomotive. Removing the reverser would essentially put the locomotive in neutral, preventing it from moving forward or backward under the power of the engine.

employee will need to fully consider the securement procedures to relay what was done to the qualified employee. Further, the qualified railroad employee (*e.g.* a trainmaster, road foreman of engines, or another train crew employee) will be in a position to ensure that a sufficient number of hand brakes have been applied. Under this final rule, the qualified railroad employee must have adequate knowledge of the railroad's securement requirements for the specific location or for the specific circumstance for which the equipment will be left unattended. Without limiting the type of employee who may be qualified, FRA envisions that a dispatcher, roadmaster, yardmaster, road foreman of engines, or another crew member would be able to serve in the verification capacity.

Riverkeeper criticizes FRA's ''refusal'' to limit the type of employee who may be qualified and claims that FRA also fails to specify the type of verification or even the details that must be provided.

As previously noted, FRA believes that a certain set of qualifications or base of knowledge is necessary to be part of the conversation relating to securement. While the employee's ''type'' or title may be instructive, it should not be the sole or primary element in determining whether an individual is qualified to apply or verify the securement rules. FRA also believes that the existing rule and this final rule address the needs relating to the type of verification or its required details. As for the required details, they have already been established in the existing regulations and in each railroad's processes and procedures. According to the proposed text, the responsible employee must ''verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures.'' Riverkeeper suggests no further details clarifying its position to FRA.

FRA has decided not to continue the recordation requirement based on experience enforcing section 2b of Emergency Order 28. FRA has found that requiring recordation of securement information is superfluous because the verification requirement ensures that two individuals consulting with each other make certain that the appropriate securement method is used. The intent of the recordation requirement was to ensure the communications are taking place. FRA has found that, since issuance of Emergency Order 28, communications occur in the course of the verification process. Therefore, it does not believe requiring railroads to make a record of each securement event is necessary to ensure proper securement. FRA sought comment concerning enforcement of the verification requirement, absent recordation.

CPUC does not see sufficient justification for eliminating the recordation requirement under Emergency Order 28. CPUC recommends that FRA at least reinstate some form of recording of the details of securing the train—such as a crew member filling out a form and leaving on the controlling locomotive—detailing the method used and the specifics of implementing the method—such as the number of hand brakes tied per the railroad's process and procedure already required by regulation. According to CPUC, such a requirement would enhance accountability, require more careful attention, provide better crew-to-crew communications, avoid dispatcher time and record keeping, and aid in accident investigations, enforcement efforts, and safety practice improvements.

CPUC would also not rely on FRA's recent experience as sufficient to warrant removal of the recordation requirement. CPUC believes that as more time passes and attention to the Lac-Mégantic accident fades, the public cannot be confident that all safe practices will be followed without structured verification.

NAFCA believes that recordation is a salutatory safety measure that should remain in place for the foreseeable future, recommending that it only be rescinded after FRA gains more experience in this area.

NTSB believes that a recordation process for the verification of proper securement is critical for ensuring that unattended equipment is secure and that FRA should continue this requirement from Emergency Order 28, which provided a definitive check on the process. NTSB suggests that written verification (recordation) be required when one crew member leaves a train unattended. According to NTSB, such a requirement would provide verification of the work performed and offer information to the relieving crew (for inclusion in job briefings) regarding the condition and status of equipment. NTSB also claims that in the NPRM FRA provided no data to support its decision not to continue the recordation requirement ''based on experience in enforcing Emergency Order 28.''

NYSDOT supports maintaining the recordation requirement and believes that its removal would make extremely challenging enforcement of § 232.103(n) as it relates to such recordation and to verify how actual and adequate securement. NYSDOT notes that it aids the incoming train crew in its assessment of how many hand brakes need to be released before the train continues its movement.

Riverkeeper also believes that the recordation requirement should remain. Otherwise, states Riverkeeper, an employee may easily not comply with safety protocols and FRA may find it difficult to meaningfully enforce the securement requirements. Riverkeeper also characterizes as circular FRA's justification for removing the recordation requirement; while FRA's purpose to require recordation was to ensure that communications are taking place, FRA found that over the last year that communications occur in the course of the verification process and that recording is not necessary. Riverkeeper asserts that FRA failed to provide any evidence supporting its contention that ''over the last year . . . communications occur'' between the securing employee and the overseeing employee. Riverkeeper also believes that FRA misses the point that maintaining records is to allow for oversight and enforcement.

Under the existing rule, the railroads are required to secure unattended equipment by applying a sufficient number of hand brakes and other safety procedures. FRA continues to believe that the existing requirements, if followed, include sufficient protections. FRA's concerns have been raised, particularly in the face of the accident in Lac Mégantic, regarding compliance with those measures. Thus, when FRA issued Emergency Order 28, it included requirements with the primary goal to increase railroad compliance with the existing safety requirements as they apply to certain hazardous materials shipments. The requirement that the employee responsible for securement verify with a qualified person whether the equipment was secured appropriately was drafted as a communicative measure to ensure compliance with existing securement requirements. The recordation requirement was an additional, second layer of communication to also ensure such compliance. While its supplementary benefits included a documentation of the information that could aid other crews, future investigations, and enforcement actions, those were not FRA's primary goals. While recordation would provide such additional benefits, FRA believes that verification should be sufficient at this time, especially since recordation of securement could result in expending railroad resources as an unnecessary

redundancy. FRA's inspectors have extensive experience in enforcing communicative regulations without the benefit of documentation (*see, e.g.,* 49 CFR 218.99, 218.103, 218.105, and 218.109). While recordation may be helpful in some instances, it is not necessary. For instance, since verification must be accomplished by at least two people, an inspector may interview them both to determine whether verification occurred correctly.

FRA has faced similar questions before regarding recordation of certain activities. For instance, in a rulemaking codifying the requirements of Emergency Order 24 concerning the handling of equipment, switches, and fixed derails, FRA declined to continually require the use of a Switch Position Awareness Form (SPAF) to remind employees of the importance of properly lining and locking main track switches. *See* 73 FR 8442, 8448, Feb. 13, 2008. While the resulting paperwork burden and communication redundancy was acceptable for the purposes of Emergency Order 24, FRA decided not to require a SPAF in the associated final rule because other comprehensive communication regulatory requirements created a direct enforcement mechanism that made enforcement through a SPAF redundant. *See id.* In that rulemaking, and in its own proceedings, NTSB supported removal of the similar paperwork burden. *See id; NTSB, Collision of Norfolk Southern Freight Train 192 With Standing Norfolk Southern Local Train P22 With Subsequent Hazardous Materials Release at Graniteville, South Carolina, Railroad Accident Report,* NTSB/RAR–05/04, at 45, *available at http://www.ntsb.gov/investigations/AccidentReports/Reports/RAR0504.pdf.* FRA's position in this rulemaking is consistent with the position taken in the final rule codifying Emergency Order 24. There have not been adverse safety consequences associated with eliminating the reporting requirement in Emergency Order 24, and FRA does not expect any adverse safety consequences in this instance. However, FRA will continue to monitor securement of equipment defined under paragraph (n)(6) to assess the effectiveness of the verification process that is being instituted in this final rule.

Also under Emergency Order 28, the employees responsible for securing the train or vehicles must lock the controlling locomotive cab door or remove and secure the reverser before leaving it unattended. Accordingly, paragraph (n)(8)(ii) requires further protection of the locomotive to prevent movement of unattended equipment that could be caused by unauthorized access to the locomotive cab.

Representatives from the railroad labor strongly suggested at the SWG meetings that a locking mechanism be applied to each locomotive covered under this rule, seeking that lock installation be complete within 18 months. BLET stated that locomotive cab security is a major concern to the labor caucus.

The language approved by the SWG provided that the controlling locomotive cab shall be locked on locomotives capable of being locked or the reverser on the controlling locomotive shall be removed from the control stand and placed in a secured location. The use of the conjunctive appears to indicate a choice; each railroad may opt to either lock the locomotive or remove its reverser. However, based on the discussions during the SWG meetings, FRA believes that the SWG intended for paragraph (n)(8)(ii) to mean that all covered locomotives should be locked when so equipped. FRA has made slight alterations to the language in paragraph (n)(8)(ii) from the language that was approved by the SWG in order to more accurately address the lock requirement. FRA understands that the reverser provision is intended for the interim period until locks are installed or for when a locomotive has been equipped with a lock but the lock has become inoperative. FRA also notes that under this final rule a railroad would be free to require both the locking of the locomotive and the removal of the reverser. FRA does not intend to limit a railroad to just one or the other. FRA sought comment on this understanding, particularly as to whether the alternative of removing the reverser should only be available during the timeframe when the locking mechanism becomes broken or otherwise ineffective or whether, in the interest of safety redundancy, the regulations should require railroads to both lock cab doors and to remove reverser handles.

NTSB believes that, in the interest of safety, the regulation should require the locking of the locomotive cab doors, as well as removing and securing the reverser handles. According to NTSB, such redundancy will ensure a higher level of safety.

NYSDOT also supports the view that redundancy of safety or security procedures is beneficial in terms of addressing risk. Therefore, NYSDOT believes that, when the train is left unattended, the locomotive cab door lock must be engaged (if operative) and the reverser must be removed and secured where feasible.

FRA is not persuaded by the comments, which provide no new information or argument. FRA continues to believe that it is not necessary to ensure safety by requiring by regulation the locking of the cab door and removal of the reverser. FRA recognizes that the railroads are already, or will be, installing locks on cab doors. This final rule formally requires such installation and requires their application for unsecured equipment in accordance with this rule. While this final rule does not require removal of the reverser in cases where an operative lock is applied, the railroads are free to include such a requirement in their respective operating rules. For the purpose of this final rule, the lock will be the primary means of locomotive cab securement and reverser removal will be required only as a backup.

When a railroad relies on removing the reverser as a means for securement, FRA expects that the reverser will be taken by the appropriate railroad employee from the controlling locomotive cab so that it is not accessible to an unauthorized person such as a trespasser. Alternatively, FRA anticipates allowing the reverser to be secured in the cab of an unlocked controlling locomotive as long as the reverser is kept in a box or other compartment that can be locked within the locomotive cab. However, FRA would not consider a reverser ''secured'' within the meaning of this final rule if the railroad allows the reverser to be stored merely out of plain sight.

In most instances, FRA would consider a locomotive with an ineffective locking mechanism to be noncompliant with paragraph (n)(8)(ii) if the locomotive is left unattended with the reverser remaining in the control stand. FRA recognizes that there may be limited circumstances where a locomotive's lock becomes inoperative and its reverser cannot be removed, thus making compliance with proposed paragraph (n)(8)(ii) nearly impossible. Accordingly, for such instances, this final rule includes an exception under paragraph (n)(8)(iii). FRA believes that application of this exception would only be utilized on the rare occasion where older locomotives with integrated reversers may be utilized or where weather conditions make the reverser necessary for operations (*i.e.,* to prevent the locomotive from freezing) and that such trains would only be left unattended in a yard or on a track directly adjacent to a yard. FRA sought comments on the intent, application, and language of this proposed exception.

NYSDOT states that the data provided in the analysis section of the NPRM indicates that the cost associated with repairing or replacing a locking mechanism is relatively small. According to NYSDOT, it is accepted that the goal of this particular exception is to provide relief in the rare instances where operation of ''non-conforming'' equipment (*e.g.* locomotive cabs without operative locks or removable reversers) would be required. However, given the acknowledged security concerns inherent with leaving trains unattended, NYSDOT asserts that consideration should be given to requiring attendance on the affected equipment until such time that the inoperative locking mechanisms can be repaired or replaced in conformance with paragraph (n)(8)(ii).

The purpose of the existing securement rule and this final rule is not to require attendance, but to require certain safety protocols when certain equipment is left unattended. To require attendance, as suggested by NYSDOT, would have this rule go further than FRA's intent and could amount to substantial and unnecessary costs for the railroads. Moreover, such a requirement likely would result in unanticipated impacts affecting FRA's hours of service rules, which is not FRA's intent in this rulemaking.

FRA believes that the job briefing requirement in Emergency Order 28 should be codified in regulation. Accordingly, paragraph (n)(9) requires each railroad to implement operating rules and practices requiring the discussion of securement among crew members and other involved railroad employees before engaging in any job that will impact or require the securement of any equipment in the course of the work being performed. This requirement is analogous to other Federal regulations that require crew members to have a job briefing before performing various tasks, such as confirming the position of a main track switch before leaving an area. The purpose of this job briefing requirement is to make certain that all crew members and other involved railroad employees are aware of what is necessary to properly secure the equipment in compliance with § 232.103(n).

Under this final rule, FRA expects that the crew will discuss the equipment that is impacted, the responsibilities of each employee involved in the securement of a train or vehicle, the number of hand brakes that will be required to secure the affected equipment, the process for ensuring that securement is sufficient, how the verification will be determined, and any other relevant factors affecting securement. FRA sought comments on whether these expectations are reasonable, accurate, and either sufficiently comprehensive or somehow lacking.

NYSDOT agrees that the specific job briefing requirements should be left up to the railroads and that effective policies and procedures are important. However, NYSDOT remains concerned about the ability to record or document the actions taken in accordance with those policies and procedures.

Riverkeeper believes that, although FRA claims that new requirements of the rules proposed here would indeed ''enhance safety culture and oversight,'' the new requirements do not go far enough and lack the enforceability needed to actually change the status quo. Riverkeeper says that, while the NPRM proposes ''requiring that securement be part of all relevant job briefings,'' FRA has no ability to ascertain whether briefed employees understand, or are implementing, securement policies. Riverkeeper similarly states that although FRA proposes requiring that there be more ''dialog between railroad employees [which would] provide enhanced oversight within the organization,'' it has no way to ensure that such dialogs occur, or whether they actually improve compliance rates. Riverkeeper notes that neither of these cultural changes will necessarily be reported to the FRA or the public in a manner that promotes transparent oversight and robust enforcement.

FRA disagrees with Riverkeeper's assessment regarding the effectiveness of the job briefing requirement and its regulatory enforceability. Crew members are already trained and qualified to understand briefing contents and the procedures and mechanics involved with securing unattended equipment. FRA also has extensive experience enforcing the job briefing criteria (*see, e.g.,* 49 CFR 214.315, 218.99, 218.103, 218.105, and 218.109) and expects to apply similar investigative methods when enforcing paragraph (n).

FRA recognizes that, in some instances, there may be only one crew member performing a switch or operation and that crew member would have to secure equipment alone at the end of the activity. In the NPRM, FRA expressed its belief that the issue of self-satisfying a job briefing is best left to the railroad when complying with part 218 and sought comment on how to apply this requirement in a situation involving a single person crew and how it interrelates with part 218.

NYSDOT acknowledges that single person crews pose a challenge in terms of ensuring that the safety benefits inherent with effective job briefings are assured in all instances, including single-person operations. At a minimum, states NYSDOT, the procedures for conducting job briefings should be established in the railroad's operating rules or in its timetable special instruction for all locations and operations to ensure that expectations are clearly established.

FRA continues to believe that it is sufficient for a one-person crew to self-satisfy a job briefing in accordance with the railroad's own operating rules developed pursuant to part 218.

Under paragraph (n)(10), FRA is requiring railroads to develop procedures to ensure that a qualified railroad employee inspects all equipment that any emergency responder has been on, under, or between for proper securement before the rail equipment or train is left unattended. As it may be necessary for emergency responders to modify the state of the equipment for the performance of their jobs by going on, under, or between equipment, it is critical for the railroad to have a qualified employee subsequently inspect the equipment to ensure that the equipment continues to be properly secured before it is again left unattended.

The final rule requires railroads to establish a process to ensure that a qualified railroad employee inspects all equipment that any emergency responder (*e.g.,* fireman, policeman, or paramedic) has been on, under, or between for proper securement before the train or vehicle is left unattended. FRA understands that on rare occasions there may be situations where an emergency responder accesses railroad equipment without the knowledge of the railroad. FRA will expect that a qualified railroad employee inspect equipment after it has been accessed by an emergency responder in any circumstance where the railroad acting in a reasonable manner knew or should have known of an emergency responder's presence on, under, or between the subject equipment.

The final rule requires that these procedures are followed as soon as safely practicable after learning that an emergency responder has interfaced with the equipment. In the NPRM, FRA sought comments on what should be considered ''as soon as safely practicable.''

AAR and ASLRRA reiterated earlier statements that the railroads support, and that the final rule should include,

the language ''as soon as safely practicable.'' AAR and ASLRRA assert that this language addresses the reality of situations where an emergency responder has had contact with rail equipment.

NYSDOT believes that the type and severity associated with any emergency event will significantly influence the definition of ''as soon as safely practicable.'' NYSDOT would recommend that, given their significant training regarding personal safety and protection, the first responders on-site would be a reasonable 'real time' resource to provide the requisite guidance in each case. NYSDOT consulted with counterparts from the NYS Division of Homeland Security and Emergency Services (DHSES), Office of Fire Prevention and Control (OFPC) on this topic. OFPC recommends that for scenarios in which first responders access unattended equipment without the on-site presence of railroad personnel, effective communication and coordination will be critical in assuring that the incident scene and access to the equipment be turned over to the appropriate railroad representative (*i.e.* ''qualified employee'') when it has been determined safe to do so. NYSDOT also states that in no case should the affected equipment be left in a potentially unsafe or unattended condition prior to the arrival of railroad personnel designated by the railroad to inspect and assume responsibility for that equipment and its proper securement.

FRA shares NYSDOT's concerns. However, while emergency and first responder training would certainly be beneficial, FRA will refrain from imposing such requirements at this time. Emergency response is primarily a local function that falls under State or local governance, which could impose such training requirements. FRA notes, however, that AAR is currently providing training at its Transportation Technology Center, Inc. (TTCI) to emergency responders on handling accidents involving crude oil. Moreover, if each railroad's employee is properly trained and complies with this regulation, there is little need to require emergency responder training, which could be quite costly nationwide.

AAR and ASLRRA also make clear their belief that, in such a situation, the railroad has to have actual knowledge that an emergency responder has been on the equipment and it has to be safe for the employee to inspect the equipment. According to AAR and ASLRRA, in some situations, the railroad might not know that an emergency responder has been in contact with the equipment until sometime after the contact. Additionally, AAR and ASLRRA assert that in a potential emergency situation, the railroad needs to be able to ensure that its employees can safely examine the equipment before being able to verify its securement.

When enforcing this provision, FRA will consider the railroad's actual and constructive knowledge of any emergency responder's presence. However, FRA does not expect to hold the railroad accountable if there is no reasonable means for the railroad to have known. Further, the ''safely practicable'' language is intended to take into consideration the circumstances presented. FRA's intent with this regulation is not put a railroad employee in harm's way by requiring him or her to enter an unsafe situation following an instance where a first responder goes on, under, or between equipment. However, FRA will require the railroad to take action once it can be reasonably ascertained that securement can be effectuated without unnecessary danger.

As noted above, on March 24, 2010, FRA issued TB 10–01 to provide enforcement guidance regarding the securement of equipment, particularly in classification yards. In the NPRM to this proceeding, FRA proposed codifying TB 10–01 by amending the rule at the final rule stage of this proceeding. Accordingly, this final rule includes a clarifying amendment to ensure that FRA's long-standing interpretation and application of the existing regulation is contained directly in the regulation. These amendments are for clarification purposes only and add no new requirements to the regulations.

NYSDOT agrees with the exception in TB 10–01 that, in certain circumstances within classification yards, skates or retarders in lieu of hand brakes may be used to secure equipment. AAR and ASLRRA expressed concern that the NPRM did not include any proposed regulatory text and recommended that FRA place the issue before the RSAC SWG for discussion.

TB 10–01 was issued approximately five years ago and the railroad industry has had significant opportunity to become accustomed to its interpretations of the existing rules. TB 10–01, and its codification in this rulemaking, does not provide any new requirements; if anything, it formalizes exceptions that provide operational flexibility for railroads in classification yards. FRA sought comment on this issue and had not received any regulatory text recommendations. Accordingly, FRA does not believe it is necessary to either extend the comment period on this issue or recall the RSAC SWG for further discussion.

The purpose of TB 10–01, and its codification in this final rule, is to indicate how § 232.103(n) applies in classification yards. Much of TB 10–01 is purely guidance, which will be incorporated into this preamble for posterity. There are a few portions of TB 10–01, however, which provide alternative securement options. These alternatives are being codified into the rule text as further discussed below. Upon the effective date of this final rule, which will incorporate TB 10–01, that guidance document itself will be rescinded. However, for continued guidance and educational purposes, FRA has placed the illustrative photographs from TB 10–01 into the docket of this proceeding.

Prior to issuance of TB 10–01, FRA's Railroad Safety Board reiterated that the failure to apply any hand brakes on unattended equipment does not comply with the securement requirements of § 232.103.[18] However, FRA recognizes that it is sometimes necessary in the switching of trains within classification yards to have equipment unsecured with hand brakes. Therefore, like the TB, this final rule allows for alternate forms of securement in limited circumstances—including where they may be appropriate and what constitutes effective use of alternate forms of securement. It also provides flexibility in the application of securement on repair tracks.

Section 232.103(n) addresses the securement of unattended equipment by means of applying hand brakes, venting the brake pipe to zero and leaving the angle cock open on one end of a cut of cars, and requiring the railroad to develop and implement procedures to verify that the equipment is secure. Unattended equipment is equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person. When assessing this situation for compliance, FRA may take into account the following factors:

- Can an individual take corrective action if the equipment should start to roll away?
- Can the individual readily mount the car and apply the hand brake, or can the individual safely open an angle cock should the equipment start to roll away?

[18] *See* Letter from Grady C. Cothen, Jr., Deputy Associate Administrator for Safety Standards and Program Development, Federal Railroad Administration, to Thomas J. Healey, Regulatory Counsel, and Jeffery A. Liepelt, VP Operations, Canadian National Railway Company, Docket No. FRA–2008–0060 (Apr. 3, 2009).

• Can the individual readily mount the locomotive and either apply the hand brake or operate the brake handles or emergency brake valve to stop the unexpected movement?

• Is a qualified person focused on the situation?

• If the individual is eating lunch or in the bathroom, full attention is not being given to the equipment.

• If the individual is in a crew room or talking on the phone, full attention is not being given to the equipment.

If an engineer and crew get off of their train to watch a passing train, and remain in close proximity to their locomotive consist, hand brakes would not have to be applied on the locomotives as long as someone is close enough to readily mount the locomotive and apply an emergency brake or hand brake, should the locomotives or train start to roll away. In these situations, FRA would consider the equipment attended. However, if the engineer and crew get off their train and position themselves with the passing train between them and their train, hand brakes have to be applied, as their train would be considered unattended.

Paragraph (n)(1) of § 232.103 includes a performance-based requirement that a sufficient number of hand brakes be applied to hold the equipment and that railroads have to develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment when the air brakes are released. This requires a railroad to develop appropriate operating rules to verify the sufficiency of the hand brakes applied, which can be tailored to the specific territory and equipment operated by the railroad. This can be as elaborate as the use of a sophisticated matrix or some other type of ''set calculations'' that specify exactly how many hand brakes have to be applied on specific numbers of cars; or it can be as simple as having the engineer release the pneumatic brakes after the hand brakes have been applied (and before uncoupling from the cars) to determine if the equipment is secure. To simply have instructions that state ''a sufficient number of hand brakes have to be applied'' does not satisfy the intent of the regulation, unless there is the provision that the pneumatic brake has to be released to determine the equipment is secure. When observing this practice, it is important that the pneumatic brakes fully release. This can be accomplished by observing piston travel on the rearmost car, or observing and ensuring that the end-of-train brake pipe pressure returns to its original setting.

Unless alternate forms of securement are permitted (as discussed below), it is FRA's enforcement policy that one or more hand brakes will have to be applied to a car in order to sufficiently secure equipment in accordance with the regulation. The application of no hand brakes on a car or a block of unattended freight cars will not meet the securement requirements of 49 CFR 232.103(n).

In paragraph (n)(11) of this final rule, FRA is including exceptions from certain portions of the remainder of § 232.103(n) as long as a delineated alternative is followed.

Paragraph (n)(11)(i) provides the flexibility to allow a railroad to use in a prescribed location an alternative means of securement in lieu of hand brakes per the remainder of paragraph (n). Like in TB 10–01, FRA continues to believe in this final rule that unattended equipment in classification yards—a series of tracks where locomotives and cars are classified or switched to dismantle and make-up train sets—present situations where alternate forms of securement can be allowed. Classification yards may have hump, bowl, flat, graded, or other characteristics. These characteristics and other local conditions, such as prevailing winds and possible severe weather, should be considered by the railroad in developing its instructions for using alternate forms of securement. The burden of proof is on the railroad in the use of alternate securement. If alternate securement is not effective, securement defaults to the application of a sufficient number of hand brakes.

In classification yards, securement is not required for the end of the yard that is actively being switched and is attended by the switch crew or hump tower operator. At these locations, FRA does not require securement for cars or blocks of cars on the yard tracks, as long as the equipment on the opposite end of those tracks being actively switched are secure. FRA believes that this flexibility applies only when active switching is occurring and is not otherwise affected by the commodities being handled, including equipment defined by paragraph (n)(6). If the operations at these locations do not work for 24 hours a day, 7 days a week, then the equipment at each end of the track would have to be secured, but cars in between the secured equipment would not have to be secured. At these locations, if a train crew removes a car or block of cars, the railroad shall have instructions in place to ensure any car remaining in the track is secure. This could be accomplished by either placing the burden on the train crew making the pickup, or by having other workers in place to secure the remaining equipment. At all other locations outside of actively switched yards—such as sidings, storage yards, or the mainline—each car and each individual block of unattended equipment must be secure in compliance with the regulation.

FRA recognizes that there may be overlap between the securement requirements within locomotive and car repair track areas and with the alternate methods of Blue Signal Protection (49 CFR 218.29), which are the primary methods of ensuring safety in these areas. However, once repair tracks become unattended and the blue signals are removed, securement will be required in these areas subject to the limitation that under certain repair and servicing situations it will be impractical or unnecessary to require the application of a hand brake. These would include equipment in repair status that may be lacking hand brakes, wheels, or trucks; and that is secured by means of a mechanical securement device; which could include jack stands, chocks, chains, skates, or other similar devices.

Without applying hand brakes in classification yards, an alternative means of securement is required per paragraph (n)(11)(i). FRA is generally referring to such alternative means as mechanical securement devices, which, as previously noted, FRA is including in this final rule a new defined term. FRA intends mechanical securement devices to include skates, retarders, inert retarders, and other devices that provide at least the equivalent securement that a sufficient number of hand brakes would provide in the same situation. In these situations, skates or retarders are considered an alternative form of securement, if they are maintained and used within their design criteria and as intended.

A skate (or rail skid) is a portable sliding device placed on the rail to engage with a car wheel so as to provide continuous braking by sliding friction. If using a skate to comply with this paragraph, the rail car must be at rest and at least one skate must be fully engaged to prevent movement. To be clearer, the following applies for the use of skates:

• The railcar shall be constructively placed at rest, fully engaged, with at least one skate, preventing movement away from the actively switched direction of the yard track.

• Unengaged skates placed near the clearance points of yard tracks (without a railcar in place) are not considered securement.

• A single railcar secured by a skate that is overwhelmed by the mass of following railcars shall be considered the same as an insufficient quantity of hand brakes, and a violation may be taken.

Under paragraph (n)(11), a railroad may also use a retarder, which is a powered or unpowered braking device permanently built into a railway track to reduce the speed or secure railcars by means of brake shoes that press against the lower sides of railcar wheels. When installed at the exit of a hump yard, they are often referred to as inert retarders or skate retarders (not to be confused with a skate defined above). It is not necessary to have the first car in each block engaged by the retarder during active switching. Also, a car may be past a retarder and be considered secure if it is coupled to a car engaged by the retarder and is not in a fouling condition as defined in § 218.101. However, if a railcar or following railcars are switched into a retarder in a manner that overwhelms the capacity of the device and consistently places equipment in a fouling condition, it shall be considered the same as an insufficient quantity of hand brakes, and a violation may be taken. While unengaged skates may be placed after retarders to provide additional safety in the event that a retarder is overwhelmed; their sole use will not be consider a properly used mechanical securement device. If skates are being engaged excessively, FRA may consider the retarders as being overwhelmed or not being maintained, and a violation may be taken. For these and similar reasons, skates and retarders are not usually considered sufficiently safe securement alternatives to hand brakes when used outside of a classification yard or within a repair shop environment where blue signal protection has been initiated.

In paragraph (n)(11)(ii) to this final rule, FRA is also incorporating the flexibility afforded by TB 10–01 as it relates to the isolation of the train pipe, also known as ''bottling of air.'' FRA will continue to not take exception to a train crew cutting away from a cut of cars, initiating an emergency brake application on the cut of cars, and then closing the angle cock for the sole purpose of taking the locomotives or otherwise proceeding directly to the opposite end of the cut of cars to either: (1) Couple the locomotives to the cars or (2) open the angle cock at the other end and leave the angle cock open and vented to the atmosphere, as required under 49 CFR 232.103(n)(2). However, if the locomotive cuts away from the cars and closes the angle cock without the locomotive or an employee going ''directly'' to the other end to either open the angle cock or couple the locomotives to the cars, the railroad will be in violation of 49 CFR 232.103(n)(2). The emphasis is on ''directly'' because, even though it may be the train crew's intent to go directly to the opposite end of the cars to take the appropriate action, if a train dispatcher, or whoever, directs the crew to perform another job task before they directly go to the opposite end of the cars, a violation is committed. It is only with the understanding that the train crew goes directly to the other end of the cars to take the appropriate action that FRA will permit this type of activity.

Section 232.105 General Requirements for Locomotives

New paragraph (h) to § 232.105 provides further requirements concerning locking mechanisms on locomotive doors. While § 232.103(n)(8)(ii) provides securement requirements for the controlling locomotive cab that is left unattended on a mainline track or siding as part of a train that meets the minimum quantities of hazardous materials established in proposed § 232.103(n)(6)(i), FRA believes that additional requirements should apply to all locomotives left outside a yard except if directly adjacent to the yard. Accordingly, FRA includes those requirements under § 232.105.

During the meetings of the RSAC SWG, representatives of the labor unions proposed requiring the installation of locking mechanisms on all locomotives covered by this rulemaking. AAR subsequently committed that *all* locomotives will be equipped with cab door locks by March of 2017. AAR clarified its statement by ensuring that there will be no distinction between interchange and non-interchange locomotives. In the interest of codifying this deadline as applicable to the scope of this proposed rule, paragraph (h)(1) requires that after March 1, 2017, each locomotive left unattended outside of a yard be equipped with an operative exterior locking mechanism. By no means does this requirement limit AAR's ambition that its members equip additional locomotives (*e.g.,* switching locomotives inside a yard) in their respective fleets. FRA is also including this requirement in § 232.105 so that it applies to all locomotives left unattended outside of a yard, but not on a track directly adjacent to a yard, not just those locomotives defined under § 232.103(n)(6).

BLET expresses concern with a 2017 deadline, describing it as too long. BLET also asserts that, without explanation or supporting data, the proposed rule, in comparison to the RSAC recommendation, narrowed the scope of the lock requirement to locomotives left outside of a yard. In one-day snapshot surveys performed in 2004 and 2008, BLET says that most respondents replied that there was no secured access to—or security presence within—their rail yards. Many reported seeing trespassers in the yard on the day they were surveyed, although the second survey showed a marked decrease.

NTSB supports the labor union's suggestion that locking mechanisms be applied to each covered locomotive within 18 months after the effective date of this final rule.

NYSDOT supports the intent of this requirement, but notes that while it requires all locomotives to have operative locks by 2017, other than the language in paragraph (n)(8)(ii) for hazardous trains as defined in paragraph (n)(6)(i), there is no requirement for the train crew to apply the lock. NYSDOT suggests additional language to that included in paragraph (n)(8)(ii) to cover all unattended locomotives on mainline tracks and sidings regardless of the lading carried by the train.

Given that the railroads are already voluntarily installing locks and have committed to a reasonable deadline of March 2017, which is supported by factors highlighted by AAR during the RSAC process, FRA does not believe it is appropriate to accelerate the process by regulation. Without additional information, which was not provided in comments, shortening the deadline by regulation could be viewed as arbitrary. Nevertheless, at the time this final rule becomes effective, it will be close to 18 months away from that deadline anyway, thus rendering BLET's and NTSB's concerns moot.

FRA also notes that AAR has issued standards regarding locomotive cab securement and has committed to install locks on all locomotives. *See* Locomotive Cab Securement, S–5520, AAR Manual of Standards and Recommended Practices, Section M–Locomotives and Locomotive Interchange Equipment (May 2014). Regardless of whether they operate in or out of yards, this final rule only requires lock installation on locomotives left unattended outside of yards, where trespasser access is arguably easier. Nevertheless, as previously discussed under paragraphs (n)(7)(ii) and (n)(8)(ii), any locomotive covered under paragraph (n)(6) with an installed locked left unattended anywhere, either within or outside of a yard, must have

that lock applied. Ultimately, this may provide each railroad with the flexibility to determine on its own whether to install and operate locks on locomotives dedicated to switching operations and confined to classification yard limits.

Paragraphs (h)(2) and (h)(3) are meant to ensure that locking mechanisms, if broken or otherwise inoperative, are repaired in a reasonable timeframe. FRA expects that each locomotive equipped with a locking mechanism will be inspected and maintained at the time of the locomotive's periodic inspection. *See* 49 CFR 229.23. If a locking mechanism is found inoperative at any time other than the periodic inspection, paragraph (h)(3) requires the railroad to repair it within 30 days. However, if the periodic inspection falls within the 30-day limit for repair, FRA would expect that the lock will be repaired at the time of the periodic inspection in accordance with the requirement in paragraph (h)(2). For instance, if a locomotive engineer were to find the lock inoperative during a daily inspection and the periodic inspection was scheduled 15 days later, then FRA would expect that the railroad could repair the locking mechanism at the time of the periodic inspection. Alternatively, if the same situation were to arise but the periodic inspection was scheduled to occur 45 days later, the railroad would be expected to repair the locking mechanism prior to the time of the periodic inspection to comply with the 30-day time limit in paragraph (h)(3).

For the purposes of this regulation, ''operative'' means that, when applied, the locking mechanism will reasonably be expected to keep unauthorized people from gaining access into a locomotive while the locomotive is unoccupied. However, in doing so, the railroad must assure that ingress and egress is provided for in normal circumstances and emergencies. In the NPRM, FRA sought comments on this understanding. FRA also sought information and comments on the possibility of a qualified person having difficulty accessing the locomotive cab in the event of an unintentional movement of the equipment.

NYSDOT believes that the proposed definition is reasonable. NYSDOT understands that whatever type of locking mechanism is provided by the railroad would be based upon its effectiveness and appropriate functionality to accommodate the required ingress and egress under all conditions.

Since the railroad would decide upon the locking mechanism, NYSDOT suggests relying upon the railroad to develop appropriate procedures to address this scenario. In the event there is unintentional movement of the equipment as described, and access to the cab is problematic, NYSDOT would expect that the qualified person would likely attempt to apply the hand brake from the outside of the locomotive.

In its comments, AAR and ASLRRA indicated that the railroads have evaluated this concern and that qualified employees will all have keys to locked locomotives. AAR and ASLRRA also say that, if the qualified employee has lost his or her company issued key, the train can be accessed by a non-lead locomotive, which is where the train could be placed into emergency.

For the moment, FRA is satisfied with AAR's and ASLRRA's explanation that, if locked out of a rolling locomotive, a qualified employee could alternatively enter a non-lead locomotive and make an emergency brake application. FRA also recognizes that, just as with a rolling consist of cars without a locomotive, the qualified employee would be expected to apply the outwardly-facing hand brakes in such a situation.

Under paragraph (h)(4), if the railroad discovers that a locking mechanism has become inoperative in the interval between a locomotive's periodic inspection dates, this provision does not require that a locomotive be removed from service. Railroads may continue to use the locomotive without an operative lock. However, if such equipment covered by § 232.103(n)(6) is left unattended and without an operative lock, then the railroad must default to the alternative securement option governing the reverser under proposed § 232.103(n)(8)(ii) or fall under the exception provided per proposed § 232.103(n)(8)(iii).

V. 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 significant under Executive Order 12866, Executive Order 13563, and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979. For purposes of analyzing this rule, FRA uses as a baseline the rules in effect at the time of publication, including Emergency Order 28. The analysis separately quantifies ongoing costs of Emergency Order 28 that might exceed business practices that would remain in effect in absence of Emergency Order 28. It is reasonable to assume that most of the requirements of Emergency Order 28 would continue as business practices; for example the railroads have already improved their practices in determining the proper application of hand brakes to secure a train and the verification that the hand brake application is adequate. Further, the exterior locking mechanism provision in the rule reflects an existing commitment among AAR member railroads, which had been working on developing a lock standard applicable to its members for over a year, so the costs associated with this provision are limited to non-AAR member railroads, primarily short line railroads. FRA received comments that the analysis should include the total cost of installing locks; however, the analysis only counts costs that would not have been incurred in the absence of the final rule. Since AAR members were in the process of installing locks compliant with the final rule on the affected locomotives, FRA will not include those costs in this analysis. This analysis also does not include sunk costs.

FRA was able to quantify the costs of the final rule, but not able to quantify all the benefits, as many of the benefits are the result of reducing risk from high consequence, low probability events that are not easily quantified. Thus, FRA will discuss the benefits that can be quantified, that by themselves justify the cost of the final rule and will provide a brief discussion of the non-quantified benefits. The monetized discounted and annualized net benefits would be:

Discounted values	Discounted value	
	Discount factor	
	7%	3%
Total	$1,076,984	$1,479,331
Annualized	95,009	96,538

Statement of Need

The United States has experienced a dramatic growth in the quantity of flammable materials being shipped by rail in recent years. According to the rail industry, in the U.S. in 2009, there were 10,800 carloads of crude oil shipped by rail. In 2013, there were 400,000 carloads. In the Bakken region, over one million barrels a day of crude oil was produced in March 2014,[19] most of which is transported by rail. Transporting flammable material carries safety and environmental risks. The risk of flammability is compounded in the context of rail transportation because petroleum crude oil and ethanol are commonly shipped in large unit trains. In recent years, train accidents involving a flammable material release and resulting fire with severe consequences have occurred with increasing frequency (*i.e.* Arcadia, OH, Plevna, MT, Casselton, ND, Aliceville, AL, Lac-Mégantic, Quebec).

Shippers and rail companies are not insured against the full liability of the potential consequences of incidents involving hazardous materials. As a result, these events impose externalities. Among Class I railroads, a self-insured retention of $25 million is common, though it can be as much as $50 million, especially when PIH/TIH material is involved. Smaller regional and short line carriers, *i.e.,* Class II and Class III railroads, on the other hand, typically maintain retention levels well below $25 million as they usually have a more conservative view of risk and usually do not have the cash-flow to support substantial self-insurance levels. At this time, the maximum coverage available in the commercial rail insurance market appears to be $1 billion per carrier, per incident.[20] While this level of insurance is sufficient for the vast majority of accidents, it appears that no amount of coverage is adequate to cover a higher consequence event. One example of this issue is the incident that occurred at Lac Mégantic, Quebec, in July of 2013. The rail carrier responsible for the incident was covered for a maximum of $25 million in insurance liability, and it had to declare bankruptcy because that coverage and the companies remaining capital combined were insufficient to pay for more than a fraction of the harm that was caused. This is one example where rail carriers and shippers may not bear the entire cost of ''making whole'' those affected when an incident involving crude and ethanol shipment by rail occurs.

FRA believes that the failure to secure equipment decreases the safe transportation of goods by rail, and increases the possibility of a higher-consequence event, particularly when dealing with a key train transporting a material such as crude oil. It is difficult to assess how much of the decrease in safety is from railroads not requiring their employees to secure equipment or from employees failing to comply with railroad securement requirements. The Lac-Mégantic accident shows that the railroads were not successful using operating rules in effect at the time of the accident, perhaps because an employee did not follow those rules or might not have had adequate guidance on what constituted adequate securement. FRA believes that use of its authority will enhance compliance with railroad issued orders. There may also have been an issue of incomplete information—which can cause a market failure—that was corrected in the wake of the Lac-Mégantic accident and Emergency Order 28, in that railroads had not yet developed the procedures required in response to Emergency Order 28. This problem of incomplete information related to securement procedures has been addressed, so it is not part of the baseline. Finally, incomplete information also may be causing a market failure among some railroads that have not put locks on their locomotives left outside yards.

Cost-Benefit Analysis of Individual Sections

Following is a discussion of the regulatory costs and benefits associated with each requirement.

Changes to the definition in § 232.5 have no substantive impact and do not result in any new costs or benefits.

Changes to § 232.103(n)(2) will have negligible impact or real burdens, but may increase compliance with existing rules. As noted above, the changes to this paragraph merely clarify FRA's longstanding interpretation, application, and enforcement of the existing regulation.

Section 232.103(n)(6) lists types of trains and equipment covered by § 232.103(n)(7) and (n)(8), but does not directly impose any specific requirements.

Section 232.103(n)(7)(i) prohibits leaving affected equipment unattended on a main track or siding (except when that main track or siding runs through, or is directly adjacent to a yard) until the railroad has adopted and is complying with a plan identifying specific locations or circumstances when the equipment may be left unattended. Railroads already have developed and implemented such plans under Emergency Order 28, so there is no cost to create such plans. The initial revision and notification burden would have been in identifying safety rationale related to such locations and circumstances, but that has already been accomplished through compliance with Emergency Order 28. To the extent that railroads further revise their plans in the future, there will be some additional costs. This will not occur frequently, resulting in nominal burden in the future.

Section 232.103(n)(7)(ii), an expansion of Emergency Order 28 that applies to trains left unattended on main tracks that are in or adjacent to yards, requires trains left in yards to have the locomotive cab locked, or the reverser removed, if possible, but would not impose additional requirements in a yard if the locking mechanism is inoperative. This portion of the final rule's requirements is part of long-standing railroad business practices, and will add no costs or benefits.

In paragraph (n)(8)(i), there is a new requirement, which in almost all cases was already in place as a business practice. It requires that the qualified individual who secures the train verify with a second qualified individual that

[19] Information regarding oil and gas production is available at the following URL: *http://www.eia.gov/petroleum/drilling/#tabs-summary-2.*

[20] *See* ''The Transportation of Hazardous Materials: Insurance, Security, and Safety Costs,'' DOT Report to Congress, December 2009, at *http://www.dot.gov/office-policy/transportation-hazardous-materials-insurance-security-and-safety-costs.*

the train has been secured in accordance with the railroad's operating rules, including whatever the employee has done to ensure that an adequate number of hand brakes have been employed. On a train with two or more crew members, the train crew will verify among themselves. This would happen as a matter of business practice. In the event that the train is secured by a single person crew, the verification would involve a second person, typically a yardmaster, who is also qualified. All safety-critical activities by train crews are communicated to at least one additional person as a standard operating practice. This is part of the railroads' conscious effort to avoid a single point human factor failure that can cause an accident. FRA believes that less than one-tenth of one-percent (0.1%) of the affected trains will be operated by a single crew member when securing in a yard, because there are very few single person crews operating affected trains, and because many affected trains will be operated continuously to their destination. Some trains will be secured outside of yards, but that burden is discussed below in this analysis. In this analysis, FRA assumes that there will be 1,000 affected trains per day, of which 0.1% (1 daily or 365 annually) would have a single person crew. Further, FRA assumes that in the absence of the final rule, 95 percent of railroads would require the verification as a business practice. This means that over 20 years, only 365 trains would be affected. FRA believes the communication will take 15 seconds of two qualified individuals' time, or 30 labor seconds. There is no cost to initiate communication, because in any event a person leaving a train would have to communicate with the yardmaster to let the yardmaster know where the crew member left the train and to let the yardmaster know the train would no longer be moving in the yard. Over the 20-year life, the undiscounted value would be 182.5 labor minutes or roughly 3 labor hours. At $50 per hour the cost over 20 years, undiscounted cost would be $150, and the annual cost would only be $7.50. FRA requested comments on the current and future levels of train operations impacted and the labor estimates associated with compliance, but did not receive any comments which directly discussed costs or benefits of this provision.

Section 232.103(n)(8)(i) requires that where a freight train or standing freight car or cars as described in paragraph (n)(6) is left unattended on a main track or siding outside of a yard, an employee responsible for securing the equipment shall verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures. This will impose no new burden nor create any new benefit since it is identical to what is currently required by Emergency Order 28. Where train crews with more than one crew member are involved, then the crew members would need to discuss the securement and ensure that they had secured the correct number of hand brakes and taken other steps to properly secure the train. Where single member crews are involved, then the crew member would have to call the dispatcher or some other qualified railroad employee to verify with the qualified employee that the train had been properly secured. As noted above, Emergency Order 28 requires this communication to occur presently, thus railroads already have these procedures established and continuing such practice will not impose an additional cost. Thus, the changes to § 232.103(n) would create no new benefits or costs, compared to the base case.

Section 232.103(n)(8)(ii) requires that the controlling locomotive cab of a freight train described in paragraph (n)(6) shall be locked on locomotives capable of being locked or the reverser on the controlling locomotive shall be removed from the control stand and placed in a secured location. In the case of a locomotive with an operative lock, the compliance will simply be locking the lock. Railroads all require their employees to lock unattended locomotives equipped with operative locks, for both safety and security reasons. This provision of the final rule codifies current business practices, and creates no new benefits or costs. Under § 232.105(h) each locomotive will have been equipped with a lock, and if there should be a lock malfunction, removing the reverser will be sufficient to comply. Removing the reverser of such a locomotive is likely to be a business practice required by operating rules except for two conditions. The first condition is where the locomotive does not have a removable reverser. Such locomotives are relatively old and are rarely used outside of yard operations. The second condition is where there is a reason to keep the locomotive running while standing. Almost all locomotives can idle with the reverser removed, but there are no locomotives that can run at speeds above normal idle, sometimes needed for cold weather conditions, with the reverser removed. If a lock should malfunction under either of those two conditions, a railroad could comply by several means:

- A railroad could remove the reverser; almost all locomotives can idle with the reverser removed, except in very cold weather;
- A railroad could attend the locomotive, which could involve either placing a qualified individual aboard the locomotive while it stands, or boarding a new crew and having the new crew continue moving the train toward its destination. The most economical way to accomplish this would be to board a new crew and take the train further along its route. The railroad was going to have to call a crew to move the train on its route anyway, so if the railroad has sufficient time to call a new crew, generally two hours, the railroad would call a crew earlier than originally planned. Dispatchers continually adjust the flow of trains, and adding a single train earlier than originally planned would have little effect on operations in almost all cases. If the train is already close to its destination, this would not be practical if the consignee unloading or transfer operation were not available, or if the train could not proceed for some other reason, such as track congestion or blockage, the railroad would not simply board the next crew and the railroad would have to comply by some other means;
- A railroad could arrange for the train to stop in a yard, or on a main track in or adjacent to a yard. This might involve having the dispatcher expedite the train so it can make a yard further along its route, which might have minimal costs;
- A railroad could have the train crew switch locomotives, putting a lock-equipped locomotive in the lead, which would be costly and impractical; or
- A railroad could arrange to have the lock repaired before leaving the train unattended, which would also carry a cost.

The burdens of § 232.103(n)(8)(ii) on main track or sidings outside of yards are imposed by Emergency Order 28, so they are not new burdens, and they still are relatively small. For purposes of this analysis, FRA conservatively estimates that 1,000 trains per day [21] will be subject to the requirements of § 232.103(n)(8)(ii), but that 90 percent of them will be excepted under § 232.103(n)(8)(iii), because they will have routing that calls for unattended stops only in or adjacent to yards.[22]

[21] In an analysis of the safety of HHFTs, PHMSA estimates that there are 150 trains per day. FRA's estimate of 1,000 trains per day is conservative.

[22] FRA assumes that railroads will fix locks in or adjacent to the first yard available, as a business

That leaves 100 trains per day, or 36,500 trains per year. FRA estimates that one in 500 locomotives or 73 per year will have a defective lock. FRA also estimates that 50 percent, or 36.5 locomotives per year, would have been left running while unattended, or would have been equipped with a non-removable reverser. A locomotive would be left running either to avoid cold weather starting or to avoid a brake test when the next crew takes charge of the train. If the locomotive would have been left running to maintain brake pressure, the train crew can leave one of the trailing locomotives running to maintain brake pressure, and lock its door. FRA estimates that in all but ten cases per year, the railroad will have been notified of the lock malfunction, and will have the next crew or current crew take the train to a yard or its destination, avoiding any costs.[23]

Trains per year:

Affected by the final rule: 365,000.

No planned stop outside yards (90 percent of 365,000): 328,500.

Planned stop outside yards (365,000–328,500): 36,500.

Defective lock and planned stop outside yard (36,500/500): 73.

Removing reverser provides compliance (50 percent of 73): 36.5.

Further action needed (73–36.5): 36.5.

Sent on to next yard or destination: 26.5.

Remedial action must be taken: 10.[24]

FRA believes that in half the cases remaining (five cases), the railroad will repair or replace the lock, and in the other half (also five cases), the railroad will have personnel attend a standing train. The railroad may repair or replace the lock, in which case the cost is the additional cost of repairing the lock outside of a yard. A railroad using AAR standard locks may attach an additional locking mechanism, not compliant with AAR standards until the AAR standard lock can be replaced. This appears to be the lowest cost means of complying with the rule. If a hasp is present, the railroad may have provided the crew with a spare lock, in which case the cost is negligible, two of the five cases per year. If a hasp is not present, the railroad may have repair personnel locate to the train, estimated at an average cost of $0.56 per mile for 20 miles, or $11.20 per incident. In addition, the installation is expected to require two hours service time, including travel, for two repair personnel, at an estimated cost of $50 per person hour,[25] for a labor cost of $200. The installation is expected to cost $100 if the railroad does not install a standard lock, one case per year. The total cost for this repair would be $11.20 for transportation, $100 for materials, plus $200 for labor, a total of $311.20. If the railroad replaces the existing lock, then no materials cost is added, because the railroad could have been expected to replace the lock at the next yard. The total cost to replace an existing lock would be $11.20 for transportation, plus $200 for labor for a total of $211.20. The total cost to replace existing locks is 2 times $211.20, or $422.40. The total cost for lock replacement includes the negligible costs if the crew has a lock that fits an existing hasp, plus $311.20 to install a new hasp and lock, plus $422.20 to replace existing locks, a total of $733.60. In any estimate of net present value, the labor costs for lock installation should not be incremented by a factor to account for growth in real wages, because the growth in real wages is assumed to be directly related to productivity. The more productive the worker, the fewer hours needed to install a lock, including reductions in time needed to travel. FRA believes that small railroads will not be affected by these costs because small railroads will use a lock and hasp system and will be able to replace the lock before the train is left stopped, should the lock malfunction.

FRA estimates the cost to switch locomotives at $150 for the cost of switching and at least $500 for a brake test after switching, for a total of $650 per train. A railroad is unlikely to do this unless the purpose of keeping engines running was to keep the engines warm on a cold day, no stop was likely at a location where the lock could be repaired, and at least one more stop was likely on the train's route. The likelihood of such a situation is so small as to be negligible. FRA does not believe this is a likely response, and this value is not used any further.

FRA estimates the cost to attend a standing train at $470 per incident,[26] or a total of $2,350 per year for 5 incidents, which assumes a burdened rate for labor of $51.04 per hour.

In summary of the foregoing costs associated with locomotive locks, FRA believes the likely responses to inoperative locking mechanisms, where the railroad cannot simply remove a reverser or move the train, will break down as follows:

Approach taken	Unit cost	Frequency	Annual total cost
Place Lock in Existing Hasp	$0.00	2	$0.00
Install New Hasp and Lock	311.20	1	311.20
Replace Existing Lock	211.20	2	422.40
Attend Train	470.00	5	2,350.00
Total			[27] 3,083.60

practice, and will leave any unattended trains in yards locked.

[23] Taking the train further along its route is the least costly method of attending a train. The railroad is obligated to provide a crew to move the train further along its route anyway, and train crews are on call. Once the train gets to the first yard on its path, the lock will be repaired. Unloading facilities are not part of the railroad, and FRA does not regulate securement at unloading facilities, which are subject instead to PHMSA regulations.

[24] In the NPRM, FRA requested comment on the number of cases per year where remedial action would be required, and on the assumptions relied upon to estimate that number. Since FRA did not receive any such comments, it continues to rely on the assumptions used in the NPRM.

[25] Surface Transportation Board (STB) wage data show that the average compensation for personnel engaged in Maintenance of Equipment & Stores was $28.46 in 2013. FRA adds a 75 percent burden which would yield $49.81 per hour, which is rounded here to $50 per hour.

[26] STB wage data show that the average compensation for personnel engaged in Train, Yard and Engine was $29.16 in 2013. FRA adds a 75 percent burden which would yield $51.04 per hour. The minimum payment for qualified personnel called out is a fixed sum or hourly pay, whichever is greater. The fixed amount is roughly equal to 8 hours' pay. There may be instances where the duration of the assignment exceeds 8 hours. FRA assumed a 9 hour average pay, or 9 times $51.04, for a burdened wage of $459.32 per incident. FRA further assumed $11.20 in travel costs, or a total cost of $470.52 per incident, which FRA rounded to $470 per incident.

[27] Rounds to $3,100.

The total cost imposed by § 232.103(n)(8)(ii) would be $2,350 plus $311.20 plus $411.40 per year, a total of $3,083.60, or roughly $3,100, per year.

To more accurately annualize these costs, however, FRA must also consider the direct wage portion of the costs attending trains and provide for annual real wage increases. Of the aforementioned burdened wage rate, $29.16 is the direct wage portion. Multiplying the direct wage portion hourly rate against 9 hours pay per event with 5 events per year, the direct wage portion annual cost total is $1,312.33, which we will round to $1,300. These direct wage costs for train personnel will need to be incremented by a factor of 1.18 percent per year to account for increases in real wage, induced by increased productivity in accordance with estimates from the Congressional Budget Office.[28]

FRA compiled the following summary table, using initial annual costs of $3,100 (*i.e.,* the first year's annual locomotive locks costs total rounded up), broken into direct wage costs for simply attending trains, $1,300—which are increased every year by 1.18 percent to account for growth in real wages, whereas the first year's increase would result in a direct wage cost of $1,315.34—and other costs of $1,800, including initial burden on wages to attend trains, labor costs to repair or replace locks, where productivity growth is assumed to match growth in real wages, and costs for other items. The costs are all the result of actions taken to comply with attendance of a train in the event a locking mechanism becomes inoperative:

Year	Wage inflator (%)	Direct wage cost	All other costs	Discounted value		
				Total costs	Discount factor	
					7%	3%
2015	101.18	$1,315.34	$1,800	$3,115.34	$3,115	$3,115
2016	102.37	1,330.86	1,800	3,130.86	2,926	3,040
2017	103.58	1,346.57	1,800	3,146.57	2,748	2,966
2018	104.80	1,362.45	1,800	3,162.45	2,582	2,894
2019	106.04	1,378.53	1,800	3,178.53	2,425	2,824
2020	107.29	1,394.80	1,800	3,194.80	2,278	2,756
2021	108.56	1,411.26	1,800	3,211.26	2,140	2,689
2022	109.84	1,427.91	1,800	3,227.91	2,010	2,625
2023	111.14	1,444.76	1,800	3,244.76	1,888	2,561
2024	112.45	1,461.81	1,800	3,261.81	1,774	2,500
2025	113.77	1,479.06	1,800	3,279.06	1,667	2,440
2026	115.12	1,496.51	1,800	3,296.51	1,566	2,381
2027	116.47	1,514.17	1,800	3,314.17	1,472	2,324
2028	117.85	1,532.04	1,800	3,332.04	1,383	2,269
2029	119.24	1,550.11	1,800	3,350.11	1,299	2,215
2030	120.65	1,568.40	1,800	3,368.40	1,221	2,162
2031	122.07	1,586.91	1,800	3,386.91	1,147	2,111
2032	123.51	1,605.64	1,800	3,405.64	1,078	2,060
2033	124.97	1,624.58	1,800	3,424.58	1,013	2,012
2034	126.44	1,643.75	1,800	3,443.75	952	1,964
Total					36,685	49,909
Annualized					3,236	3,257

Section 232.103(n)(8)(ii) also provides a direct safety benefit of this rulemaking. Only about 36.5 trains per year are likely to be affected, as described above. FRA believes that in the absence of this rulemaking all locomotives would be equipped with locks as a business practice, as described below. FRA believes that as a business practice, the locomotives that can be locked will be locked, and the remaining locomotives that have reversers that can be removed that are not left running would have their reversers removed and secured. FRA believes that trains left running with reversers in place are the most vulnerable to serious harm as a result of casual mischief. It is possible that a vandal moving a reverser in an unattended running locomotive could cause a higher-consequence event, given the kinds of materials regulated here. Further, individuals who believe they are doing some good—for example first responders who believe the train is in a dangerous location—may also be tempted to try to move the train. If they lack proper skills, this movement creates a risk. FRA does not have a good way to estimate the likelihood of a serious event from such a small number of affected trains; however, given the kinds of trains involved, FRA finds that the costs are justified by the benefits of risk reduction.

Section 232.103(n)(8)(iii) provides an exception for trains left unattended on main tracks in or adjacent to yards, and does not change burdens from Emergency Order 28. The communication requirement in § 232.103(n)(9) is unchanged from Emergency Order 28, and will impose no new burden nor create any new benefit for train crews with more than one crew member. Section 232.103(n)(10) requires railroads to adopt and comply with procedures to ensure that, as soon as safely practicable, a qualified employee verifies the proper securement of any unattended equipment when the railroad has knowledge that a non-railroad emergency responder has been on, under, or between the equipment. This was required by Emergency Order 28 and remains unchanged from Emergency Order 28, and will impose no new burden nor create any new benefit. FRA also believes that after the Lac Mégantic accident that railroads would have adopted this practice even

[28] Based on real wage growth forecasts from the Congressional Budget Office, DOT's guidance estimates that there will be an expected 1.18 percent annual growth rate in median real wages over the next 30 years (2013–2043).

in the absence of Emergency Order 28, as a standard business practice, so FRA is confident that this section creates no new benefits or costs.

One requirement of Emergency Order 28 that is not included in the final rule is a requirement that employees who are responsible for securing trains and vehicles transporting Appendix A Materials must communicate to the train dispatcher the number of hand brakes applied, the tonnage and length of the train or vehicle, the grade and terrain features of the track, any relevant weather conditions, and the type of equipment being secured; train dispatchers must record the information provided; and train dispatchers or other qualified railroad employees must verify and confirm with the train crew that the securement meets the railroad's requirements. The final rule includes verification procedures but does not include the recordkeeping required by Emergency Order 28. FRA's Paperwork Reduction Act analysis of the recordkeeping requirements shows the annual burden at 867 hours to notify the dispatcher to make the record, and an additional 867 hours to make the record. FRA estimates that there will be an average of 26,000 communications (100 instances on 260 days per year) to dispatchers triggering the recording requirement, which takes an average of four minutes to complete, for a total of 1,734 hours. If the value of the employees' time is $50 per hour, the annual cost of the Emergency Order 28 recordkeeping requirement is $86,700, and that cost would be eliminated by the final rule. FRA believes the recordkeeping requirements have been relatively more onerous for smaller railroads, but does not have a breakdown of the proportion of the cost reduction benefit that will accrue to small railroads.

Section 232.105(h) requires, after March 1, 2017, that each locomotive left unattended outside of a yard shall be equipped with an operative exterior locking mechanism. AAR standard S–5520 requires that each locomotive left unattended outside of a yard shall be equipped with an operative exterior locking mechanism, and requires that locomotives be equipped in order to be used in interchange service. These mechanisms will meet the requirements of § 232.105(h). FRA believes that for Class I and Class II railroads, all costs and benefits of § 232.105(h) will be a result of business practices because their locomotives operate in interchange service. These railroads are already in the process of installing exterior locking mechanisms on all of their locomotives that do not operate exclusively in yard service. FRA further believes that small railroads have already equipped virtually all of their locomotives with exterior locking mechanisms. This was discussed at RSAC meetings.

FRA believes that the reason Class I and Class II railroads have just recently started installing locking mechanisms on their locomotives is that until recently there was no standard for keying the locking mechanisms. Locomotives of these railroads operate in interchange service and can move from railroad to railroad. If each railroad had to maintain a set of keys for all other railroads' locomotives, that would have been cumbersome. The recent, common keyed, industry standard provides a solution, and allows the business practice of installing locking mechanisms to proceed.

FRA believes that, for smaller railroads, locking locomotive cabs is a good business practice that already takes place because it avoids vandalism and locomotive cab intruders. Several reports indicate that a locomotive belonging to the Adirondack Scenic Railroad was vandalized on or around October 15, 2013.[29] Damage to the locomotive was approximately $50,000, and does not include lost revenue. Anecdotal reports are that the vandals removed the copper wiring, which has value as scrap. This event was not reported to FRA. This is an example of unreported vandalism, and FRA staff believes that a great deal of vandalism is unreported, largely because the events do not meet all the requirements that would result in filing an accident/incident report with FRA. Over the years, FRA staff has received several first-hand accounts of vandalism or cabs occupied by intruders. FRA believes that the likelihood of vandalism or cabs being occupied by trespassers increases as the likelihood of railroad observation of the train decreases. Most small railroads operate in environments with a lower than average likelihood of observation. FRA believes that vandalism is also more likely to have a severe impact on a small railroad's operations since these railroads do not have many spare locomotives or personnel. If a railroad has ten locomotives and five get vandalized, its operations will be severely impacted. Likewise if a small railroad's operating crew is injured by an intruder in a cab, the operations for that day will likely be halted. As indicated by small railroad representatives at RSAC, small railroads do generally equip their locomotives with exterior cab locks. FRA believes that if all small railroads considered the impacts of vandalism and intruders, the small railroads would and have installed exterior cab locks.

The unit cost for a locking mechanism meeting AAR standard S–5520 is $215. FRA believes that smaller railroads could comply with § 232.105(h) with a simpler lock and hasp system, for a unit cost of $100. Given the smaller number of locomotives, personnel, territory, and facilities, use of this type of system would not be problematic. FRA requested comment regarding this estimate. ASLRRA commented that its members claim that the unit cost will be greater for small railroads than the $210 per unit estimated for AAR type locks. FRA rejects the contention that a hasp and padlock would cost more than $100 per unit, based on observation of hasp and lock costs at hardware stores, and FRA staff knowledge of the costs to install a hasp by welding, based on actual work experience as Class III railroad employees. Nevertheless, FRA points out that the business benefits of installing locks far exceed the unit costs of $210 per locomotive for AAR type locks, so even if FRA were to accept the ASLRRA comment, the business benefits of locks would still exceed their costs.

FRA believes that no more than 500 locomotives belonging to Class III railroads lack locking mechanisms that comply with § 232.105(h). Thus, the cost to install the locking mechanisms would be no more than 500 times $100, or $50,000.

Based on anecdotal information from FRA staff, between 1 percent and 3 percent of locomotives are vandalized each year. Some vandalism is relatively minor, such as graffiti sprayed on the walls of the cab, but some is much more serious, for example damage or removal of electrical equipment, or of instruments. More modern cabs have very expensive control systems, with one or more monitor screens. It would not be difficult for vandals to cause more than $50,000 in damage to a modern cab. The repairs not only would involve removal and replacement of damaged components, but would also involve calibration. For purposes of this analysis, FRA is assuming 1 percent of locomotives would be vandalized each year if not equipped with locks, and the mean cost of a vandalism incident is $3,000. The expected cost of vandalism is therefore $30 per locomotive year for unequipped locomotives.

Locomotive cabs are also occupied by unauthorized occupants, usually homeless, from time to time. Based on staff anecdotal data, FRA assumes that

[29] Adirondack Scenic Railroad Locomotive Vandalized, North County Public Radio Web site, October 15, 2013.

five percent of locomotive cabs are occupied at least once per year. FRA believes that the cost per incident is $100, including costs to clean debris and inspect to determine that nothing in the cab has been damaged. This cost represents 20 minutes delay with a train delay cost. The economic impact of slowing trains depends upon multiple factors including other types of trains, other train speeds, dispatching requirements, work zones, and topography. Looking at numerous variables, for purposes of another analysis, DOT estimated the average cost of a train delay to be $500 per hour.[30] This cost estimate was determined by reviewing costs associated with crew members, supply chain logistic time delays based on various freight commodities, and passenger operating costs for business and other travel. It is reasonable to assume that delays to smaller railroad operations are lower in cost. Thus, for purposes of this analysis, for the impacted railroads, FRA is using an hourly train delay cost of $300 per hour. FRA requests comment regarding this assumption. Thus the cost per year for 500 locomotives would be 500 times 5 percent times $100, or $2,500, or $5 per locomotive year. Added to the vandalism cost the total cost of exposure would be $35 per locomotive year. If an installation of a locking mechanism costs $100, it would take less than 3 years for the locks to pay for themselves (before applying discount factors). FRA believes that in the absence of this rule most small railroads would apply locking mechanisms to locomotives left unattended outside of yards, especially in light of the vandalism incident on the Adirondack Scenic Railroad. FRA believes the net cost of installing and using the locks for small railroads is less than zero because the installation cost is more than offset by the business benefits. FRA did not receive any comments taking issue with FRA's estimates of locomotive vandalism costs.

FRA assumes the locks will be purchased in the first year, because the business benefit is apparent. Thus, the costs are $100 times 500 locomotives, or $50,000, the same at both discount rates because 2015 is not discounted.

Year	Total costs	Discounted value	
		Discount factor	
		7%	3%
2015	$50,000.00	$50,000	$50,000
Total	50,000.00	50,000	50,000
Annualized	.....	4,411	3,263

A more serious crime with far more potential to cause harm off the railroads' rights-of-way is theft and operation of a train. In 1975, two teenagers stole a switching locomotive and operated it until it crashed.[31] FRA staff has received anecdotal information regarding other locomotives being stolen and operated, but permanent records of the incidents could not be found. If a train described in § 232.103(n)(6) were stolen and operated, it could easily cause the kinds of harm seen at in the Graniteville, South Carolina accident and the Lac Mégantic incident, with societal costs of $260 million to $1.2 billion. The Lac Mégantic incident is illustrative of, but not necessarily the outer limit of, a high-consequence event scenario for derailment of a paragraph (n)(6) train. The derailment occurred in a small town with a low population density by U.S. standards, but resulted in the deaths of 47 people and the destruction of much of the downtown area. A year after the event, decontamination of the soil and water/sewer systems is still ongoing. Cleanup of the lake and river that flows from it has not been completed, and downstream communities are still using alternative sources for drinking water. Initial estimates of the cost of this event were roughly $1 billion, but the cleanup costs have doubled from initial estimates of $200 million to at least $400 million, and the total cost to clean up, remediate, and rebuild the town could rise as high as $2.7 billion. The frequency and magnitude of these events is highly uncertain. It is, therefore, difficult to predict with any precision how many of these higher consequence events may occur over the coming years, or how costly these events may be. In the worst case scenario for a fatal event, the results could be several times the damages seen at Lac Mégantic both in loss of life and other associated costs.

In estimating the damages of a higher-consequence event, we begin with the current estimated damages of Lac Mégantic. We used this accident to illustrate the potential benefits of preventing or mitigating events of this magnitude. It is challenging to use this one data point to model potential damages of higher consequence events that differ in nature from the Lac Mégantic accident. However, as the volume of crude oil shipped by rail continues to grow, it is reasonable to assume that events of this magnitude may occur.

By installing locks to avoid such dangers, the benefits indicated in the following table are $17,500 per year ($35 times 500 locomotives), starting in 2016, the year after the locks are installed.

[30] In analyzing the NPRM, FRA noted that PHMSA's proposed rule ''Hazardous Materials: Enhanced Rail Tank Car Standards and Operational Controls for High-Hazard Flammable Trains'' applied a $500 per hour estimate of the cost of delay for the rail network overall. 79 FR 45015, Aug. 1, 2014. There were no comments to the NPRM taking issue with that estimate, and FRA continues to use that estimate here.

[31] Pierce Haviland, The Putnam Division, last updated November 10, 2010, available at *http://piercehaviland.com/rail/putnam.html* This incident was probably not reportable because it occurred on an abandoned railroad, no longer part of the general system of rail transportation.

Year	Total benefits	Discounted value	
		Discount factor	
		7%	3%
2015	$0.00	$0	$0
2016	17,500.00	16,355	16,990
2017	17,500.00	15,285	16,495
2018	17,500.00	14,285	16,015
2019	17,500.00	13,351	15,549
2020	17,500.00	12,477	15,096
2021	17,500.00	11,661	14,656
2022	17,500.00	10,898	14,229
2023	17,500.00	10,185	13,815
2024	17,500.00	9,519	13,412
2025	17,500.00	8,896	13,022
2026	17,500.00	8,314	12,642
2027	17,500.00	7,770	12,274
2028	17,500.00	7,262	11,917
2029	17,500.00	6,787	11,570
2030	17,500.00	6,343	11,233
2031	17,500.00	5,928	10,905
2032	17,500.00	5,540	10,588
2033	17,500.00	5,178	10,279
2034	17,500.00	4,839	9,980
Total		180,873	250,666
Annualized		15,956	16,358

In addition to the above noted benefits, the final rule itself reduces costs—by removing the requirement to record securement activities, provided under Emergency Order 28—by $86,700 per year, with no decrease in safety. In FRA's view, these savings more than offset the minor costs associated with the final rule.

Year	Total benefits	Discounted value	
		Discount factor	
		7%	3%
2015	$86,700.00	$86,700	$86,700
2016	86,700.00	81,028	84,175
2017	86,700.00	75,727	81,723
2018	86,700.00	70,773	79,343
2019	86,700.00	66,143	77,032
2020	86,700.00	61,816	74,788
2021	86,700.00	57,772	72,610
2022	86,700.00	53,992	70,495
2023	86,700.00	50,460	68,442
2024	86,700.00	47,159	66,448
2025	86,700.00	44,074	64,513
2026	86,700.00	41,191	62,634
2027	86,700.00	38,496	60,810
2028	86,700.00	35,977	59,038
2029	86,700.00	33,624	57,319
2030	86,700.00	31,424	55,649
2031	86,700.00	29,368	54,029
2032	86,700.00	27,447	52,455
2033	86,700.00	25,651	50,927
2034	86,700.00	23,973	49,444
Total		982,796	1,328,573
Annualized		86,700	86,700

FRA calculated the total monetized costs of the rule, with the costs for locomotive lock installation accounted for only for the first year:

Year	Wage inflator (%)	Direct wage cost	All other costs	Total costs	Discounted value	
					Discount factor	
					7%	3%
2015	101.18	$1,315.34	$51,800	$53,115.34	$53,115	$53,115

Year	Wage inflator (%)	Direct wage cost	All other costs	Total costs	Discounted value	
					Discount factor	
					7%	3%
2016	102.37	1,330.86	1,800	3,130.86	2,926	3,040
2017	103.58	1,346.57	1,800	3,146.57	2,748	2,966
2018	104.80	1,362.45	1,800	3,162.45	2,582	2,894
2019	106.04	1,378.53	1,800	3,178.53	2,425	2,824
2020	107.29	1,394.80	1,800	3,194.80	2,278	2,756
2021	108.56	1,411.26	1,800	3,211.26	2,140	2,689
2022	109.84	1,427.91	1,800	3,227.91	2,010	2,625
2023	111.14	1,444.76	1,800	3,244.76	1,888	2,561
2024	112.45	1,461.81	1,800	3,261.81	1,774	2,500
2025	113.77	1,479.06	1,800	3,279.06	1,667	2,440
2026	115.12	1,496.51	1,800	3,296.51	1,566	2,381
2027	116.47	1,514.17	1,800	3,314.17	1,472	2,324
2028	117.85	1,532.04	1,800	3,332.04	1,383	2,269
2029	119.24	1,550.11	1,800	3,350.11	1,299	2,215
2030	120.65	1,568.40	1,800	3,368.40	1,221	2,162
2031	122.07	1,586.91	1,800	3,386.91	1,147	2,111
2032	123.51	1,605.64	1,800	3,405.64	1,078	2,060
2033	124.97	1,624.58	1,800	3,424.58	1,013	2,012
2034	126.44	1,643.75	1,800	3,443.75	952	1,964
Total					86,685	99,909
Annualized					7,647	6,520

FRA calculated the total monetized benefits of the rule, which includes savings from relief of Emergency Order 28's recordation requirement for each year plus savings provided each year from the use of locomotive locks after the first year of installation:

Year	Total benefits	Discounted value	
		Discount factor	
		7%	3%
2015	$86,700.00	$86,700	$86,700
2016	104,200.00	97,383	101,165
2017	104,200.00	91,012	98,218
2018	104,200.00	85,058	95,358
2019	104,200.00	79,494	92,580
2020	104,200.00	74,293	89,884
2021	104,200.00	69,433	87,266
2022	104,200.00	64,891	84,724
2023	104,200.00	60,645	82,256
2024	104,200.00	56,678	79,861
2025	104,200.00	52,970	77,535
2026	104,200.00	49,505	75,276
2027	104,200.00	46,266	73,084
2028	104,200.00	43,239	70,955
2029	104,200.00	40,411	68,888
2030	104,200.00	37,767	66,882
2031	104,200.00	35,296	64,934
2032	104,200.00	32,987	63,043
2033	104,200.00	30,829	61,207
2034	104,200.00	28,812	59,424
Total		1,163,669	1,579,240
Annualized		102,656	103,058

Summary of the Costs and Benefits

To summarize the above identified costs and benefits, FRA tabulated the contributions of each item to the total discounted costs and benefits over 20 years.

Discounted values	Discounted value	
	Discount factor	
	7%	3%
Costs		
Attending Trains	$36,685	$49,909
Installing Locks	50,000	50,000
Total Costs	86,685	99,909
Benefits		
Reduced Vandalism	180,873	250,666
Reduced Recordkeeping	982,786	1,328,573
Total Benefits	1,163,669	1,579,240

For further distillation, FRA calculated the net benefits over 20 years:

Discounted values net benefits	Discounted value	
	Discount factor	
	7%	3%
Total	$1,076,984	$1,479,331
Annualized	95,009	96,538

The costs that are not directly offset by a monetized benefit are the annual costs of either attending locomotives or expediting their repair. Above, FRA estimates the annualized cost beyond current business practices at $3,236–$3,257 per year.[32] These costs are balanced against an incident with costs of $260 million to $1.2 billion, but with extremely low probability. The incidents avoided by attendance provisions would only occur where the train was not equipped with functioning locking mechanisms under conditions where the railroad would have sent a repair team out to the location of the train to repair the locking mechanism or would have sent a qualified employee to attend the train, roughly ten events per year. As discussed above, these situations would involve a locomotive that is left running either to avoid cold weather starting or to avoid a brake test when the next crew takes charge of the train. The number of events estimated is based on professional judgment. If the event avoided is $330 million,[33] and the annual cost is less than $3,300 for ten events, then the rule costs about $330 per event and would roughly break even if one in a million events of leaving a locomotive consist for one of the regulated trains unattended with an unlocked cab and a reverser unsecured in the cab were to result in a higher-consequence incident. FRA believes the small but relatively predictable annual cost is justified by the hard to measure very small probability, very high consequence incident risk avoided. The portion of the rule requiring attendance of a train with inoperative locking mechanisms will not affect the likelihood of such an incident where the locking mechanism is functioning or where railroad does not comply with the rule.

The remainder of Emergency Order 28 and the final rule do not impose costs beyond expected business practices. FRA believes that the business benefits of installing locking mechanisms and locking locomotive cabs return net benefits to the railroads. FRA believes that locking the locomotive cab or removing the reverser will reduce the likelihood of a higher-consequence event. FRA believes the continuing requirements from Emergency Order 28 or the requirements of the final rule will provide more opportunities to sever the potential causal chain of a low-probability high-consequence event. Thus, FRA rejects the alternative of simply removing Emergency Order 28.

Alternatives Considered

FRA considered as an alternative requiring all trains subject to § 232.103(n)(6) to be attended if left stopped outside yards, without regard to the presence of a locking mechanism or reverser. FRA believes that railroads would work to enhance routing and crew scheduling so that of the 1,000 affected trains per day, only 50 would require unattended stops outside of yards. The cost per event to attend a train would be $470 per incident. The daily cost would be 50 times $470, or $23,500. The annual cost would be $8,577,500.

FRA believes the final rule is as effective as the alternative considered, at much lower cost. Thus, FRA rejected the more restrictive alternative. FRA further believes that given the tradeoff between the certainty of relatively low costs and the benefit of very low-probability yet very high-consequence incidents, the final rule is a reasonable approach. In the NPRM FRA requested comments on all aspects of this analysis. The comments FRA received are discussed above.

Regulatory Flexibility Act and Executive Order 13272

To ensure that the impact of this rulemaking on small entities is properly considered, FRA developed this final rule in accordance with Executive Order

[32] This cost is slightly increased by the increase in value of real wages over time.

[33] This estimate falls between the damages of Graniteville and Lac-Mégantic. It is selected only for illustrative purposes.

13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's policies and procedures to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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.

As discussed in the preamble above, FRA is amending regulations affecting securement of certain trains carrying particular hazardous materials in particular quantities, and requiring that cabs of all locomotives left unattended, except for those left unattended on main tracks that are in or adjacent to yards, be equipped with locking mechanisms. FRA is certifying that this final rule will result in ''no significant economic impact on a substantial number of small entities.'' The following section explains the reasons for this certification.

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. In this case, the ''universe'' will be Class III freight railroads that own locomotives or that have traffic including trains that would be subject to § 232.103(n)(6).

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.'' ''Small entity'' is defined in the Act as a small business that is independently owned and operated, and is not dominant in its field of operation. Additionally, section 601(5) defines ''small entities'' as 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 policy that formally establishes ''small entities'' as railroads which meet the line haulage revenue requirements of a Class III railroad.[34] The revenue requirements are currently $20 million or less in annual operating revenue. The $20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) [35] is based on the Surface Transportation Board's (STB) threshold for a Class III railroad carrier. FRA is using the STB's threshold in its definition of ''small entities'' for this rule.

FRA believes that virtually all small railroads on the general system of rail transportation will be affected by this rule, as there are almost no railroads that do not own at least one locomotive. There are 671 small railroads on the general system of rail transportation.

As noted above, no small entities are expected to incur any costs under § 232.103. Small entities owning locomotives may incur a cost to install a locking mechanism under § 232.105, but as also noted above, the locking mechanisms will pay for themselves in reduced vandalism costs in less than three years. FRA believes that at least 90 percent of affected locomotives are already equipped with locking mechanisms, and the cost to install a locking mechanism is $100 for a mechanism that does not have to comply with AAR standards for interchange. Any small railroad's locomotives operated in interchange service would have to have AAR compliant locks to remain in interchange service, but that is not a cost of the rule. Thus, the rule will impose a cost of $100 on about ten percent of locomotives, but the investment will pay for itself in less than three years. FRA believes this is not a substantial impact on any small entity.

Further, small railroads will benefit from a reduction in recordkeeping requirements, as described above.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FRA Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In the NPRM, FRA requested comment on both this analysis and the certification, and its estimates of the impacts on small railroads. The only comment FRA received was that the unit cost of locks for small railroads would be more than $100, exceeding even the AAR-estimated unit cost of $210 per locomotive. For reasons discussed in the Regulatory Impact section above, FRA rejects that comment.

B. Paperwork Reduction Act

The information collection requirements in this 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 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
229.27—Annual tests	30,000 locomotives	120,000 tests	15 minutes	30,000 hours.
232.3—Applicability—Export, industrial, & other cars not owned by railroads—identification.	655 railroads	8 cards	10 minutes	1 hour.
232.7—Waivers	655 railroads	10 petitions	160 hours	1,600 hours.
232.15—Movement of Defective Equipment—Tags/Records.	1,620,000 cars	128,400 tags/records.	2.5 minutes	5,350 hours.
—Written Notification	1,620,000 cars	25,000 notices	3 minutes	1,250 hours.
232.17—Special Approval Procedure				
—Petitions for special approval of safety—critical revision.	655 railroads	1 petition	100 hours	100 hours.
—Petitions for special approval of pre-revenue service acceptance plan.	655 railroads	1 petition	100 hours	100 hours.
—Service of petitions	655 railroads	1 petition	20 hours	20 hours.
—Statement of interest	Public/railroads	4 statements	8 hours	32 hours.

[34] *See* 68 FR 24891, May 9, 2003; 49 CFR part 209, app. C.

[35] For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Comment	Public/railroads	13 comments	4 hours	52 hours.
232.103—Gen'l requirements—all train brake systems—Stickers.	114,000 cars	70,000 sticker	10 minutes	11,667 hours.
Proposed Rule New Requirements	Already Fulfilled under OMB No. 2130–0601.	Fulfilled under OMB No. 2130–0601.	Fulfilled under OMB No. 2130–0601.	Fulfilled under OMB No. 2130–0601.
232.103(n)(3)(iv)—RR Procedure for Securing Unattended Locomotive.				
232.103(n)(7)—RR Plan Identifying Specific Locations or Circumstances where Equipment May Be Left Unattended.	655 railroads	10 revised plans	10 hours	100 hours.
—Notification to FRA When RR Develops and Has Plan in Place or Modifies Existing Plan.	655 railroads	10 notices	30 minutes	5 hours.
232.103(n)(8)—Employee Verification with Another Qualified Employee of Securement of Freight Train or Freight Car Left Unattended.	Included under Sec. 232.103(n)(9).	Included Under Sec. 232.103(n)(9).	Included under Section 232.103(n)(9).	Included under Sec. 232.103(n)(9).
232.103(n)(9)—RR Implementation of Op. Rules/Practices Requiring Job Briefing for Securement of Unattended Equipment.	655 railroads	491 revised rules/practices.	2 hours	982 hours.
—Securement Job Briefings	100,000 Employees.	23,400,000 job briefings.	30 seconds	195,000 hours.
232.103(n)(10)—RR Adoption of Procedure for Verification of Securement of Equipment by Qualified Employee.	655 railroads	12 inspections/records.	4 hours	48 hours.
—Inspection of Equipment by Qualified Employee after Responder Visit.				
—Procedure for Alternative Securement *(New Requirement)*.	655 railroads	655 procedures	1 hour	655 hours.
232.105—General requirements for locomotives—Inspection.	30,000 Locomotives.	30,000 forms	5 minutes	2,500 hours.
Proposed Rule New Requirements				
232.105(h)—RR Inspection of Locomotive Exterior Locking Mechanism/Records.	30,000 Locomotives.	30,000 insp./records.	30 seconds	250 hours.
—RR Repair, where necessary, of Locomotive Exterior Locking Mechanism.	30,000 Locomotives.	73 repairs/records	60.25 minutes	73 hours.
232.107—Air source requirements and cold weather operations—Monitoring Plan (Subsequent Years).	10 new railroads	1 plan	40 hours	40 hours.
—Amendments/Revisions to Plan	50 railroads/plans	10 revisions	20 hours	200 hours.
—Recordkeeping	50 railroads/plans	1,150 records	20 hours	23,000 hours.
232.109—Dynamic brake requirements—status/record	655 railroads	1,656,000 rec	4 minutes	110,400 hours.
—Inoperative dynamic brakes: repair record	30,000 locomotives	6,358 records	4 minutes	424 hours.
—Tag bearing words "inoperative dynamic brakes"	30,000 locomotives	6,358 tags	30 seconds	53 hours.
—Deactivated dynamic brakes (Sub. Yrs.)	8,000 locomotives	10 markings	5 minutes	1 hour.
—Operating rules (Subsequent Years)	5 new railroads	5 rules	4 hours	20 hours.
—Amendments/Revisions	655 railroads	15 revisions	1 hour	15 hours.
—Requests to increase 5 mph Overspeed restriction	655 railroads	5 requests	30 min. + 20 hours	103 hours.
—Knowledge criteria—locomotive engineers—Subsequent Years.	5 new railroads	5 amendments	16 hours	80 hours.
232.111—Train information handling—Sub. Yrs.—Amendments/Revisions.	5 new railroads	5 procedures	40 hours	200 hours
	100 railroads	100 revisions	20 hours	2,000 hours.
—R655 report requirements to train crew	655 railroads	2,112,000 reports	10 minutes	352,000 hours.
232.203—Training requirements—Tr. Prog.—Sub Yr.	15 railroads	5 programs	100 hours	500 hours.
—Amendments to written program	655 railroads	559 revisions	8 hours	4,472 hours.
—Training records	655 railroads	67,000 records	8 minutes	8,933 hours.
—Training notifications	655 railroads	67,000 notices	3 minutes	3,350 hours.
—Audit program	655 railroads	1 plan + 559 copies.	40 hours/1 min.	49 hours.
—Amendments to validation/assessment program	655 railroads	50 revisions	20 hours	1,000 hours.
232.205—Class 1 brake test—Notifications/Records	655 railroads	1,646,000 notices/records.	45 seconds	20,575 hours.
232.207—Class 1A brake tests—Designation Lists Where Performed.	655 railroads	5 lists	1 hour	5 hours.
Subsequent Years: Notice of Change to	655 railroads	250 notices	10 minutes	42 hours.
232.209—Class II brake tests—intermediate "Roll-by inspection"—Results to train driver.	655 railroads	1,597,400 comments.	3 seconds	1,331 hours.
232.213—Written Designation to FRA of Extended haul trains.	83,000 long dist. movements.	250 letters	15 minutes	63 hours.
232.303—General requirements—single car test: Tagging of Moved Equipment.	1,600,000 frgt. cars.	5,600 tags	5 minutes	467 hours.
—Last repair track brake test/single car test	1,600,000 frgt. cars.	320,000 markings	5 minutes	26,667 hours.
—Stenciled on Side of Equipment				
232.305—Single Car Tests—Performance and Records	1,600,000 frgt. cars.	320,000 tests/records.	60 minutes	320,000 hours.
232.307—Modification of single car air brake test procedures: Requests.	AAR	1 request + 3 copies.	100 hours + 5 minutes.	100 hours.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Affirmation Statement on Mod. Req. To Employee Representatives.	AAR	1 statement + 4 copies.	30 minutes + 5 minutes.	1 hour.
—Comments on Modification Request	Railroad/Public	2 comments	8 hours	16 hours.
232.309—Repair track brake test	640 shops	5,000 tests	30 minutes	2,500 hours.
232.403—Unique Code	245 railroads	12 requests	5 minutes	1 hour.
232.407—EOT Operations requiring 2-way Voice Radio Communications.	245 railroads	50,000 verbal comments.	30 seconds	417 hours.
232.409—Inspection/Tests/Records EOTs	245 railroads	447,500 tests/notices/record.	30 seconds	3,729 hours.
—Telemetry Equipment—Testing and Calibration	245 railroads	32,708 units marked.	1 minute	545 hours.
232.503—Process to introduce new brake technology	655 railroads	1 letter	1 hour	1 hour.
—Special approval	655 railroads	1 request	3 hours	3 hours.
232.505—Pre-revenue svc accept. test plan	655 railroads	1 procedure	160 hours	160 hours.
—Submission of maintenance procedure				
—Amendments to maintenance procedure	655 railroads	1 revision	40 hours	40 hours.
—Design description	655 railroads	1 petition	67 hours	67 hours.
—Report to FRA Assoc. Admin. for Safety	655 railroads	1 report	13 hours	13 hours.
—Brake system technology testing	655 railroads	1 description	40 hours	40 hours.
232.603—Configuration Management—Configuration Management Plan (ECP).	4 railroads	1 plan	160 hours	160 hours.
—Subsequent Years—Configuration Management Plans.	4 railroads	1 plan	60 hours	60 hours.
—Request for Modification of Standards and Extra Copies to FRA.	4 railroads	1 request + 2 copies.	8 hours + 5 minutes.	8 hours.
—Affirmative Statements that RRs have served copies of Modification Request to Employee Representatives.	4 railroads	4 statements + 24 copies.	60 minutes + 5 minutes.	6 hours.
—Comments on requested modification	Public/Industry	4 comments	2 hours	8 hours.
232.605—ECP Brakes: Training—Adopt/Developing an ECP Training Program—First Year.	1 railroad	1 program	100 hours	100 hours.
—Subsequent Years—ECP Training Prog.	1 railroad	1 program	100 hours	100 hours.
—ECP Brakes Training of Employees—First Year	1 railroad	1,602 trained employees.	8 hours/24 hrs.	26,480 hours.
—ECP Brakes Training of Employees—Subsequent Years.	2 railroads	1,602 trained employees.	1 hour/8 hours	7,580 hours.
—ECP Training Records—Yr. One	2 railroads	1,602 records	8 minutes	214 hours.
—ECP Training Records—Subsequent Yrs.	2 railroads	1,602 records	4 minutes	107 hours.
—Assessment of ECP Training Plan	2 railroads	1 ECP plan	40 hours	40 hours.
—Adopt Operating Rules for ECP Brakes	2 railroads	1 Oper. Rule	24 hours	24 hours.
—Amended Locomotive Engineer Certification Program (ECP Brakes).	2 railroads	1 amended program.	40 hours	40 hours.
232.607—ECP Inspection and Testing—Initial Terminal—Inspections and Notification/Record of Class I Brake Tests.	1 railroad	2,500 insp.+ 2,500 notices.	90 min. + 45 seconds.	3,781 hours.
—Cars added or removed en route—Class I Brake Test and Notification.	1 railroad	250 inspection + 125 notices.	60 minutes + 45 seconds.	253 hours.
—Non-ECP cars added to ECP Trains—Inspections and Tags for Defective Cars.	200 Cars	50 insp. + 100 tags/records.	5 minutes + 2.5 minutes.	8 hours.
232.609—Handling of Defective Equipment with ECP Brake Systems—Freight Car w/defective conventional brakes moved in train operating in ECP brake mode.	25 Cars	50 tags/records	2.5 minutes	2 hours.
—Inspections/Tagging for ECP Train moving w/less than 85 percent operative/effective brakes.	20 Cars	20 insp. + 40 tags/records.	5 minutes + 2.5 minutes.	3 hours.
—Cars tagged in accordance with Section 232.15	25 Cars	50 tags/records	2.5 minutes	2 hours.
232.609—Conventional Train with stand-alone ECP brake equipped cars—Tagging.	50 Cars	100 tags/records	2.5 minutes	4 hours.
—Procedures for handling ECP brake system repairs and designation of repair locations.	2 railroads	2 procedures	24 hours	48 hours.
—List of repair locations	2 railroads	2 lists	8 hours	16 hours.
—Notification to FRA Safety Administrator regarding change to repair location list.	2 railroads	1 notification	1 hour	1 hour.
232.611—Periodic Maintenance—Inspections before being released from repair Shop.	500 Freight Cars	500 insp./rcds	10 minutes	83 hours.
—Procedures/Petition for ECP Single Car Test	1 Railroad Rep.	1 petition + 2 copies.	24 hours + 5 minutes.	24 hours.
—Single Car Air Brake Tests—Records	50 Freight Cars	50 tests/records	45 minutes	38 hours.
—Modification of Single Car Test Standards	1 Railroad Rep.	1 mod. Proc.	40 hours	40 hours.

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, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Poston, Information Clearance Officer, at 202–493–6073.

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 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 intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

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.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the final rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this final rule does 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 adds requirements to part 232. FRA is not aware of any State having regulations similar to these proposals. 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, revised, reenacted, 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 addition, section 20119(b) authorizes FRA to issue a rule governing the discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained 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 49 U.S.C. 20106 and 20119. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

D. 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 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. 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.

E. Environmental Assessment

FRA has evaluated this rule in accordance with 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 requirements covered under FRA NEPA reviews. FRA has determined that this rule is not a major FRA action as defined in FRA's Procedures (requiring the preparation of an environmental assessment or environmental impact statement) because it is categorically excluded from further environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows:

> (c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded:
>
> * * * (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.

This rule amends existing FRA regulations and strengthen the requirements relating to securement and unattended equipment. Compliance with these requirements would not result in actions that would adversely affect the environment. To the extent that a reduction in safety incidents, in particular hazardous materials releases, prevents adverse environmental impacts, this rule will have the potential for minor environmental benefits. The rule does not require any new infrastructure improvements or changes in railroad operating practices that would result in adverse environmental consequences. As such, FRA does not expect any significant increases in air emissions, water pollution, noise, or traffic congestion. Thus, in accordance with section 4(c) and (e) of FRA's Procedures, the agency concludes that no extraordinary circumstances exist with respect to this proposed regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this rule will not

significantly affect the quality of the human environment and is categorically excluded from further review.

F. 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 the agency prepare a written statement detailing the effect of this rule on State, local, and tribal governments and the private sector:

> [B]efore 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.

For the year 2013, this monetary amount of $100,000,000 has been adjusted to $151,000,000 to account for inflation. This final rule will not result in the expenditure of more than $151,000,000 by the public sector 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 a notice of inquiry, advance NPRM, and NPRM) 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 final rule in accordance with Executive Order 13211. FRA has determined that this final rule 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.

H. Privacy Act

Interested parties should be aware that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://www.dot.gov/privacy.html*.

I. 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 (EJ) 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 the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined that it would not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

J. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this proposed 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 proposed 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.

List of Subjects in 49 CFR Part 232

Hazardous material, Power brakes, Railroad safety, Securement.

The Rule

In consideration of the foregoing, FRA is amending part 232 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 232—[AMENDED]

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

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. Section 232.5 is amended by adding in alphabetical order the definitions of ''Mechanical securement device'' and ''Unattended equipment'', and by removing the word ''limits'' from the defined term ''Yard limits''.

The revisions read as follows:

§ 232.5 Definitions.

* * * * *

Mechanical securement device means a device, other than the air brake, that provides at least the equivalent securement that a sufficient number of hand brakes would provide in the same situation. Current examples include skates, retarders, and inert retarders.

* * * * *

Unattended equipment means equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person.

* * * * *

■ 3. In § 232.103, revise paragraphs (n) introductory text and (n)(1) through (3) and add paragraphs (n)(6) through (11)'' to read as follows:

§ 232.103 General requirements for all train brake systems.

* * * * *

(n) *Securement of unattended equipment.* Unattended equipment shall be secured in accordance with the following requirements:

(1) A sufficient number of hand brakes, to be not fewer than one, shall be applied to hold the equipment unless an acceptable alternative method of securement is provided pursuant to paragraph (n)(11)(i) of this section. Railroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released.

(2) Except for equipment connected to a source of compressed air (*e.g.,* locomotive or ground air source), or as

provided under paragraph (n)(11)(ii) of this section, prior to leaving equipment unattended, the brake pipe shall be reduced to zero at a rate that is no less than a service rate reduction, and the brake pipe vented to atmosphere by leaving the angle cock in the open position on the first unit of the equipment left unattended. A train's air brake shall not be depended upon to hold equipment standing unattended (including a locomotive, a car, or a train whether or not locomotive is attached).

(3) Except for distributed power units, the following requirements apply to unattended locomotives:

(i) All hand brakes shall be fully applied on all locomotives in the lead consist of an unattended train.

(ii) All hand brakes shall be fully applied on all locomotives in an unattended locomotive consist outside of a yard.

(iii) At a minimum, the hand brake shall be fully applied on the lead locomotive in an unattended locomotive consist within a yard.

(iv) A railroad shall develop, adopt, and comply with procedures for securing any unattended locomotive required to have a hand brake applied pursuant to paragraph (n)(3)(i) through (iii) of this section when the locomotive is not equipped with an operative hand brake.

* * * * *

(6)(i) The requirements in paragraph (n)(7) through (8) of this section apply to any freight train or standing freight car or cars that contain:

(A) Any loaded tank car containing a material poisonous by inhalation as defined in § 171.8 of this title, including anhydrous ammonia (UN 1005) and ammonia solutions (UN 3318); or

(B) Twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of a hazardous material listed in paragraph (n)(6)(i)(A) of this section, or any Division 2.1 (flammable gas), Class 3 (flammable or combustible liquid), Division 1.1 or 1.2 (explosive), or a hazardous substance listed at § 173.31(f)(2) of this title.

(ii) For the purposes of this paragraph, a tank car containing a residue of a hazardous material as defined in § 171.8 of this title is not considered a loaded car.

(7)(i) No equipment described in paragraph (n)(6) of this section shall be left unattended on a main track or siding (except when that main track or siding runs through, or is directly adjacent to a yard) until the railroad has adopted and is complying with a plan identifying specific locations or circumstances when the equipment may be left unattended. The plan shall contain sufficient safety justification for determining when equipment may be left unattended. The railroad must notify FRA when the railroad develops and has in place a plan, or modifies an existing plan, under this provision prior to operating pursuant to the plan. The plan shall be made available to FRA upon request. FRA reserves the right to require modifications to any plan should it determine the plan is not sufficient.

(ii) Except as provided in paragraph (n)(8)(iii) of this section, any freight train described in paragraph (n)(6) of this section that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard shall comply with the requirements contained in paragraphs (n)(8)(i) and (n)(8)(ii) of this section.

(8)(i) Where a freight train or standing freight car or cars as described in paragraph (n)(6) of this section is left unattended on a main track or siding outside of a yard, and not directly adjacent to a yard, an employee responsible for securing the equipment shall verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures.

(ii) The controlling locomotive cab of a freight train described in paragraph (n)(6) of this section shall be locked on locomotives capable of being locked. If the controlling cab is not capable of being locked, the reverser on the controlling locomotive shall be removed from the control stand and placed in a secured location.

(iii) A locomotive that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard is excepted from the requirements in (n)(8)(ii) of this section where the locomotive is not equipped with an operative lock and the locomotive has a reverser that cannot be removed from its control stand or has a reverser that is necessary for cold weather operations.

(9) Each railroad shall implement operating rules and practices requiring the job briefing of securement for any activity that will impact or require the securement of any unattended equipment in the course of the work being performed.

(10) Each railroad shall adopt and comply with procedures to ensure that, as soon as safely practicable, a qualified employee verifies the proper securement of any unattended equipment when the railroad has knowledge that a non-railroad emergency responder has been on, under, or between the equipment.

(11) A railroad may adopt and then must comply with alternative securement procedures to do the following:

(i) In lieu of applying hand brakes as required under paragraph (n) of this section, properly maintain and use mechanical securement devices, within their design criteria and as intended within a classification yard or on a repair track.

(ii) In lieu of compliance with the associated requirement in paragraph (n)(2) of this section—and in lieu of applying hand brakes as required under paragraph (n) of this section— isolate the brake pipe of standing equipment from atmosphere if it:

(A) Initiates an emergency brake application on the equipment;

(B) Closes the angle cock; and

(C) Operates the locomotive or otherwise proceeds directly to the opposite end of the equipment for the sole purpose to either open the angle cock to vent to atmosphere or provide an air source.

(iii) Upon completion of the procedure described in paragraph (n)(11)(ii) of this section, the securement requirements of paragraph (n) of this section shall apply.

* * * * *

■ 4. In § 232.105, add paragraph (h) to read as follows:

§ 232.105 General requirements for locomotives.

* * * * *

(h)(1) After March 1, 2017, each locomotive left unattended outside of a yard, but not on a track directly adjacent to the yard, shall be equipped with an operative exterior locking mechanism.

(2) The railroad shall inspect and, where necessary, repair the locking mechanism during a locomotive's periodic inspection required in § 229.23 of this chapter.

(3) In the event that a locking mechanism becomes inoperative during the time interval between periodic inspections, the railroad must repair the locking mechanism within 30 days of finding the inoperative lock.

(4) A railroad may continue the use of a locomotive without an operative locking mechanism; however, if the controlling locomotive of a train meeting the requirements of § 232.103(n)(6)(i) does not have an operative locking mechanism for the locomotive, the train must not be left unattended on main track or a siding unless the reverser is removed from the control stand as required in § 232.103(n)(8)(ii) or the locomotive

otherwise meets one of the exceptions described in § 232.103(n)(8)(iii).

■ 5. In appendix A to part 232, revise the entry for § 232.103(n) and add an entry for § 232.105(h) to read as follows:

Appendix A to Part 232—Schedule of Civil Penalties [1]

Section	Violation	Willful Violation
* * * * * * *		
232.103 General requirements for all train brake systems:		
* * * * * * *		
(n) Securement of unattended equipment.		
(1) Failure to apply sufficient number of hand brakes; failure to develop or implement procedure to verify number applied	5,000	7,500
(2) Failure to initiate emergency or depend upon air brake	2,500	5,000
(3) Failure to apply hand brakes on locomotives	2,500	5,000
(4) Failure to adopt or comply with procedures for securing unattended locomotive	5,000	7,500
(5) Release of hand brakes before brake system is properly charged	5,000	7,500
(7)(i) Failure to adopt or comply with unattended location plan	2,500	5,000
(8)(i) Failure to verify securement	2,500	5,000
(8)(ii) Failure to apply lock or remove and secure reverser	2,500	5,000
(9) Failure implement operating rule for securement job briefing	2,500	2,500
(10) Failure to adopt and comply with securement procedures for after emergency response	2,500	5,000
232.105 General requirements for locomotives:		
* * * * * * *		
(h)(1) Failure to equip with operative locomotive lock	2,500	5,000
(h)(2)–(h)(3) Failure to inspect or timely repair locomotive lock	2,500	5,000
* * * * * * *		

Issued in Washington, DC, on July 27, 2015.

Sarah Feinberg,

Acting Administrator.

[FR Doc. 2015–19002 Filed 8–5–15; 8:45 am]

BILLING CODE 4910–06–P

[1] A penalty may be assessed against an individual only for a willful violation. Generally when two or more violations of these regulations are discovered with respect to a single unit of equipment that is placed or continued in service by a railroad, the appropriate penalties set forth above are aggregated up to a maximum of $25,000 per day. An exception to this rule is the $15,000 penalty for willful violation of § 232.503 (failure to get FRA approval before introducing new technology) with respect to a single unit of equipment; if the unit has additional violative conditions, the penalty may routinely be aggregated to $15,000. Although the penalties listed for failure to perform the brake inspections and tests under § 232.205 through § 232.209 may be assessed for each train that is not properly inspected, failure to perform any of the inspections and tests required under those sections will be treated as a violation separate and distinct from, and in addition to, any substantive violative conditions found on the equipment contained in the train consist. Moreover, 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 for movement of defective equipment set forth in § 232.15(a) will deprive the railroad of the benefit of the movement-for-repair provision and make the railroad and any responsible individuals liable for penalty under the particular regulatory section(s) concerning the substantive defect(s) present on the equipment at the time of movement.

Failure to provide any of the records or plans required by this part pursuant to § 232.19 will be considered a failure to maintain or develop the record or plan and will make the railroad liable for penalty under the particular regulatory section(s) concerning the retention or creation of the document involved.

Failure to properly perform any of the inspections specifically referenced in § 232.209, § 232.213, § 232.217, and subpart G may be assessed under each section of this part or this chapter, or both, that contains the requirements for performing the referenced inspection.

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Part XV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed 2016–17 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–2015–0034: FF09M21200–156–FXMB1231099BPP0]

RIN 1018–BA70

Migratory Bird Hunting; Proposed 2016–17 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 2016–17 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 and Flyway Council (SRC) meetings, describes the regulatory alternatives for the 2016–17 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, you will be given an opportunity to submit comments on this proposed rule and the subsequent proposed frameworks by January 15, 2016. Tribes must submit proposals and related comments on or before December 1, 2015.

Meetings: The SRC will meet to consider and develop proposed regulations for migratory game bird hunting on October 20–21, 2015. 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–2015–0034.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–HQ–MB–2015–0034; 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 SRC will meet 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 will provide dates much earlier than was possible under the old process. This will make planning much easier for the States and all parties interested in migratory bird hunting. Beginning with the 2016–17 hunting season, we are using a new schedule for establishing our annual migratory game bird hunting regulations. We will combine the current early- and late-season regulatory actions into a single process, based on predictions derived from long-term biological information and established harvest strategies that will establish migratory bird hunting seasons much earlier than the system we have used for many years. Under the new process, we will develop proposed hunting season frameworks for a given year in the fall of the prior year. We will 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 implementing this new process. This year, there will be a one-time overlap in the regulatory processes for the 2015–16 and 2016–17 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 International Association of Fish and Wildlife Agencies (IAFWA), also assist in researching and providing migratory game bird management information for Federal, State, and Provincial governments, as well as private conservation agencies 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 20–21, 2015, to review information on the current status of migratory game birds and develop 2016–17 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 September and October. Although agendas are not yet available, these meetings usually commence at 8 a.m. on the days indicated. Several of the meetings will be conducted via conference call.

Atlantic Flyway Council: October 6.

Mississippi Flyway Council: September 30.

Central Flyway Council: October 8, Holiday Inn and Suites, 6900 Tower Road, Denver, CO.

Pacific Flyway Council: September 22.

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 2016–17 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 2016–17 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 2016–17 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 2016–17

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 2016–17 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 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 regulatory alternatives for the 2016–17 duck hunting seasons are contained at the end of this document. We will publish proposed season frameworks in mid-December 2015. We will publish final regulatory frameworks in late February 2016.

Review of Public Comments

This proposed rulemaking contains the regulatory alternatives for the 2016–17 duck hunting seasons. This proposed rulemaking also describes other recommended changes or specific preliminary proposals that vary from the 2015–16 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 2016–17 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)—Dave Scott, 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)—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 2016–17 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 2016–17 hunting season should submit their proposals no later than December 1, 2015. 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 2014–15,'' with its corresponding August 21, 2014, 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 2016–17 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 2016–17 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, and the 2015–16 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–2015–0034.

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–2015–0034.

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, these rules 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 2016–17 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 2016–17 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: July 9, 2015.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Proposed 2016–17 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 2015–16 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 2016–17 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 New England 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 2016–17 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

For the 2016–17 season, the current early- and late-season regulatory actions will be combined into a new single process. Migratory bird hunting regulations will be 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 state each spring followed by an updating of model weights and the derivation of an optimal harvest policy that was then used to make a state-dependent decision (*i.e.,* breeding population estimates were used with a policy matrix to inform harvest regulatory decisions). The system's state then evolves over time in response to the decision and natural variation in population dynamics. The following spring, the monitoring programs observe the state 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's state 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's and model's states. To address this issue, we adjusted the optimization procedures to calculate harvest values conditional on the last observed state 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 exhibited knife-edged 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 2016–17 AHM Protocol

We will detail the final AHM protocol for the 2016–17 season in the supplemental proposed rule, which we will publish in mid-December (see Schedule of Biological Information Availability, Regulations Meetings and

Federal Register Publications for the 2016–17 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 2016–17 seasons after information becomes available in late August 2015.

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 2016–17, we propose to utilize the same regulatory alternatives that are in effect for the 2015–16 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 is in 2016, for use during the 2016–20 period. However, as we discussed in the September 23, 2014, **Federal Register** (79 FR 56864), and the April 13, 2015, **Federal Register** (80 FR 19852), we are implementing significant changes to the annual regulatory process as outlined in the 2013 SEIS. As such, the previously identified May 1, 2016, due date for zone and split season configuration changes that was developed under the current regulatory process, is 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 we anticipate publishing the proposed rule for all 2016–17 migratory bird seasons sometime this fall—approximately 30 days after the SRC meeting (which is scheduled for October 27–29, 2015). A final rule tentatively would be published 75 days after the proposed rule (but no later than April 1). This schedule would preclude inclusion of new zone descriptions in the proposed rule as had been done in past open seasons and would not be appropriate because it would preclude the ability for the public to comment on these new individual State zone descriptions. Therefore, we need to include any new proposed 2016–20 zone descriptions in the 2016–17 hunting seasons proposed rule document that will tentatively be published in mid-December this year.

Considering all of the above, we will utilize a two-phase approach. For those States wishing to change zone and split season configurations in time for the 2016–17 season, we will need to receive new configuration and zone descriptions by December 1, 2015. States that do not send in new zone and split season configuration changes until the previously identified May 1, 2016, deadline will have those changes implemented in the 2017–18 hunting season. The next scheduled open season would remain in 2021 for the 2021–25 seasons.

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

i. September Teal Seasons

For the 2016–17, we will utilize the 2015 breeding population estimate of 8.3 million blue-winged teal from the traditional survey area and the criteria developed for the teal season harvest strategy. Thus, we will propose a 16-day September teal season in the Atlantic, Central, and Mississippi Flyways for 2016.

iv. Canvasbacks

Since 1994, we have 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 current 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 current canvasback harvest management strategy will no longer be 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, 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 one-time decision-making approach in October for the 2016–17 seasons. Over the next year, we will work with the Flyway technical committees and councils to develop a new harvest strategy for use in subsequent years.

6. Brant

As we discussed in the June 11 (80 FR 33223) and July 21 (80 FR 43266), 2015, **Federal Registers**, for the 2015–16 Atlantic brant season, we will continue to use the existing Flyway Cooperative Management Plan for this species to determine the appropriate hunting regulations. However, as we discuss below, the process for determining regulations for the 2016–17 season will need to be modified. In the April 30, 2014 (79 FR 24512), and the April 13, 2015 (80 FR 19852), **Federal Registers**, we discussed how, under the new regulatory process, the current early- and late-season regulatory actions will be combined into a new, single process beginning with the 2016–17 seasons. Regulatory proposals will be developed using biological data from the preceding year(s), model predictions, and/or most recently accumulated data that are available at the time the proposals are being formulated. Individual harvest strategies will be modified using data from the previous year(s) because the current year's data would not be available for many of the strategies. Further, we stated that during this transition period, harvest strategies and prescriptions would be modified to fit into the new regulatory schedule. Atlantic brant is one such species that will require some modifications to the regulatory process that we have largely used since 1992 to establish the annual frameworks.

In developing the annual proposed frameworks for Atlantic brant in the past, the Atlantic Flyway Council and the Service used the number of brant counted during the Mid-winter Waterfowl Survey (MWS) in the Atlantic Flyway, and took into consideration the brant population's expected productivity that summer. The MWS is conducted each January, and expected brant productivity is based on early-summer observations of breeding habitat conditions and nesting effort in important brant nesting areas. Thus, the data under consideration were available before the annual Flyway and SRC decision-making meetings took place in late July. Although the existing regulatory alternatives for Atlantic brant were developed by factoring together long-term productivity rates (observed during November and December productivity surveys) with estimated observed harvest under different framework regulations, the primary decision-making criterion for selecting the annual frameworks was the MWS count.

In the April 13, 2015, **Federal Register**, we presented the major steps in the 2016–17 regulatory cycle relating to biological information availability, open public meetings, and **Federal Register** notifications. Under the new regulatory schedule due to be implemented this fall and winter for the 2016–17 migratory bird hunting regulations, neither the expected 2016 brant production information (available summer 2016) nor the 2016 MWS count (conducted in January 2016) will be available this October, when the decisions on proposed Atlantic brant frameworks for the 2016–17 seasons must be made. However, the 2016 MWS will be completed and winter brant data will be available by the expected publication of the final frameworks (late February 2016). Therefore, following discussions with the Atlantic Flyway Council this fall, we will be proposing frameworks for Atlantic brant in 2016–17 using the process and alternatives very similar to that laid out in the July 21, 2015, **Federal Register**.

For a more detailed discussion of the various technical aspects of the new regulatory process, we refer the reader to the 2013 SEIS on our Web site at *http://www.fws.gov/migratorybirds/pdf/management/AHM/SEIS&AHMReportFinal.pdf.*

9. Sandhill Cranes

As we discussed in the July 21, 2015, **Federal Register** (80 FR 43266), the current harvest strategy used to calculate the allowable harvest of Rocky Mountain Population (RMP) of sandhill cranes does not fit well within the the new regulatory process, similar to the Atlantic brant issue discussed above under 6. Brant. Currently, results of the fall survey of RMP sandhill cranes, upon which the annual allowable harvest is based, will continue to be released between December 15 and January 31 each year, which is after the date for which proposed frameworks

will be formulated in the new regulatory process. If the usual procedures for determining allowable harvest were used, data 2–4 years old would be used to determine the annual allocation for RMP sandhill cranes. Due to the variability in fall survey counts and recruitment for this population, and their impact on the annual harvest allocations, we agree that relying on data that is 2–4 years old is not ideal. Thus, we agreed that a formula to determine the annual allowable harvest for RMP sandhill cranes should be used under the new regulatory schedule and proposed to use as such. That formula uses information on abundance and recruitment collected annually through operational monitoring programs, as well as constant values based on past research or monitoring for survival of fledglings to breeding age and harvest retrieval rate. The formula is:

$$H = C \times P \times R \times L \times f$$

Where:

H = total annual allowable harvest;
C = the average of the three most recent, reliable fall population indices;
P = the average proportion of fledged chicks in the fall population in the San Luis Valley during the most recent 3 years for which data are available;
R = estimated recruitment of fledged chicks to breeding age (current estimate is 0.5);
L = retrieval rate of 0.80 (allowance for an estimated 20 percent crippling loss based on hunter interviews); and
f = (C/16,000) (a variable factor used to adjust the total harvest to achieve a desired effect on the entire population)

We note that this proposed formula is identical to that used in the current Pacific and Central Flyway management plan for this population.

A final estimate for the allowable harvest would be available to publish in the final rule, allowing us to use data that is 1–3 years old, as is currently practiced. We look forward to continuing discussions and work on the RMP crane issue with the Central and Pacific Flyway Councils this summer and fall in preparation for the 2016–17 season.

16. Doves

As we discussed in the April 13 and July 21, 2015, **Federal Registers**, 2016 is 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 have decided that a two-phase approach is appropriate. For those States wishing to change zone and split season configurations in time for the 2016–17 season, we will need to receive that new configuration and zone descriptions by December 1, 2015. For those States that do not send in zone and split season configuration changes until the previously identified May 1, 2016, we will implement those 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.

REGULATORY ALTERNATIVES FOR DUCK HUNTING DURING THE 2016-17 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
Species/Sex Limits within the Overall Daily Bag Limit												
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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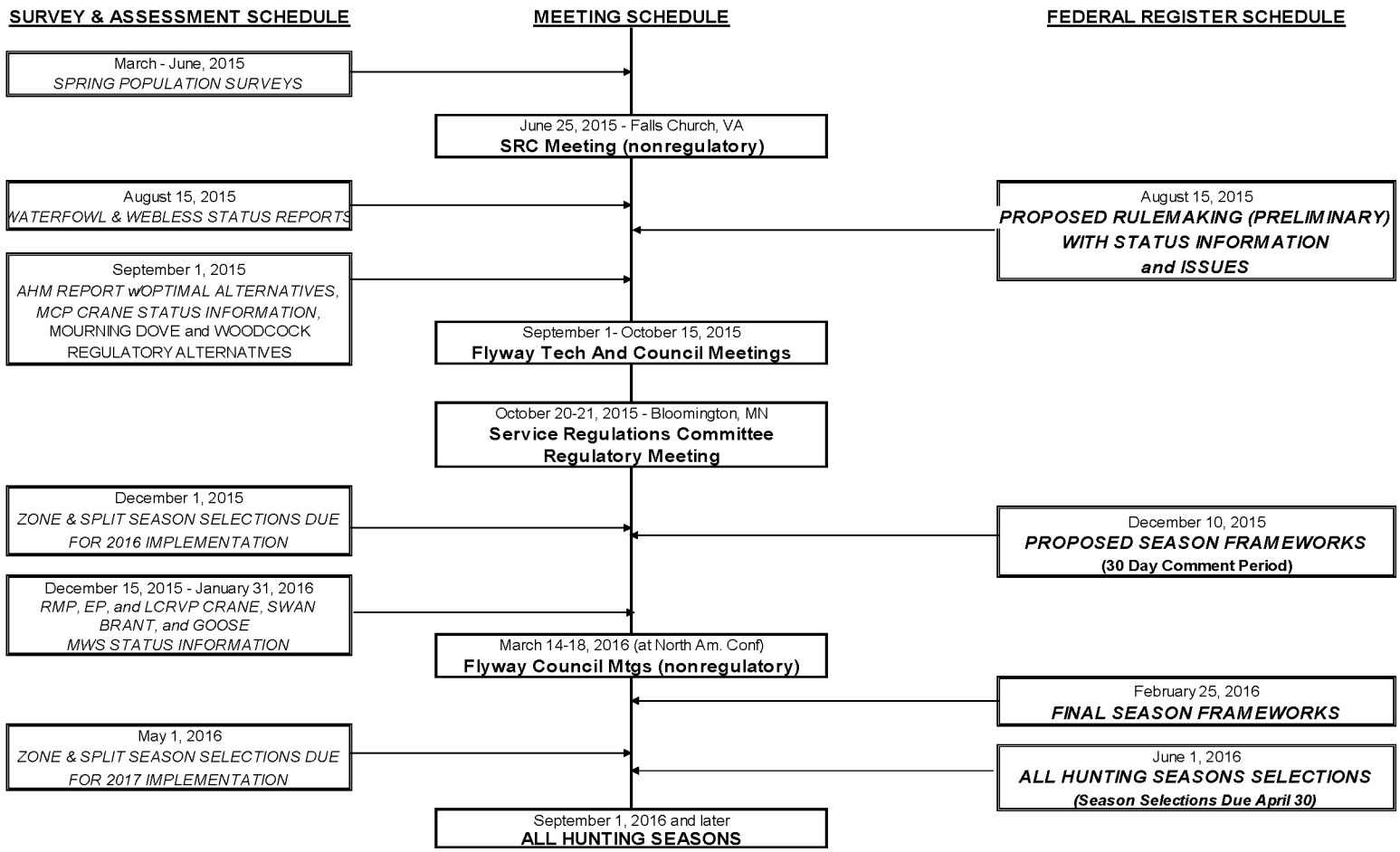

[FR Doc. 2015–19318 Filed 8–5–15; 8:45 am]
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Federal Register

Vol. 80, No. 151

Thursday, August 6, 2015

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FEDERAL REGISTER PAGES AND DATE, AUGUST

45841–46180 3
46181–46484 4
46485–46788 5
46789–47398 6

CFR PARTS AFFECTED DURING AUGUST

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Proposed Rules:
3474 47254

3 CFR

Proclamations:
9305 46175
Executive Orders:
13702 46177
13703 46181

6 CFR

Proposed Rules:
19 47284

7 CFR

6 46185
1208 46789
Proposed Rules:
16 47244
1051 47210
3560 46853

10 CFR

1 45841
37 45841
40 45841
50 45841
55 45841
74 45841
75 45841
429 46730
430 46730
Proposed Rules:
429 ..... 46855, 46870
430 ..... 46521, 46855
431 46870

12 CFR

701 45844

14 CFR

39 ..... 45851, 45853, 45857, 46187
65 46791
97 ..... 45860, 45862
1217 45864
Proposed Rules:
39 ..... 45900, 45902, 46206
71 46525

19 CFR

351 46793

21 CFR

73 46190
866 46190
874 46192
878 46485

22 CFR

Proposed Rules:
205 47238

24 CFR

5 46486
Proposed Rules:
5 47302
92 47302
570 47302
574 47302
576 47302
578 47302
582 47302
583 47302
1003 47302

26 CFR

1 ..... 45865, 46795
602 ..... 45865, 46795
Proposed Rules:
1 ..... 45905, 46882

27 CFR

Proposed Rules:
9 46883

28 CFR

553 45883
Proposed Rules:
38 47316

29 CFR

1956 46487
Proposed Rules:
2 47328

31 CFR

Proposed Rules:
23 46208

32 CFR

199 46796

33 CFR

117 46492
165 ..... 45885, 45886, 46194

34 CFR

Ch. III 46799
Proposed Rules:
75 47254
76 47254

38 CFR

17 46197
Proposed Rules:
4 46888
50 47340
61 47340
62 47340

39 CFR

Proposed Rules:
3050 46214

40 CFR

52 .....45887, 45890, 46201, 46494, 46804
180.....46816
1600.....46822

Proposed Rules:

9.....45914, 46526
22.....45914, 46526
52.....45915
85.....45914, 46526
86.....45914, 46526
600.....45914, 46526
1033.....45914, 46526
1036.....45914, 46526
1037.....45914, 46526
1039.....45914, 46526
1042.....45914, 46526
1065.....45914, 46526
1066.....45914, 46526
1068.....45914, 46526

42 CFR

412.....46652, 47036
418.....47142
483.....46390

Proposed Rules:

409.....46215
424.....46215
484.....46215

43 CFR

2.....45893

44 CFR

64.....45894

45 CFR

Proposed Rules:

87.....47272
1050.....47272

46 CFR

Proposed Rules:

296.....46527

47 CFR

20.....45897
63.....45898
73.....46824

Proposed Rules:

0.....46900
2.....46900
15.....46900
18.....46900
54.....45916
73.....45917
90.....46928

48 CFR

207.....45899

Proposed Rules:

1.....46531
4.....46531
9.....46531
17.....46531
22.....46531
52.....46531
202.....45918
212.....45918
215.....45918
252.....45918

49 CFR

27.....46508
192.....46847
193.....46847
195.....46847
232.....47350
611.....46514

Proposed Rules:

191.....46930
192.....46930
195.....46930
512.....45914, 46526
523.....45914, 46526
534.....45914, 46526
535.....45914, 46526
537.....45914, 46526
541.....46930
583.....45914, 46526

50 CFR

218.....46112
300.....46515
622.....46205
635.....46516
648.....46518, 46848
660.....46519, 46852
679.....46520

Proposed Rules:

20.....46218, 47388
219.....46939
222.....45924
600.....46941
648.....46531
697.....46533

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List August 4, 2015

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